

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronald Rutkowski,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2199 C.D. 2012
	:	Submitted: May 31, 2013
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: July 17, 2013

Ronald Rutkowski (Claimant) petitions for review of the decision and order of the Unemployment Compensation Board of Review (Board), holding that he is ineligible for unemployment compensation benefits under Section 402(e.1) of the Unemployment Compensation Law,¹ because Claimant's termination from employment was a result of a failed drug test administered by Genco I Inc. (Employer) in violation of Employer's established substance abuse policy. Because Employer did not elicit testimony at the referee's hearing to properly

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, added by the Act of December 9, 2002, P.L. 1330, No. 156 § 3, *as amended*, 43 P.S. § 802(e.1). Section 402(e.1) provides, in relevant part, that "[a]n employe shall be ineligible for compensation for any week . . . [i]n which his unemployment is due to discharge or temporary suspension from work due to failure to submit and/or pass a drug test conducted pursuant to an employer's established substance abuse policy, provided that the drug test is not requested or implemented in violation of the law or of a collective bargaining agreement." 43 P.S. § 802(e.1).

authenticate the report that was admitted as evidence of Claimant's failed drug test, we reverse.

At the time of his termination, Claimant was employed by Employer as a forklift operator and general warehouseman. (Record Item (R. Item) 12, Board Decision and Order of November 2, 2012, Finding of Fact (F.F.) ¶1.) Employer maintained a substance abuse policy, which provided that any employee involved in a workplace accident would be tested for the presence of drugs or alcohol in his or her system, and any employee who failed the drug or alcohol test was subject to termination. (F.F. ¶2; R. Item 8, Hearing Transcript with Exhibits (H.T.) at 3, 5.) Employer communicated the substance abuse policy to employees in an employee handbook, and Claimant admits that he was aware of this policy. (F.F. ¶2; H.T. at 3, 18, 29.)

On March 14, 2012, Claimant was struck by a pallet jack operated by a co-worker and sustained injuries to his feet. (F.F. ¶4; H.T. at 13, 24.) Following the accident and in accordance with the substance abuse policy, Claimant submitted to drug and alcohol tests.² Employer's policy required that drug test samples be collected by a trained operations supervisor and then sent to an outside laboratory for analysis. (F.F. ¶3; H.T. at 6.) In this instance, the test sample was collected by Richard Selby, an operations supervisor. (H.T. at 1, 4, 12.) Selby had previously served as a safety supervisor at Employer, and in that role had administered at least 100 tests, had received training on sample collection and had

² Two tests administered to Claimant directly after the accident showed the presence of alcohol, but a breathalyzer test administered later in the day at Concentra, a medical clinic at which Claimant received treatment for his injuries, was negative for alcohol. (F.F. ¶5; H.T. at 4, 8-9, R.R. at 5, 9-10.) Employer's termination of Claimant's employment was solely the result of the drug test. (H.T. at 4, R.R. at 5.)

conducted drug test training for other Employer supervisors. (F.F. ¶7; H.T. at 12, 16-18.)

The drug test kit consisted of two swabs and two vials inside of sealed envelopes. (F.F. ¶8; H.T. at 13.) Selby testified at the referee's hearing held on June 14, 2012 that he opened the envelope containing the swabs and vials and Claimant took the swabs out of the package; Claimant then swabbed the inside of his cheek to collect saliva and put the swabs inside the vials and closed the vials. (F.F. ¶¶8, 9; H.T. at 13, 21, 32.) Claimant then initialed two sticker strips, sealed the vials with the sticker strips, placed both of the sealed vials inside of an envelope and sealed the envelope. (F.F. ¶8; H.T. at 14.) The envelope was then placed in a Federal Express package and sent to Alere, Employer's drug testing laboratory (Laboratory). (F.F. ¶8; H.T. at 14.) Selby completed the Laboratory's Lab-Based Oral Fluid Drug Testing Custody & Control Form (Custody and Control Form), and Claimant signed the form to certify that he had provided his saliva as a specimen and followed the procedures to confirm that the specimen had not been tampered with in any way.³ (F.F. ¶10; H.T. at 15, 26, 28-29 & Ex. E2.) Claimant, Employer and the Laboratory each received a copy of the Custody and Control Form. (H.T. at 14-15.)

On March 22, 2012, Shannon Spak, a teammate services manager at Employer, received a drug test report (Report) from the Laboratory, indicating that Claimant tested positive for marijuana. (F.F. ¶11; H.T. at 1-3, 10 & Ex. E1.) Spak then informed Claimant that his employment was terminated. (H.T. at 3.)

³ The certification on the Custody and Control Form that Claimant signed states: "I certify that I provided my specimen to the collector; that I have not adulterated it in any manner; each specimen was sealed with tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen is correct." (H.T. at Ex. E2.)

Claimant subsequently applied for unemployment benefits, and the Unemployment Compensation Service Center found Claimant ineligible under Section 402(e.1) because his discharge was the result of a failed drug test. (R. Item 4.) Claimant then appealed the Service Center's determination. (R. Item 5.)

At the hearing before the referee, Employer presented the testimony of Spak and Selby and introduced the Report and the Custody and Control Form as exhibits.⁴ (H.T. at 1 & Exs. E1, E2.) Spak testified that she received the Report from the Laboratory and then informed Claimant of his discharge but conceded that she did not have knowledge of the testing procedures employed by the Laboratory. (H.T. at 2-7.) Selby testified regarding the collection of the samples and the completion of the Custody and Control Form but, like Spak, did not testify as to the testing conducted by the Laboratory. (H.T. at 15.) Employer offered no additional evidence concerning the receipt or testing of the samples by the Laboratory. Claimant objected to both the Report and Custody and Control Form on the grounds of hearsay and lack of foundation. (H.T. at 2, 15.)

Claimant also testified at the hearing. His testimony paralleled that of Spak and Selby, except he testified that the drug test kit was not sealed when Selby initiated the test. (H.T. at 25-26.) Claimant also stated that he could not completely focus his attention on the certification he signed on the Custody and Control Form because of the pain from the injury. (H.T. at 28-30.) Claimant also denied that he had used marijuana and averred that he had passed a March 23, 2012 drug test that he had sought independent of Employer's tests. (H.T. at 10-11, 28, 31.)

⁴ Employer also introduced a blank Custody and Control Form as an exhibit. (H.T. at 22 & Ex. E3.)

The referee reversed the UC Service Center's denial of unemployment compensation benefits, finding that Employer did not produce first-hand testimony as to the actual testing of Claimant's specimen, which had been properly objected to by Claimant. (R. Item 9, Referee's Decision and Order of June 21, 2012 (Referee's Decision).)

Employer appealed the referee's decision, and the Board reversed. The Board discredited Claimant's testimony that the drug test kit was already open and his avowed lack of understanding of the Custody and Control Form certification, and found that Employer had adequately established the chain of custody of the samples before they reached the Laboratory for testing. (R. Item 12, Board Decision and Order of November 2, 2012 (Board Decision) at 3.) Based on the credible evidence and testimony offered by Employer, the Board found that Employer had proved that Claimant failed a drug test administered pursuant to an established substance abuse policy and thus was ineligible for benefits under Section 402(e.1). (*Id.*).

On appeal to this Court,⁵ Claimant makes two arguments challenging the evidence Employer offered to prove Claimant failed the drug test. First, Claimant argues that Employer did not offer any testimony concerning the chain of custody over the saliva samples after they were sent to the Laboratory, including any testimony concerning the receipt of the samples or their condition upon receipt. Second, Claimant maintains that Employer did not lay a proper foundation for the Report through the testimony of Spak, and instead could only have admitted

⁵ Our scope of review is limited to determining whether the Board's necessary findings are supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. *O'Brien v. Unemployment Compensation Board of Review*, 49 A.3d 916, 919 n.3 (Pa. Cmwlth. 2012).

the Report through the testimony of a medical review officer or a representative of the Laboratory familiar with the testing procedures. As a proper foundation was not laid, Claimant argues, the Report was inadmissible hearsay, and Employer did not carry its burden of proving Claimant violated Section 402(e.1) by failing the drug test.

