

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cinram Manufacturing, LLC,	:	
Petitioner	:	
	:	
v.	:	No. 2051 C.D. 2007
	:	SUBMITTED: February 29, 2008
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: July 18, 2008

Cinram Manufacturing, LLC (Employer) petitions for review of the order of the Unemployment Compensation Board of Review (Board), affirming the award of unemployment compensation benefits. In doing so, the Board agreed with the referee's conclusion that John A. Mitchko (Claimant) was not ineligible for benefits under Section 402(e.1) of the Unemployment Compensation Law (Law).¹ On appeal to this court, Employer argues that the Board erred as a matter of law in

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937), *as amended*, 43 P.S. § 802(e.1). Section 402(e.1) provides that a claimant is ineligible for benefits if he fails or refuses to take a drug test.

concluding that Claimant was eligible for benefits. Employer also argues that the Board's decision is not supported by substantial evidence.

Claimant began working for Employer in 1978. Employer adopted a substance abuse policy, which provided, in part, for drug testing for employees involved in accidents which result in injury or property damage. This policy was published in Employer's Employee Handbook. On June 3, 2007, Claimant was operating a forklift and struck a pole. Claimant reported to the Mid-Valley Hospital to submit to a drug test. After the test, he was instructed to remain home until the results were received. The test revealed that Claimant had opiates in his system. When Claimant was informed of the test results, he claimed that he had eaten two poppy seed rolls that day and exercised his right under the policy to have his sample retested. The second test yielded the same results. Claimant was subsequently suspended. He applied for benefits, and a hearing before a referee followed. At the hearing, Claimant offered into evidence two notes from his doctor purporting to explain the positive drug test results, toxicology reports supporting these letters, and a label from medicine that he claimed affected his test results. Employer offered into evidence its alcohol and drug policy and an employee handbook. Employer further presented documentation surrounding Claimant's accident, including an accident report, a chain of custody form, drug test results and a notice of suspension signed by Claimant. The parties did not object to any of the documentary evidence.

The referee issued a decision, specifically finding:

3. The claimant was suspended by Cinram for failing a drug screening from June 3, 2007 to July 5, 2007.
4. Cinram does have a workplace drug policy allowing for drug screening and/or testing of employees.
5. The Claimant acknowledged knowing the policy.

6. The drug screen performed by the employer indicated that the claimant had tested positive for morphine at a level of 230 NG/ML.
7. In the paperwork filled out by the claimant prior to testing, the claimant advised the laboratory and/or the physician that he ate two poppy seed rolls that morning.
8. Poppy seed rolls and other poppy seed products can lead to a false positive for opiates and/or morphine.
9. The claimant had also taken Robitussin DM (with dextromethorphan) cough syrup the morning before the test but forgot to list the over-the-counter medication on his form.
10. The Claimant's physician, Joseph C. Seprosky, Jr., M.D., provided the claimant a letter in which the doctor opined that the eating of poppy seeds and the taking of Robitussin DM (with dextromethorphan) can give a false positive test for morphine.
11. The test results by the company were a false positive.
12. The claimant did not violate the employer's drug policy.

Referee's op. at 1-2 (Appeal No. 07-09-A-7379, mailed August 15, 2007). The referee concluded that Claimant was not ineligible for benefits under Section 402(e.1) of the Law because the Claimant provided evidence that was "credible and more compelling and logical" than that presented by Employer and which established that the test result was a false positive. Employer appealed to the Board. The Board reviewed the evidence before the referee, adopted and incorporated the referee's findings and conclusions, and affirmed.

Employer appeals to our court contending that the Board erred in affirming the referee's decision granting benefits because Employer satisfied all requirements to render Claimant ineligible for benefits under Section 402(e.1) of the Law. Employer argues that the Board's decision renders Employer's written substance abuse policy meaningless and imposes a greater burden on employers than that established in *Turner v. Unemployment Comp. Bd. of Review*, 899 A.2d

381 (Pa. Cmwlth. 2006). Employer further argues there is not substantial evidence to support the Board's decision.

Under Section 402(e.1) of the Law, an employee is ineligible for unemployment compensation in 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). It is beyond question that Employer introduced evidence which could have satisfied all requirements of Section 402(e.1) had it been accorded different weight and persuasive value. Employer suspended Claimant for one month because he failed a drug test. Referee's Finding of Fact (F.F.) No. 3. Employer had in place an established substance abuse policy. Referee's F.F. No. 4. Finally, Claimant does not argue that the test was illegal or violated a collective bargaining agreement.

We first address Employer's claim that the Board and referee erred in granting benefits despite the finding that all of the elements of the statute were satisfied. The referee granted benefits and the Board affirmed despite Employer's evidence of a positive drug test. Claimant does not dispute that the drug test was positive. Instead, Claimant disputes the accuracy of the drug test results. Employer argues that because it established the required elements listed in Section 402(e.1) of the Law and reiterated in *Turner*, 899 A.2d at 384, the referee and Board should not have examined the accuracy of the drug test. Employer would have us hold that any claimant is ineligible for benefits under Section 402(e.1) of the Law if he is

suspended for positive drug test results, regardless of how obviously incorrect those results might be. We do not believe that the legislature intended such an absurd result.

The Board found credible Claimant's evidence that lawful items he had consumed caused his drug test to produce a false positive result. While Employer interprets this as placing an additional burden on employers, it is merely the Board serving in its capacity as fact-finder. In unemployment compensation cases, the Board serves as final fact-finder and resolves any conflicts in evidence or credibility of witnesses. *Kelly v. Unemployment Comp. Bd. of Review*, 776 A.2d 331 (Pa. Cmwlth. 2001).

In *Philadelphia Gas Works v. Unemployment Comp. Bd. of Review*, 671 A.2d 264 (Pa. Cmwlth. 1996), we concluded that the Board erred in rejecting the results of two positive drug tests in favor of a claimant's unsupported general denial. Specifically, we said that "[t]he Board cannot ignore the results of the urine tests and conclude that Claimant's self-serving testimony that he did not use cocaine is credible *without more*." *Id.* at 268 (emphasis added).

Here, we are presented with a situation where Claimant offered more evidence than simply self-serving testimony. He presented a letter from his doctor saying that there was a possibility that the poppy seed rolls and over-the-counter cough medicine that he consumed the day of the accident may have caused him to test positive for opiates on a drug screen. *See* Letter from Joseph C. Seprosky, M.D., dated June 12, 2007. Claimant also offered a letter from his doctor stating that Claimant took a drug test on a day where he consumed poppy seeds and Robitussin DM (with dextromethorphan) and tested positive for morphine with numbers similar to the test on the day of the accident. *See* Letter from Joseph C.

Seprosky, M.D., dated June 26, 2007. According to Claimant's doctor, Claimant took another test on a day where he did not consume these items and the test results were negative. *Id.* The Board found the letters from Claimant's doctor to be credible.

The Board did not ignore Claimant's positive drug test. In *UGI Utilities, Inc. v. Unemployment Comp. Bd. of Review*, we held that "once admitted, Employer's lab reports of Claimant's positive drug tests were entitled to be given probative value." 851 A.2d 240, 252 (Pa. Cmwlth. 2004). Here, the Board considered the positive test result, but accorded it no credibility, but instead accepting substantial evidence which impugned its reliability. *See* Board's Op. at 1. The Board clearly concluded that Claimant rebutted the positive test results with credible evidence that consumption of poppy seed roll and over-the-counter medicine resulted in a false positive test. Based thereon, the Board concluded that he did not violate Employer's drug policy. We are not in a position to question the Board's finding. Thus, there is no reason for us to reverse this decision.

Employer then argues that the Board's decision is not supported by substantial evidence. "Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion." *Popoleo v. Unemployment Comp. Bd. of Review*, 777 A.2d 1252, 1255 (Pa. Cmwlth. 2001). An examination of the record as well as our discussion above reveals that substantial evidence supports the Board's decision.

Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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	:	
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

ORDER

AND NOW, this 18th day of July, 2008, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge

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OPINION NOT REPORTED

CONCURRING OPINION
BY JUDGE LEAVITT

FILED: July 18, 2008

Although I concur in the result reached by the majority, I write separately because I do not believe Claimant's documentary evidence was substantial, or even probative.

In this case, Claimant never disputed that Employer's drug screen test registered positive for opiates. Instead, he claimed that the initial result, and the retest of the same sample, were falsely positive because he had consumed poppy seeds and Robitussin DM the morning of Employer's drug testing. Claimant brought his breakfast menu to the attention of the testing physician, but the doctor denied that consumption of poppy seeds could result in a positive test at the levels recorded.

One month later, Claimant underwent two additional drug screenings. One test was negative for opiates, and the other was positive. With respect to this

second test, Claimant testified that he ate two poppy seed rolls, and no opiates, before testing positive. Claimant also presented a note from his physician, Joseph C. Seprosky, Jr., M.D., indicating that Robitussin DM and poppy seeds can produce a false positive result for opiates. Based on Dr. Seprosky's notes, and Claimant's own testimony, the Board concluded that Claimant credibly established that Employer's drug testing had produced a false positive.

Dr. Seprosky's notes, which are hearsay, purport to offer an expert opinion based upon drug screenings undertaken by Claimant on his own initiative. Although Dr. Seprosky's notes may be more persuasive than the completely self-serving testimony of the claimant that was rejected in *Philadelphia Gas Works v. Unemployment Compensation Board of Review*, 671 A.2d 264 (Pa. Cmwlth. 1996), they are far from compelling. Dr. Seprosky acknowledged that Claimant's tests were not supervised. Stated otherwise, there was no way of knowing what Claimant had actually ingested prior to the drug test that was positive for opiates. Nevertheless, Dr. Seprosky stated that he believed Claimant. I question the probative value of what is essentially a glorified character reference along with Claimant's testimony.

However, Employer failed to lodge an appropriate objection to Claimant's documentary evidence, and the Board acted within its discretion to credit that evidence along with Claimant's testimony. Therefore, I am constrained to concur with the majority opinion inasmuch as this is essentially a credibility and weight of the evidence case.

Further, I agree with the majority's rejection of Employer's position that a claimant can never contest a positive drug test result even if the results are obviously incorrect. Section 402(e.1) of the Unemployment Compensation Law,

43 P.S. §802(e.1),¹ does not impose “strict liability” for a positive result, even a false positive. Here, however, I do not believe the documentary evidence relied upon by the Board has probative value. I believe, at a minimum, it was incumbent upon Claimant to present a live expert witness who could testify knowledgeably about drug testing and how false positive results can be produced, and then be cross-examined thereon by Employer.

MARY HANNAH LEAVITT, Judge

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937), *as amended*, 43 P.S. §802(e.1). It provides that an employee 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.” *Id.*