IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael L. Dabney,	:	
Petitioner	:	
	:	
v.	:	No. 450 C.D. 2012
	:	Submitted: August 3, 2012
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE COLINS **FILED: September 19, 2012**

Michael L. Dabney (Claimant) petitions, *pro se*, for review of the February 21, 2012 decision and order of the Unemployment Compensation Board of Review (Board) reversing the decision of the referee to allow unemployment compensation benefits. After the referee reversed the determination of the Scranton service center that disapproved benefits, XTL-PA, Inc. (Employer) appealed to the Board and requested a remand hearing. The Board denied the remand request, but concluded that Claimant was ineligible for benefits under section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). That section provides, in relevant part, that "[a]n employe shall be ineligible for compensation for any week – (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is 'employment' as defined in this act." Willful misconduct has been defined as (1) the
(Footnote continued on next page…)

Employer is a warehouse distributor for the Pennsylvania Liquor Control Board. Claimant, who was a full-time employee at the warehouse, was suspended with intent to discharge and, following an investigation, was discharged, after Employer discovered an empty case of Johnnie Walker Blue Label Scotch Whiskey, together with six inserts that had contained the individual bottles inside the case, just outside a secured area referred to as the "high dollar cage."[2] Claimant was discharged for violation of warehouse work rule #2, which states "NO EMPLOYEE SHALL INTENTIONALLY DESTROY, DAMAGE OR STEAL OR CONCEAL COMPANY PROPERTY OR THE PROPERTY IN ITS CARE OR THE PROPERTY OF ANOTHER EMPLOYEE." (Record Item 3, Employer Separation Information, XTL Inc. Warehouse Work Rules.) Work rule #2 is one of eleven different rules categorized as 'Group 1 Rules;' Employer's warehouse work rules state that the penalty for a first offense of any Group 1 Rule is discharge. (*Id*.) Claimant filed for, and was denied unemployment compensation benefits by the service center, and timely appealed from that denial.

At the referee hearing, both parties acted *pro se*, and Claimant and two witnesses for Employer appeared and testified. Thomas White, Employer's general manager, testified that Claimant was operating a forklift on a shift which

(continued…)

wanton and willful disregard of the employer's interest; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect from his employee; or (4) negligence which manifests culpability, wrongful intent, evil design or intentional and substantial disregard for the employer's interests or the employee's duties and obligations. *Sheetz, Inc. v. Unemployment Compensation Board of Review*, 578 A.2d 621, 623-24 (Pa. Cmwlth. 1990).

[2] According to the Pennsylvania Liquor Control Board's retail website, one 750 ML bottle of Johnnie Walker Blue Label Scotch Whiskey retails for $229.99.

began at 2 PM on the afternoon of July 25, 2011, and Claimant's last documented task was performed at 12:06 AM the next day. (Record Item 8, Transcript of Testimony (T.T.) at 9.) Mr. White stated that Claimant was spotted, on a motion-activated surveillance camera, in the "K" area where the empty case was found, at 12:12 AM on July 26, 2011. (T.T. at 10.) Mr. White stated that there was no reason why Claimant should have been in area "K" at that time. (*Id*.) Claimant's timesheet indicates that he clocked out of his shift at 12:28 AM. (T.T. at 8.) Mr. White testified that Claimant's fingerprint was found on the empty case.[3] (*Id*.) Referring to Employer's form entitled "Audit Trail by Item," as well as Claimant's timesheet for the dates in question, Mr. White testified that the missing items were delivered to the warehouse, together with 47 other cases, on July 13, 2011, and were placed in the locked "high dollar" cage at 12:28 PM on that date, prior to the time Claimant clocked in for his scheduled 2:00 PM shift. (T.T. at 13, 19.) Mr. White further testified that between July 13, 2011 and July 25, 2011, Claimant was not authorized at any time for entry into the locked cage, and could not therefore have handled the case containing the missing items from the time they first arrived at the warehouse through the date the empty case, which had contained the missing items, was discovered. (*Id*.) He testified that the locked cage can only be accessed with a key; the key can only be provided by a supervisor in the office; the

[3] Claimant's fingerprint was found on the outside of the case, and was identified as Claimant's left ring finger. A certified latent print examiner at Idman Forensics, LLC performed the fingerprint examination and provided Employer with a letter dated September 26, 2011 confirming the results, as verified by a second certified latent print examiner. (Record Item No. 8, Employer Exhibits, at E1.) The letter report indicated that "a number of fingerprint impressions" were found on the case, and "at least two of these impressions were evaluated and determined to be of value for comparison and identification purposes." (*Id*.) Idman Forensics, LLC then took finger and palm impressions from Claimant and Employer's witness, Thomas White, and Mr. White's left thumbprint was also found on the case. (*Id*.)

supervisor himself unlocks the cage for the employee; and the name of each employee granted entry is documented, with no exceptions. (T.T. at 18.)