The purpose of a chain of custody inquiry in a Section 402 (e.1) case is to determine whether the fact finder can have assurance that the results of a laboratory test are reliable and relate to the correct sample. *UGI Utilities Inc. v. Unemployment Compensation Board of Review*, 851 A.2d 240, 249 (Pa. Cmwlth. 2004). Everyone who comes into contact with a sample need not testify; rather, gaps in the chain of custody go to the weight given to the testimony concerning the chain of custody and not the admissibility of the evidence. *Id.*; *Broadus v. Unemployment Compensation Board of Review*, 721 A.2d 70, 73 (Pa. Cmwlth. 1998).

Claimant cites our decision in *Ellis v. Unemployment Compensation Board of Review*, 749 A.2d 1028 (Pa. Cmwlth. 2000), arguing that here, as in *Ellis*, there was not just a gap in the chain of custody but instead a “complete absence of evidence” regarding the custody of Claimant’s samples. *Id.* at 1031. However, in *Ellis*, the employer only produced testimony as to the chain of custody after the sample arrived at the laboratory and elicited no testimony regarding the collection of the sample or how it arrived at the laboratory for testing. *Id.* On the other hand, this Court has upheld Board findings of ineligibility of benefits in the face of chain of custody objections where there was detailed and credible testimony regarding the collection of the sample but no testimony concerning the chain of custody after the laboratory received the sample. *See O’Brien v. Unemployment Compensation*

Board of Review, 49 A.3d 916 (Pa. Cmwlth. 2012); *Artis v. Unemployment Compensation Board of Review*, 699 A.2d 849 (Pa. Cmwlth. 1997).

Here, the Board found credible Employer's testimony concerning the collection and mailing of the sample. (Board Decision at 3.) Selby testified in detail about the saliva sample collection procedure and the various steps he took to insure that the samples were not adulterated and were sealed and certified by Claimant before being put in a Federal Express envelope to be mailed to the Laboratory. (F.F. ¶8; Board Decision at 3.) The Board discredited Claimant's conflicting testimony that the drug test kit was already open and that he was not fully aware of the meaning of the certification he made on the Custody and Control Form as to the legitimacy of the samples. (F.F. ¶10; Board Decision at 3.) The Board noted the absence of testimony regarding the receipt of the samples by the Laboratory and the actual testing of the samples, but stated that this gap in the chain of custody only went to the weight of the evidence. (Board Decision at 3.) The Board is the ultimate fact-finder and empowered to determine the credibility of witnesses and resolve conflicts of evidence. *Kelly v. Unemployment Compensation Board of Review*, 776 A.2d 331, 336 (Pa. Cmwlth. 2001). Findings of fact by the Board are conclusive where supported by substantial evidence. *Id.* In light of the detailed testimony regarding the collection of the sample and delivery to the Laboratory and the Board's credibility findings regarding the conflicting testimonial evidence, we believe that there was a sufficient demonstration by Employer of the chain of custody of the samples.

Claimant next argues that Employer did not lay a proper foundation for the admission of the Report. Results of a drug test may be admitted as a

hearsay exception under Section 6108(b) of the Uniform Business Records as Evidence Act. 42 Pa. C.S. § 6108(b). The statute provides that

A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

Id. We have previously rejected the view that only the custodian may authenticate drug test results in unemployment compensation proceedings.⁶ *O'Brien*, 49 A.3d at 919; *Turner v. Unemployment Compensation Board of Review*, 899 A.2d 381, 386 (Pa. Cmwlth. 2006) (*en banc*). In *Turner*, this Court held that:

[I]t is not essential to produce either the person who made the entries or the custodian of the record at the time the entries were made or that the witness qualifying the business records even has personal knowledge of the facts reported in the business record. As long as the authenticating witness can provide sufficient information relating to the preparation and maintenance of the records to justify a presumption of trustworthiness of the

⁶ Claimant argues, citing *UGI Utilities*, that “lab reports and chain of custody files should be admitted through the testimony of” a medical review officer. 851 A.2d at 248. The employer in *UGI Utilities* conducted its drug testing in accordance with U.S. Department of Transportation regulations, and the employer’s substance abuse policy required the retention of a physician to act as medical review officer and review all positive drug tests and determine if there were legitimate medical reasons to explain a positive result. *Id.* at 243, 246 n.12, 246 n.14. Here, there is no indication that Employer’s substance abuse policy required the appointment of a medical review officer, and thus the instruction of *UGI Utilities* cannot be given force. See *O'Brien*, 49 A.3d at 919 (“[T]hat statement [in *UGI Utilities*] did not mean to imply that reports must be always admitted only through a medical review officer, but rather, through someone with knowledge of the testing procedure.”)

business records of a company, a sufficient basis is provided to offset the hearsay character of the evidence.

899 A.2d at 386 (quoting *Virgo v. Workers' Compensation Appeal Board (County of Lehigh-Cedarbrook)*, 890 A.2d 13, 20 (Pa. Cmwlth. 2005)).

The Board found in favor of Employer, but did not directly address the authentication of the Report as a business record in its decision. The Report was admitted at the hearing over Claimant's objection on the basis of the testimony of Spak, a teammate services manager at Employer.⁷ Spak testified that she was the addressee and recipient of the Report, but admitted on cross-examination that she had no personal knowledge about how the samples were tested or how the Report was prepared. (H.T. at 2-3, 7.) Selby then testified and provided a detailed description of the sample collection process, as described above, but did not testify regarding the testing of the samples.

In *O'Brien*, we found the drug test report properly authenticated based on the testimony of a witness for the employer, a police department, who was not associated with the laboratory conducting the test. In that case, the authenticating witness was a lieutenant in the internal affairs division with responsibility for the drug screening unit. *O'Brien*, 49 A.3d at 917. The lieutenant testified regarding all aspects of the drug testing process, including the testing process for normal spectrum drugs and the specialty testing conducted at a different laboratory to detect the presence of the drug at issue in that case. *Id.* at 919.

⁷ Though she admitted the Report at the hearing, the referee found in Claimant's favor on the basis that the Employer offered no first-hand testimony regarding the actual testing of the specimen. (Referee's Decision at 2.)

By contrast, Employer's witnesses here offered no testimony regarding the testing procedures followed by the Laboratory, such as the equipment used for the test, the testing process, the technician's qualifications, quality control safeguards, the drug levels tested or the Laboratory's accreditation. Rather, Spak simply stated that Claimant tested positive for marijuana, and that he was discharged based upon that test. The Board argues that Spak's testimony that the Report was addressed to her and that she kept it as part of her records was sufficient to authenticate the Report.⁸ However, the fact that the Laboratory listed Spak's name on the Report is only tenuously related to the "preparation and maintenance" of the Report. *Turner*, 899 A.2d at 386.

The Report, a one-page document, is not notarized or verified and contains no information relating to the Laboratory's testing protocols, nor any statement as to the steps taken by the Laboratory to safeguard the samples. There is no evidence in the Report concerning the reliability of the oral testing method employed in this case, nor any information correlating the concentration of

⁸ The Board cites the following exchange between the referee, Spak and counsel for Employer:

[Referee]: Did you receive the reports from the [medical review officer]?

[Spak]: Yes, I did.

...

[Referee]: And it's all part of your records, that recordkeeping?

[Spak]: Yes.

...

[Employer's Counsel]: Mark the document as E1. I'm showing it to the witness. Could you tell us what this is?

[Spak]: That is a result report from our lab, Alere, noting Mr. Rutkowski's failure of his drug test.

[Employer's Counsel]: And that was addressed and sent to you?

[Spak]: It's – yes.

(H.T. at 2-3.)

marijuana in the sample to the time elapsed since its ingestion. Put simply, the document does not contain enough indicia of reliability on its face to be admitted as an exception to the hearsay rule.

Accordingly, we find that Employer did not provide sufficient information that would “justify a presumption of trustworthiness of the [Report]” and allow for it to be admitted as part of the record. *Id.* Without the Report, there was insufficient evidence to support the Board’s conclusion that Claimant failed the drug test.

For the foregoing reasons, we reverse the Board’s finding that Claimant was ineligible for unemployment compensation benefits.

JAMES GARDNER COLINS, Senior Judge

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	:	
Unemployment Compensation	:	
Board of Review,	:	
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ORDER

AND NOW, this 17th day of July, 2013, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby REVERSED.

JAMES GARDNER COLINS, Senior Judge