

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-096

SEP 4 2009

SEPTEMBER TERM, 2009

Michael Barrows	}	APPEALED FROM:
	}	
	}	
v.	}	Employment Security Board
	}	
Department of Labor	}	DOCKET NO. 12-08-153-01
(Mactaw Inc. Pete's RV Center, Employer)	}	

In the above-entitled cause, the Clerk will enter:

Claimant appeals the Employment Security Board's decision upholding the denial of unemployment compensation benefits based upon a finding of gross misconduct. We agree with claimant that the evidence was insufficient to support the denial of benefits; accordingly, we reverse the Board's decision.

Claimant had worked for employer Pete's RV Center as a technician for seventeen or eighteen years when, in the fall of 2008, the owner of the business became convinced, based upon conversations with other employees and a visit to claimant's residence, that claimant was stealing propane from the company. When claimant returned from vacation in November 2008, the owner informed claimant that he was being discharged for stealing. Claimant sought unemployment benefits, but the claims adjudicator, appeals referee, and Board concluded that claimant was not entitled to benefits because employer had met its burden of demonstrating that it had discharged claimant for work-related gross misconduct. Claimant appeals, arguing that the hearsay evidence presented by employer failed to satisfy its burden of demonstrating that claimant had engaged in gross misconduct.

A claimant shall be disqualified from receiving unemployment benefits for a designated period if he was discharged "for gross misconduct connected with his work." 21 V.S.A. § 1344(a)(2)(B). "In cases relying on misconduct as basis for discharge, the burden of proof is upon the employer." Cooley v. Dep't of Employment Sec., 138 Vt. 211, 212 (1980). To satisfy this burden, the employer must show "substantial disregard of the employer's interest, either wilful or culpably negligent." In re Gray, 127 Vt. 303, 305 (1968). Hearsay evidence is admissible in unemployment compensation proceedings, in which neither the appeals referee nor the Board are "bound by common law or statutory rules of evidence or by technical or formal rules of procedure . . . , but may conduct a hearing or trial in such manner as to ascertain the substantial rights of the parties." 21 V.S.A. § 1351. Indeed, the Board's decision may be supported solely by hearsay evidence as long as there is "sufficient indicia of reliability to support the Board's findings." Bouchard v. Dep't of Employment and Training, 174 Vt. 588, 590 (2002) (mem.). "Accordingly, a reviewing court should determine the weight that each item of hearsay should receive, based upon that court's finding of truthfulness, reasonableness, and credibility." Id. In so doing, we must consider factors such as "whether the hearsay was specific

and detailed, whether the statements made were consistent, and whether the sources of the hearsay evidence were disinterested persons.” Id. Although we will construe the Board’s findings, if possible, to support its judgment, “we will overturn a Board decision where we find the evidence wholly insufficient to allow the Board to reach the conclusion it did.” Id. at 589 (internal quotes and citation omitted).

Here, the parties do not dispute that the alleged theft, if proven, would suffice as gross misconduct; rather they dispute whether employer satisfied his burden of proving that claimant engaged in the alleged misconduct. The owner of the business was the only person to testify on behalf of employer. According to his testimony, other employees informed him that claimant had asked them to fill propane tanks for him, saying that the owner had approved it. The owner testified that, upon hearing what the employees had to say and being concerned about some missing propane tanks, he drove out to claimant’s residence and saw propane tanks along the side of the house. The owner acknowledged that he had not actually seen claimant fill any of the tanks. Claimant testified that the company’s service manager had given him permission to fill the tanks, but when he asked how much he owed for the propane, the service manager said that he was unsure because he did not know the price of the propane. According to claimant, he asked the service manager on a couple of occasions how much he owed, but the service manager never billed him or got back to him on what he owed. In rebuttal, the owner testified that the service manager, the store manager, and the store clerk each told him that claimant never asked to pay for any propane he had taken. He also testified that, if claimant actually had wanted to pay for the propane, all the service manager would have had to do was enter claimant’s employee number in the computer system, and claimant would have been automatically charged fifteen percent over cost for the propane. He further testified that employees who took propane paid on the spot and were not billed.

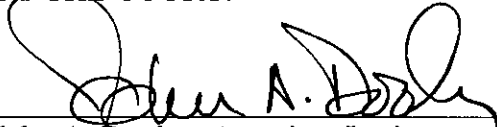
In denying claimant benefits, the Board accepted the findings of the appeals referee, who acknowledged that the only witness for employer did not have first-hand knowledge of the alleged theft, but found convincing the service manager’s testimony that if in fact claimant had actually reported his propane usage to the service manager, the service manager would have known that the price for employees was fifteen percent above cost and that the cost of the propane was readily available on the computer. The appeals referee concluded that the owner’s testimony undermined the credibility of claimant’s testimony.

Upon review of the record, we conclude that the owner’s testimony was insufficient to satisfy employer’s burden of demonstrating by a preponderance of the evidence that claimant stole propane from the company and thus engaged in gross misconduct related to his work. Employer’s case was built solely upon the hearsay testimony of the owner, who had no personal first-hand knowledge of the alleged theft. The owner testified that he had seen propane tanks on claimant’s property, but he acknowledged at the hearing before the appeals referee that he had not fired claimant for stealing tanks. The critical question was whether claimant had offered to pay for the propane at the time he took it. Claimant testified that on several occasions he offered to pay, but the service manager never got back to him. Rather than present the testimony of the service manager to rebut claimant’s testimony, employer presented only the owner’s testimony that the service manager had told him that claimant had never offered to pay for the propane. The owner also testified that the cost of the propane would have been apparent in the computer, but he had no personal knowledge of whether there had been a discussion of payment between claimant and the service manager, or, if so, whether the manager had checked the computer or allowed claimant to delay payment until the price was resolved.

Examining the relevant factors for determining whether hearsay evidence, standing alone, is sufficient to support an employer's burden of proving gross misconduct on the part of an employee, we conclude that although the owner's testimony was internally consistent, it was speculative in part and not particularly detailed. Further, notwithstanding the owner's testimony that he liked claimant and the absence of any evidence of a pretext for the discharge, the owner is not a disinterested party in the sense that an award of unemployment benefits to claimant will increase his business expenses. Under these circumstances, we cannot conclude that employer met its burden of presenting sufficient evidence to demonstrate that claimant engaged in gross work-related misconduct. Cf. In re Selivonik, 164 Vt. 383, 390 (1995) (although Human Services Board's finding that petitioner had engaged in sexual abuse was based solely on hearsay evidence, evidence had sufficient indicia of reliability insofar as its sources were disinterested persons, it was specific and detailed, and two independent accounts were consistent).

Reversed and remanded.

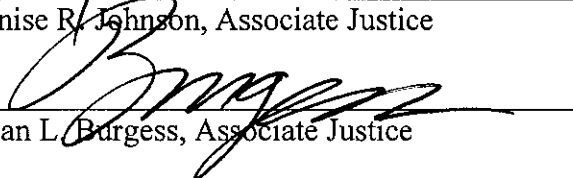
BY THE COURT:



John A. Dooley, Associate Justice



Denise R. Johnson, Associate Justice



Brian L. Burgess, Associate Justice