When questioned as to how his fingerprint could have been found on the empty box, Claimant testified that it was possible because he could, in fact, have been inside the secured "locked cage" area during the period in question and may have touched the box at that time. He stated that tasks arise during the day that require entry by workers into the secured area, and such workers are not always logged in. (T.T. at 16, 21.) Claimant testified that, alternatively, it is possible that the case was left outside the office prior to its placement inside the secured area, and he may have sat on it or leaned against it prior to receiving his assignment for the day. (*Id*.) He stated that there was more than one set of fingerprints on the box. (T.T. at 10.) Claimant suggested that it was odd, given Employer's accusation that he took the liquor bottles, that Employer would have telephoned Claimant's union president and informed him that if Claimant would identify persons involved in the theft, Claimant would be offered good references for a new job. (T.T. at 22.)

The referee found that "[t]he [E]mployer hired an investigator who found multiple finger prints on the empty carton. The [E]mployer instructed the investigator to only compare the finger prints of two employees to those found on the carton." (Record Item No. 9, Referee's Decision, Finding of Fact No. 4.) The referee reasoned that Employer's policy prohibited theft of property, but no Employer witness established that Claimant removed the liquor, and no expert witness testified as to the validity of the fingerprint report, and concluded that Claimant did not violate Employer's policy. (Record Item No. 9, Referee's Decision at 2.)

In its determination to reverse the referee, the Board made additional findings of fact, including the following:

> 4. The employer has a locked area where it stores the high value liquor; the area is known as the "HD (high-dollar) cage."
>
> 5. The employer maintains documentation detailing the dates and times of each employee assigned to work in the HD cage.
>
> 6. On July 26, 2011, the employer discovered an empty box that had contained a case of high valued liquor near the HD cage.
>
> 7. The employer has motion-detection surveillance in the area where the box was found; the employer viewed the surveillance and the video showed the claimant in the area.
>
> 8. At the time of the surveillance recording, the claimant had completed his job duties for the day and had no legitimate reason to be in the area near the HD cage.
>
> 9. The employer investigated and found that the box of liquor in question had been delivered to the warehouse on July 13, 2011, and placed into the HD cage prior to the start of claimant's shift on July 13, 2011.
>
> 10. The claimant was not assigned to work in the HD cage between July 13, 2011 and July 26, 2011, and therefore would not have legitimately touched the box in question.

(Record Item No. 12, Board's Decision and Order, Findings of Fact (F.F.) ¶¶ 4-10.) The Board further found that Claimant admitted his print was identified when the box was tested, that Employer has been unable to locate the contents of the box,

and that Employer discharged Claimant for concealing or stealing the case of liquor, in violation of its policy. (F.F. ¶¶ 11-13.)

On appeal,[4] Claimant contends that the Board's decision should be reversed because it is not supported by substantial evidence, and that Employer improperly changed its grounds for termination of employment **after** the referee hearing, thus depriving him of his due process rights.

Substantial evidence is that evidence which "a reasonable mind, without weighing the evidence or substituting its judgment for that of the fact finder, might accept as adequate to support the conclusion reached." *Centennial Sch. Dist. v. Dep't of Educ.*, 503 A.2d 1090, 1093 n.1 (Pa. Cmwlth. 1986), *aff'd*, 517 Pa. 540, 539 A.2d 785 (1988). Here, Claimant argues that video surveillance placing him in the area where the box was found, together with his fingerprint on an empty box, do not constitute substantial evidence, and that Employer failed to offer any evidence that he removed liquor from the secured area or any other part of the facility. In his brief, Claimant argues that Employer failed to "offer expert testimony in support of the fingerprint report." (Claimant's Brief at 10-11.) However, at the referee hearing, Claimant assented to the admission of the report, and, rather than dispute that the print found was his, questioned why Employer did not discover his fingerprints on the individual bottle inserts located inside the box.[5]

---

[4] "The Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record." *Western & Southern Life Insurance Co. v. Unemployment Compensation Board of Review*, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

[5] Employer's witness testified that Idman Forensics LLC was unable to detect fingerprints on the inserts located within the box, noting that the wavy texture with which the inserts are designed

(Footnote continued on next page…)

(Claimant's Brief at 10, 15, 21.) Claimant testified that his fingerprints would necessarily have to have been found on the inserts in order to prove he removed liquor bottles from the case:

> It's possible that I have been in the cage and may have touched this case but my fingerprints were not found on the inserts, not just the outside of the case, you have to open the case and take the bottle out. My prints are not anywhere in there. They are on the outside.

(T.T. at 16.)

This Court has held that circumstantial evidence, if substantial, is sufficient to support a finding of willful misconduct. *Wysocki v. Unemploymnent Compensation Board of Review*, 487 A.2d 71, 72-73 (Pa. Cmwlth. 1985). Even in cases of circumstantial evidence, the prevailing party is to be given the benefit of inferences drawn from the record. *Flores v. Unemployment Compensation Board of Review*, 686 A.2d 66, 73 n.26 (Pa. Cmwlth. 1996). Here, the Board credited Mr. White's testimony that strict documentation is kept by Employer detailing dates and times employees are assigned to work in the secured area, as well as his testimony that Claimant was not assigned to work in the secured area between the time the box was placed inside and the time it was found empty. (Board's Decision and Order at 3.) The Board stated:

> The fact that the employer's video surveillance captured the claimant in the area of the empty box without a legitimate business purpose, and that the claimant's

---

(continued…)

prevented the confirmation of any prints other than those detected on the outside and inside cover of the box. (T.T. at 24.)

> fingerprints were found on the box, serves to bolster the employer's evidence. The employer presented sufficient circumstantial evidence to establish that the claimant was responsible for either concealing or stealing the contents of the box. The claimant has not credibly justified the established violation of policy.

(*Id.*) The Board is the ultimate fact-finding body in unemployment matters and is empowered to resolve conflicts in evidence, to determine what weight is to be accorded the evidence, and to determine the credibility of witnesses. *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518, 521 (Pa. Cmwlth. 1999). We conclude that the findings of the Board are supported by substantial, albeit circumstantial, evidence.

Claimant's other argument, that his due process rights were violated, is without merit. Employer's July 26, 2011 letter to Claimant notifies him that he is being suspended for *concealing company property*, pursuant to work rule #2. (Record Item No. 3, Employer Separation Information.) The Employer Questionnaire form submitted by Employer to the service center indicates a violation of the work rule that prohibits *concealing*, stealing, or damaging company property, and details the video surveillance and fingerprint results. (*Id.*) Employer's petition for appeal from the referee's determination restates its position that Claimant's employment was terminated for concealing company property, and summarizes the evidence developed at the referee hearing, with a request for a remand hearing, if necessary, to be more specific with its documentation. (Record Item No. 10, Employer's Petition for Appeal, dated 11/28/11.) Our careful reading of the record reveals that Claimant had ample notice of the issues on which the service center ruled, and which the referee and Board would and did consider, and cannot now argue that he was denied the opportunity to testify or submit evidence

specifically addressing concealment of company property. Accordingly, we affirm the decision and order of the Board.

JAMES GARDNER COLINS, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael L. Dabney,	:	
Petitioner	:	
	:	
v.	:	No. 450 C.D. 2012
	:	
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

O R D E R

AND NOW, this 19th day of September, 2012, the order of the Unemployment Compensation Board of Review, dated February 21, 2012, at No. B-530912, is affirmed.

JAMES GARDNER COLINS, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael L. Dabney,	:	
Petitioner	:	
	:	
v.	:	No. 450 C.D. 2012
	:	Submitted: August 3, 2012
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

DISSENTING OPINION
BY JUDGE BROBSON **FILED: September 19, 2012**

I respectfully dissent because I disagree with the majority's conclusion that substantial circumstantial evidence exists to support the Board's decision.

Specifically, I disagree with the Board's ultimate finding that that XTL-PA, Inc. (Employer) "presented sufficient circumstantial evidence to establish that [Michael L. Dabney (Claimant)] was responsible for either concealing or stealing the contents of the box." (Board's decision at 3.) Essentially, the Board based that finding on the following circumstances: (1) on July 13, 2011, when the case of alcohol arrived at Employer's warehouse, individuals other than Claimant placed the case in the locked "high dollar" cage, to which Claimant did not have access during the time in question; (2) Employer's motion-activated surveillance camera detected and

recorded Claimant in the "K" area where the empty case was found, at a time when, according to the testimony of Employer's general manager, Thomas White, Claimant should not have been in that area; and (3) Claimant's fingerprint, along with other unidentified fingerprints, were found on the empty case.

At most, the circumstances outlined above support a finding that Claimant touched a box that, at one point in time, had been secured in the "high dollar" cage to which he did not have access. Without more, the circumstances require incredible speculation as to how, if at all, Claimant himself concealed or stole the contents of the empty box. In fact, the circumstances outlined above do not even establish the time when someone removed the box from the "high dollar" cage, the place or places where the box may have been placed prior to being discovered empty in the "K" area, who else had access to the box in the "high dollar" cage or elsewhere, and who else's fingerprints were on the box.

Given the unknown circumstances described above and the limited evidence connecting Claimant to the case of alcohol, I cannot conclude that substantial circumstantial evidence exists to support a finding that Claimant was "responsible for either concealing or stealing the contents of the box." (Board's opinion at 3.) Accordingly, I would reverse the order of the Board.

P. KEVIN BROBSON, Judge