Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-231

DECEMBER TERM, 2010

David Shaddy	}	APPEALED FROM:
	}	
	}	
v.	}	Employment Security Board
	}	
	}	
Department of Labor	}	DOCKET NO. 03-08-107-05-E
(Brattleboro Retreat, Employer)	}	

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

Following remand from this Court, claimant again appeals the Employment Security Board's determination that he is not entitled to unemployment benefits because he was terminated from his employment for engaging in gross misconduct connected with his work. We affirm.

The facts of this case are set forth in detail in this Court's earlier decision, in which we remanded the case for the Board to require the employer to produce potentially exculpatory work schedules. Shaddy v. Dep't of Labor, 2009 VT 103, 186 Vt. 633 (mem.). In brief, the employer, the Brattleboro Retreat, became aware that someone had been tampering with packets of a regulated drug in the medication room of its facility. After reviewing the work schedules of the persons with access to the room, the employer focused its investigation on claimant because he was the only one who had had access to the room during each of the tampering incidents. The employer arranged for claimant to be in charge of the medication room on the evening of January 20, 2009, and instructed all other nurses not to enter the room without being observed by another nurse. At the end of claimant's shift, the employer discovered that capsules of the same regulated drug had been tampered with in a manner similar to prior incidents. Shortly thereafter, the employer fired claimant.

Three months later, claimant sought unemployment benefits. The Board denied the benefits on grounds that claimant was fired for gross misconduct. We reversed that decision, however, holding that the administrative law judge abused its discretion by not granting claimant's request for a subpoena to obtain work schedules concerning the prior incidents of tampering, which had the potential to exonerate claimant. On remand, the employer produced the work schedules and the Board once again denied claimant unemployment benefits on the same grounds as before. Appellant appeals once again, arguing that (1) the evidence does not support the Board's decision; and (2) the administrative law judge abused its discretion by refusing to subpoena further records from the employer.

Upon review of the record, we conclude that the evidence was more than sufficient to support the Board's denial of benefits on grounds that claimant was fired for gross misconduct.

See Romeo v. Dep't of Emp't and Training, 150 Vt. 591, 592 (1988) (noting that in cases of disqualification for unemployment benefits due to work-related misconduct, burden is on employer to show misconduct by preponderance of evidence). The administrative law judge and the Board found that the employer had proved by a preponderance of the evidence that claimant had an opportunity to tamper with the regulated drug on each of the occasions that it was done, and further that claimant was the only person who had access to the medication room unobserved on the evening of January 20, 2008, when the last incident occurred. Claimant points to alleged discrepancies in the testimony concerning opportunities that others may have had on that evening, but the evidence of the tampering overwhelmingly points toward claimant. See Littlefield v. Dep't of Emp't and Training, 145 Vt. 247, 251 (1984) (stating that findings of appeals referee and Board will be sustained as long as they are supported by any credible evidence, even if there is conflicting evidence). The minor discrepancies in the evidence noted by claimant do not overcome the testimony from the employer's charge nurse, pharmacy manager, and human resources manager indicating that claimant was the person who tampered with the regulated drug.

Claimant also argues once again that the administrative law judge abused his discretion by failing to accept further evidence and subpoena more records from the employer. We find this argument unavailing. Our initial decision remanded the case for the administrative law judge to issue the requested subpoenas concerning the employer's work records. The employer fully complied with claimant's request in that regard, but those records only further demonstrated that claimant had an opportunity to tamper with the drugs on the prior occasions. This time, claimant submitted a lengthy written request for records concerning former co-worker's personnel files, private patient information, and statements by various individuals. On appeal, claimant refers to statements made by the pharmacy manager and by another person, but it is unclear how those statements are relevant or when claimant became aware of the statements. In any event, there is no apparent nexus between these statements and the documents appellant requested below. Claimant has demonstrated neither that any of his requests are material to his defense, nor that the administrative law judge abused his discretion by denying the requests. See Langlois v. Dep't of Emp't and Training, 149 Vt. 498, 500 (1988) (holding that 21 V.S.A. § 1352 vests Board or appeals referee with discretion to issue subpoenas).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

_____

John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice