IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carlisle Carrier Corporation, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 567 C.D. 2013
	:	Submitted: August 30, 3013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: October 3, 2013

Carlisle Carrier Corporation (Employer) challenges the order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's determination that Eugene T. Zawatski (Claimant) was eligible to receive unemployment compensation benefits.

The facts, as initially found by the referee and confirmed by the Board, are as follows:

> 1. The claimant was last employed as a full-time driver by Carlisle Carrier Corp. from January 7, 2012, until September 21, 2012, at a final rate of pay of $ .42 per mile.
>
> 2. The employer has a policy which allows for random drug testing of its drivers.
>
> 3. The policy provides that a driver will be informed of a positive test in a manner that assures each driver a second (confirming) test.

> 4. The claimant was selected to undergo a random test.
>
> 5. A positive test is grounds for discharge.
>
> 6. The claimant's test came back positive for cocaine.
>
> 7. The claimant was informed of the positive test by the employer's third party, medical review officer.
>
> 8. The claimant was informed of his termination as a result of his positive test by the employer's Human Resource Officer.
>
> 9. Neither the medical review officer nor the human resource officer specifically informed the claimant that he had a right to a second or split sample test to confirm the original results.

Referee's Decision, January 9, 2013, (Decision), Findings of Fact Nos. 1-9 at 1; Reproduced Record (R.R.) at 62a.

> The referee determined:
>
> In the present case, the credible testimony of the employer establishes that it has a policy which allows for random drug testing and that the claimant was selected to undergo that testing. The record also establishes that the test results were positive for cocaine. However, the policy provides that a driver be informed of a positive test in a manner that assures each driver a second test. The claimant asserts that he was never informed of the availability of a second test. The employer has not presented evidence rebutting the claimant's testimony on this issue. The only testimony the employer presented is that he [Claimant] should have been informed of the availability of a second, split sample, test from the medical review officer, but did not present the testimony of that medical review officer. Therefore, the employer has not established that its policy regarding informing the employee was followed. Accordingly, the employer has not established that the claimant was discharged for

> failing to pass a drug and alcohol test under its established policy and benefits will be allowed under Section 402(e.1) of the Law.[1]

Decision at 2; R.R. at 63a.

Employer appealed to the Board which affirmed.[2]

Employer contends that the Board erred when it affirmed the referee's decision on the basis that Employer failed to comply with its own drug policy.[3]

Pursuant to Section 402(e.1) of the Law, an employer must prove that it had an established substance abuse policy and that the claimant violated the policy. If an employer meets this initial burden, then a claimant will be ineligible for benefits unless the claimant proves that the employer's substance abuse policy

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[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e.1). This section was added by the Act of December 9, 2002, P.L. 1330. Section 402(e.1) provides:

> An employe shall be ineligible for compensation for any week—
>
> . . . .
>
> (e.1) In 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.

[2] In its brief the Board concedes that it improperly placed the burden on Employer to show that it followed its established drug testing policy. The burden of proof was on Claimant. The Board determined that Claimant met his burden and that its error was harmless. Employer does not challenge the decision on this basis.

[3] This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

was in violation of a law or a collective bargaining agreement. Greer v. Unemployment Compensation Board of Review, 4 A.3d 733 (Pa. Cmwlth.), *petition for allowance of appeal denied*. 609 Pa. 693, 14 A.3d 830 (2010).

Here, Employer submitted into evidence a copy of its Alcohol and Controlled Substance Abuse Policy (Policy) which was signed by Claimant and which provided for random drug testing. Employer also submitted into evidence a copy of the results for the drug test administered by Worknet Drug and Alcohol Services which indicated that Claimant tested positive for cocaine. The Board credited this evidence.[4]

The burden then shifted to Claimant to establish that Employer violated a law or collective bargaining agreement. The Employer's Policy provides that it complies with the requirements of the Federal Highway Administration, Department of Transportation. Further, the portion of the policy entitled "Testing Procedures" states that Employer "will ensure compliance with the Federal Highway Administration Department of Transportation Motor Carrier Safety regulation part 391, Subpart H and Part 40, by screening tests for both current drivers and new applicants as required by those regulations." Alcohol and Controlled Substance Abuse Policy at 1; R.R. at 51a. Also, under Testing

[4] In unemployment compensation proceedings, the Board is the ultimate factfinding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence. Unemployment Compensation Board of Review v. Wright, 347 A.2d 328 (Pa. Cmwlth. 1975). Findings of fact are conclusive upon review provided that the record, taken as a whole, provides substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977).

