

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

| | | |
|------------------------|---|---------------------|
| KEVIN L. WRIGHT, SR., |) | |
| |) | |
| Claimant-Below/ |) | |
| Appellant, |) | |
| |) | |
| v. |) | C.A. No. 07A-12-005 |
| |) | |
| CLAYMONT STEEL and |) | |
| UNEMPLOYMENT INSURANCE |) | |
| APPEAL BOARD, |) | |
| |) | |
| Appellees. |) | |

Submitted: May 12, 2008
Decided: August 4, 2008

On Appeal from the Unemployment Insurance Appeal Board.
AFFIRMED.

OPINION AND ORDER

Kevin L. Wright, Wilmington, Delaware, Appellant, pro se.

James J. Sullivan, Jr., Esq., Buchanan Ingersoll & Rooney PC, Wilmington, Delaware, Attorney for Appellee, Claymont Steel.

Mary Page Bailey, Esq. Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for Appellee, Unemployment Insurance Appeal Board.

BRADY, J.

This is an appeal from a decision of the Unemployment Insurance Appeal Board (“Board”) which denied unemployment benefits to Kevin L. Wright, Sr. (“Wright”). Wright was terminated from his employment with Claymont Steel (“Claymont”) due to a violation of Claymont’s substance abuse policy. After a hearing that took place on September 11, 2007, a Division of Unemployment Insurance Appeals Referee determined that Wright was disqualified from receiving unemployment benefits because he was terminated for just cause. The Board affirmed the Referee’s decision on December 10, 2007, and the instant appeal followed. After considering the parties’ briefs and the record in this matter, the Board’s decision is **AFFIRMED**.

Facts

Wright worked as a shipper/checker/loader for Claymont from September 18, 2006 to June 14, 2007. On his date of hire, Wright executed a form whereby he acknowledged receipt of Claymont’s Substance Abuse Policy (“Policy”).¹ Pursuant to the Policy, any employee who tests positive for any level of an illegal drug is subject to immediate termination.

¹ Docket Item 4 (hereinafter “Record”) at 33-35.

However, if an employee voluntarily discloses a substance abuse problem, Claymont will select and pay for an appropriate treatment program. The employee's continued employment is contingent upon successful completion of the selected treatment program. The Policy also sets forth a procedure for testing for illegal drugs. If an employee's urine sample tests positive for an illegal substance, the test is not considered positive until a laboratory test confirms the initial result.

On January 22, 2007, Wright approached Patty Stevens² ("Stevens") and voluntarily disclosed a substance abuse problem with alcohol and cocaine.³ After disclosing his problem, Wright signed a Continued Employment Agreement ("Agreement") which set forth, in pertinent part, as follows:

I understand that Claymont Steel has agreed to continue my employment provided I meet and satisfy each of the following conditions:

1. I must immediately enroll and successfully complete a rehabilitation program approved by Claymont Steel...
3. During the 12 months following my return to work, I agree to allow and will promptly comply with Claymont

² Stevens testified before the Claims Referee, but she did not testify before the Board. She did not state her official title, but the evidence in record indicates that she is a registered nurse in Claymont's Medical Department.

³ Record at 53.

Steel's requests to conduct drug screening and searches on a random, unannounced basis.

4. I agree to participate in and complete any follow-up programs and/or treatment which are deemed necessary by the rehabilitation counselors approved by Claymont Steel...

I understand that if I fail to satisfy any of the conditions listed above, I will be terminated... I further understand that in addition to the conditions set forth above, I must abide by all other Claymont Steel regulations and policies...⁴

After Wright entered into the above agreement, Claymont referred him to an intensive outpatient substance abuse program at PACE, Inc. On May 15, 2007, PACE's executive director sent correspondence informing Stevens that Wright "has not completed the substance abuse program at PACE and has been given a negative discharge status."⁵

Upon Wright's discharge from PACE, he was referred to Dr. Alvin Turner to receive individual substance abuse counseling. Stevens testified that Claymont agreed to give Wright the opportunity to undergo treatment with Dr. Turner, despite his negative discharge from PACE. She testified

⁴ Record at 37.

⁵ Record at 40.

that he missed two out of his first three scheduled appointments prior to his termination.⁶

On April 26, 2007, Stevens obtained a urine sample from Wright. She tested the sample and it came back positive for cocaine. Pursuant to Claymont's policy, Stevens sent the sample to an outside lab. The lab results indicated a negative result for cocaine.⁷

However, Stevens testified that the lab uses a different standard for a positive test result than Claymont. Specifically, the lab has a minimum threshold that a sample must exceed before it is considered positive, whereas Claymont does not permit any level of illegal drugs.⁸ Accordingly, on June 4, 2007, Stevens obtained a second urine sample, which also tested positive for cocaine. She sent the sample to the lab with the following instruction: "If test is negative, please test for presence."⁹

As before, the lab results came back negative for cocaine. However, the requested "presence" test came back as "reconfirmed."¹⁰ According to Stevens, the "reconfirmed" test result indicated that the test that she used –

⁶ Record at 55-57.

⁷ Record at 58-60.

⁸ Id.

⁹ Record at 15.

¹⁰ Record at 13.

which apparently tests for trace amounts – was accurate. Therefore, according to Stevens’ interpretation of the lab results, the lab confirmed Wright’s positive test.¹¹

Wright testified on his own behalf in front of the Appeals Referee. He stated that, despite the letter from PACE stating otherwise, he received a neutral discharge from PACE.¹² He stated that PACE was going to give him a successful discharge upon his successful completion of treatment with Dr. Turner. However, he did not submit any documentary evidence or provide any witnesses to support that assertion. Wright testified that he missed two out of his first three appointments with Dr. Turner. He stated that he missed the first appointment because of a work-related emergency, and he missed the second appointment because of a power-outage in Dr. Turner’s office.¹³ Wright provided no witnesses or independent documentary evidence to support these assertions.¹⁴

Wright stated that he was taking medications, vitamins, and supplements and that, in his belief, these items caused him to test positive

¹¹ Record at 62.

¹² Record at 67.

¹³ Record at 12, 76.

¹⁴ Wright did submit a hand-written note that he prepared and apparently gave to his supervisor to explain his second missed appointment.

for cocaine.¹⁵ However, he did not submit any evidence documenting that he was on any medication at the time, and he did not provide any evidence that the medications, vitamins and supplements could cause a false positive drug test.

Based on the above, the Claims Referee determined that Wright violated the Continued Employment Agreement by failing to successfully complete a treatment program and twice testing positive to the employer-administered drug tests. The Referee did not accept the results of the two lab tests since the individuals who performed the tests were not present to testify regarding the tests' methods and reliability. However, the Referee found that Claymont's in-house drug tests were sufficiently reliable. Accordingly, the Referee determined that Wright was fired for just cause.

Wright appealed the Referee's decision to the Board. Wright did not present any additional documentary or testimonial evidence to the Board regarding his contention that he received a neutral discharge from PACE. He also did not submit any additional evidence supporting his position that he had valid reasons for missing his first two appointments with Dr. Turner.

¹⁵ Record at 72.

Wright did present a witness in support of his claim that he received a false-positive drug screening. Wright presented the testimony of Mariano Spittili, a former Claymont employee who was terminated for testing positive for cocaine.¹⁶ According to Mr. Spittili, he was taking the same sports supplement as Wright, and Mr. Spittili claims the supplement caused him to test positive for cocaine.¹⁷

Wright also provided additional testimony regarding the reason why, in his opinion, he was fired. Wright testified that on April 28, 2007 he was injured when he was hit by a train at work.¹⁸ He stated that his attorney contacted Claymont regarding the accident, but Claymont did not document the accident.¹⁹ Wright suggested that Claymont disingenuously terminated his employment for violating its Substance Abuse Policy, while, in actuality, Claymont chose to fire him because they did not want to “deal with this issue with him and the train.”²⁰ Wright provided no evidence to corroborate this allegation or to corroborate the alleged work injury.

¹⁶ Record at 102-103.

¹⁷ *Id.*

¹⁸ Record at 125.

¹⁹ Record at 134.

²⁰ Record at 134-135.

The Board determined that Claymont terminated Wright for just cause. The Board did not accept Wright's testimony regarding his neutral discharge from PACE. In particular, the Board stated that at "both the hearing below and before the Board, the claimant testified that he had been given a neutral discharge by PACE, in clear contradiction of the documentary record."²¹ Accordingly, the Board found that Wright failed to successfully complete the PACE program in direct violation of the Agreement with Claymont, and, as such, Claymont had just cause to terminate Wright as of May 15, 2007. The Board did not find Wright to be a particularly credible witness, and Wright's lack of evidence corroborating his version of events further damaged his credibility with the Board.²²

The Board did not determine whether or not Wright's two failed drug tests provided a separate, independent basis for terminating his employment for just cause. Rather, the Board stated the following:

Because the claimant failed to abide by the agreement memorialized in the Continued Employment Agreement of January 2007 by being negatively discharged from the PACE program, the employer had just cause to terminate the claimant at any time following May 15, 2007. While the claimant's failure of a second drug test in June may

²¹ Record at 111.

²² Record at 111-112.

have precipitated the employer's action, just cause for that action had been established on May 15th.²³

Accordingly, the Board affirmed the decision of the Claims Referee, and the instant appeal followed.

Standard of Review

This Court's review of the Board's decision is limited to determining whether the decision is free from legal error and supported by substantial, competent evidence.²⁴ "The Board is to solve any questions as to credibility and conflicts."²⁵ On appeal, Wright is bound by the record of the administrative hearing and cannot seek to enlarge the record by offering additional evidence.²⁶ "Where a party with the burden of proof fails to convince the Board below, the resulting finding of fact can be overturned by this Court only for errors of law, inconsistencies, or a capricious disregard for competent evidence."²⁷

²³ Record at 111.

²⁴ *Hopkins Construction, Inc. v. UIAB*, 1998 WL 960713 at *2 (Del. Super. Dec. 17, 1998).

²⁵ *Id.*

²⁶ *Petty v. University of Delaware*, 450 A.2d 392, 396 (Del. 1982).

²⁷ *Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del. Super. 1979); *Wilson v. Miller's Furniture, Inc.*, 2000 WL 16111113 at *1 (Del. Super. Aug. 29, 2000).

Analysis

Pursuant to the Delaware Code, an individual who is discharged from work for just cause is not eligible to receive unemployment compensation.²⁸ Previous decisions of this Court have held that an employee's failure to abide by the terms of a substance abuse rehabilitation agreement constitutes just cause for terminating employment.²⁹

Wright does not allege any legal error in the Board's decision. Rather, Wright claims that Claymont did not have requisite just cause, because "[n]one of the stipulations of my work agreement were ever violated..."³⁰ Specifically, Wright claims that the Board erred in finding that Wright failed to successfully complete his substance abuse treatment. He further argues that he never tested positive for any illegal drugs because his two positive tests were not properly confirmed by the lab. As he suggested in the proceedings below, Wright claims that he was dismissed

²⁸ 19 Del. C. § 3314.

Disqualification for Benefits.

An individual shall be disqualified for benefits:

- (2) For the week in which the individual was discharged from the individual's work for just cause in connection with the individual's work and for each week thereafter...

²⁹ *Hopkins v. E.I. Du Pont De Nemours & Co. and UIAB*, 1999 WL 167787 (Del. Super. March 10, 1999); *Trivits v. UIAB and Medical Center of Delaware*, 1994 Del. Super. LEXIS 299 (Del. Super. June 30, 1994).

³⁰ Appellant's Reply Br. at 1.

because Claymont employees failed to properly report a work accident and are now attempting to “sweep [the accident] under the rug by getting rid of the employee and defaming his character.”³¹

After reviewing the evidence in record, the Court finds that the Board’s decision is supported by substantial evidence and, therefore, must be **AFFIRMED**.

The record demonstrates that the Agreement between Wright and Claymont required Wright to “immediately enroll and successfully complete a rehabilitation program approved by Claymont Steel.”³² Substantial evidence indicates that Wright never successfully completed the rehabilitation program selected by Claymont. Rather, the evidence in the record indicates that Wright was negatively discharged from PACE. Wright claims that he was given a neutral discharge from PACE. Even assuming that this is the case, a neutral discharge is not a successful completion.

Although Claymont had just cause to discharge Wright when he failed to successfully complete the PACE program, Stevens testified that Wright’s superiors agreed to give Wright a final chance with Dr. Turner, but Wright missed two of his first three appointments and twice tested positive for

³¹ *Id.* at 2.

³² Record at 37.

cocaine, thus forcing Claymont to terminate Wright's employment. As Stevens testified, the second drug test was the final proverbial straw, but the record supports the Board's finding that Wright failed to satisfy his obligations under the Agreement prior to the disputed positive drug screens.

Although Wright transferred from PACE to Dr. Turner (with the apparent blessing of Claymont), the Board was not satisfied that Wright followed through with his treatment with Dr. Turner. Wright proffered reasons for missing his first two appointments that, if true, might be legitimate, but the Board did not find Wright to be a particularly credible witness and was not inclined to accept his version of events. It is the role of the Board, not this Court, to weigh the evidence and "solve any questions as to credibility and conflicts."³³ Therefore, this Court must accept the Board's determination regarding the credibility of Wright's proffered reasons for missing his scheduled appointments with Dr. Turner.

Wright attached to his Opening Brief a letter from PACE which supports Wright's contention that he was given a neutral, rather than an unsuccessful, discharge from the program. This letter is not part of the record and, in fact, is dated February 25, 2008, more than two months after

³³ *Hopkins Construction* at *2.

the Board issued its decision in this matter. Similarly, Wright attached a letter from Dr. Turner, confirming Wright's attendance at two therapy sessions. The letter is dated December 14, 2007, four days after the Board issued its decision. The Court is bound by the record of the proceedings below, and Wright cannot seek to enlarge the record by offering additional evidence.³⁴

It is regrettable if the facts upon which the Board based the decision are incomplete or, perhaps, even inaccurate. However, both parties were given an opportunity to establish the record regarding their position. If Claymont had failed, until following a hearing at which they were unsuccessful, to present documentation of Wright's unsuccessful completion of the PACE program, Wright would, legitimately, object to giving that new information any consideration. So, equally, should this Court not consider an expansion of the record offered by Wright.

Further, assuming the Court were to consider the letter from PACE, the Court notes that the letter indicates that Wright was given a neutral discharge. Nothing in the letter suggests that he successfully completed the program, as he was required to do under the terms of the Agreement with

³⁴ *Petty v. University of Delaware*, 450 A.2d 392, 396 (Del. 1982).

Claymont. Therefore, the Court will not consider the letters attached to Wright's opening brief.

Wright's Positive Drug Screens and Alleged Work Injury

Wright devotes a substantial portion of his opening brief to the issue of whether or not his two positive drug screens satisfied the requirement for a positive drug test under Claymont's Policy. However, the Board did not base its decision on this issue. The Board explicitly refrained from ruling on this issue and, instead, rested its decision on Wright's failure to successfully complete the PACE program pursuant to Wright's Agreement with Claymont. Therefore, this Court need not address whether or not Wright's positive drug screens provided an independent basis to terminate his employment for just cause.

The Board's decision did not specifically address Wright's claims regarding his alleged work injury. However, given the Board's determination that Wright was terminated for just cause, the Board implicitly rejected Wright's claim that he was discharged in furtherance of some type of conspiracy to cover-up his alleged injury. Nothing in the record leads this Court to an alternative conclusion.

Conclusion

For the forgoing reasons, the decision of the Unemployment Insurance Appeal Board is hereby **AFFIRMED**.

IT IS SO ORDERED.

/s/

M. Jane Brady
Superior Court Judge

cc: Prothonotary