Methods, the Policy states that Employer will "conform to part 40 regulations and will be informed in a manner that assures each driver a second (confirming) test which will be at drivers [sic] expense." Alcohol and Controlled Substance Abuse Policy at 1; R.R. at 51a. Employer does not dispute that its drug policy provided for a second test in compliance with Federal Department of Transportation regulations.

Employer used a medical review officer (MRO) to conduct its drug tests. The federal regulation, 49 CFR §40.153, sets forth that an MRO must inform an employee of the right to a test of the split sample after the first sample results in a positive test:

> **§ 40.153 How does the MRO notify employees of their right to a test of the split specimen?**
>
> (a) As the MRO, when you have verified a drug test as positive for a drug or drug metabolite, or as a refusal to test because of adulteration or substitution, you must notify the employee of his or her right to have the split specimen tested. You must also notify the employee of the procedures for requesting a test of the split specimen.
>
> (b) You must inform the employee that he or she has 72 hours from the time you provide this notification to him or her to request a test of the split specimen.
>
> (c) You must tell the employee how to contact you to make this request. You must provide telephone numbers or other information that will allow the employee to make this request. As the MRO, you must have the ability to receive the employee's calls at all times during the 72 hour period (e.g., by use of an answering machine with a "time stamp" feature when there is no one in your office to answer the phone).

> (d) You must tell the employee that if he or she makes this request within 72 hours, the employer must ensure that the test takes place, and that the employee is not required to pay for the test from his or her own funds before the test takes place. You must also tell the employee that the employer may seek reimbursement for the cost of the test (see § 40.173).
>
> (e) You must tell the employee that additional tests of the specimen e.g., DNA tests) are not authorized.

At hearing before the referee, Claimant testified that he was not informed of the opportunity to have the split sample tested:

> Sample B, I'm referring to as the split sample. I had 72 hours to have the opportunity to send that to an independent laboratory just in the event that Vile [sic] A could have been contaminated or a mistake, maybe their equipment wasn't calibrated properly or whatever. But my portion Sample B, I had 72 hours to send that to an independent laboratory – a certified independent laboratory, but an independent laboratory to clear myself of a positive test. Now, I was never told about that and I understand from the United States Department of Transportation, it's not Carlisle Carrier's responsibility to inform me of that, but it is the MRO. The person that called me that day that told me that I had tested positive was supposed to tell me that I had the ability to send the other half of that sample to a different laboratory to have that – possibly have that cleared and I was never told. That's due process, that came right from the United States DOT. I was never told about that.

Notes of Testimony, January 8, 2013, (N.T.) at 12; R.R. at 41a.

Susan Baum (Baum), director of human resources for Employer, testified that the MRO would call Claimant and inform him that he tested positive

for cocaine, "And at that time . . . they would tell him what his options are. I'm kind of out of it at that point." N.T. at 8; R.R. at 37a.

Employer argues that it presented evidence which demonstrated that Claimant was provided with training regarding the Policy that would place him on notice of his right to the test of the split sample. However, the federal regulation requires that the MRO inform the employee of the right to a test of the split sample when the MRO informs the employee of the positive test. The federal regulations, 49 CFR §40.153(a-b), require that an MRO inform an employee who tests positive of his "right to have the split specimen tested," inform the employee of the "procedures for requesting a test of the split specimen," and inform the employee "that he or she has 72 hours from the time you provide this notification to him or her to request a test of the split specimen." Because the regulations require the MRO to provide this information to an employee who tests positive at the time the MRO informs the employee of the positive test, the training Claimant received from Employer did not satisfy this federal regulatory requirement.

Employer also contends that while it did not provide the testimony of the MRO, Baum's testimony that the MRO would tell Claimant what his options were after the positive test supports a finding that the MRO complied with the Policy and with the federal regulation. Baum had no firsthand knowledge of what the MRO said to Claimant. Such testimony would be hearsay.[5] An unobjected to

[5] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted and is inadmissible. Pa. R.E. 801-02.

hearsay statement will be given its probative effect and may support a finding of fact if corroborated by any competent evidence in the record. Walker v. Unemployment Compensation Board of Review, 367 A.2d 366 (Pa. Cmwlth. 1976).

Here, Baum's testimony was unobjected to, but lacked corroboration by other evidence of record. As such it does not support a finding. Employer argues that the Board failed to render a specific finding concerning Claimant's credibility and that Claimant's testimony was neither credible nor persuasive. Once again, the Board is the factfinder. While the Board did not explicitly state that it found Claimant credible, its finding of fact that Claimant was not informed of his right to a test of the second or split sample indicated that the Board found Claimant credible.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 3rd day of October, 2013, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge