Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *V. P. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 135

Tribunal File Number: GE-16-1084

BETWEEN:

V. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Meridian Manufacturing

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: September 16, 2016

DATE OF DECISION: October 24, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Mr. V. P., the Appellant (claimant) along with his representative Ms. Sandra Guevara-Holguin, Community Unemployed Help Centre attended the hearing.

Meridian Manufacturing, the employer **did not** attend.

INTRODUCTION

[1] On August 9, 2015 the Appellant established a claim for employment insurance benefits. On October 5, 2015 the Canada Employment Insurance Commission (Commission) denied the Appellant benefits as it was determined he lost his employment due to his own misconduct. On November 17, 2015 the Appellant made a request for reconsideration. On February 11, 2016 the Commission maintained its original decision and the Appellant appealed to the *Social Security Tribunal of Canada* (Tribunal). On July 15, 2016 the Tribunal granted an adjournment and a new hearing date was scheduled for September 16, 2016.

[2] In accordance with subsection 10(1) of *Social Security Tribunal Regulations* (Regulations) states the Tribunal may, on its own initiative or if a request is filed, add any person as a party to the proceeding if the person had a direct interest in the decision. In this case the Tribunal determined the employer had a direct interest and added them as a party to the appeal on May 5, 2016.

[3] In accordance with subsection 12(1) of the Regulations states if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of hearing. In this case on June 17, 2016 Canada Post confirmed the employer received the Notice of Hearing for a hearing scheduled for July 15, 2016. On July 15, 2016 an adjournment was granted and a new hearing was scheduled for September 16, 2016. Canada Post confirmed the employer received the new Notice of Hearing on August 4, 2016, thus the Tribunal is satisfied the party received notice and therefore proceeded under the authority of the above-noted subsection.

[4] The hearing was held by In person for the following reasons:

a) The complexity of the issue(s) under appeal.

b) The fact that the credibility may be a prevailing issue.

c) The fact that more than one party will be in attendance.

d) The information in the file, including the need for additional information.

e) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[5] The Tribunal must decide whether the Appellant should be imposed an indefinite disqualification under sections 29 and 30 of the *Employment Insurance Act* (the Act) because he lost his employment due to his own misconduct.

EVIDENCE

[6] On his application for benefits the Appellant completed Fired (Dismissed) questionnaire stating he was dismissed for committing a safety violation. He stated he was terminated effective immediately due to a cumulating events involving unsafe work practices and failing to follow the Job Hazard Analysis procedures. He stated he does not agree he committed the safety infraction. He stated that he didn't know if his employer had a policy and there were previous incidents within the last six months that he had been accused of committing. The Appellant listed and explained incidents on 4 occasions between May and July 2015. He stated he never took any action after he was told he was dismissed. He stated he didn't know about such possibilities, he stated he was called into the office and was given a letter saying he was dismissed for cumulating events of unsafe work practices. He stated he asked if they were proven and he was only told that he would be assisted in clean his box in the change room and to leave parking lot in his car (GD3-8 to GD3-14).

[7] A record of employment indicates the Appellant was employed with Meridian Manufacturing Inc. from August 27, 2014 to August 6, 2015 when he was dismissed from his employment (GD3-20).

[8] On September 10, 2015 the Commission contacted the employer and spoke to the Human Resources Manager (HR) who stated the Appellant was dismissed for unsafe conduct and there had been accumulating events. She stated the Appellant had been through progressive discipline, which resulted in his dismissal. She stated the Appellant had received a suspension a month prior to his dismissal and two months prior the Appellant received a written warning and two months prior had received a verbal warning. The HR stated she would send copies of the relevant documentation (GD3-22).

[9] On October 7, 2015 the employer provided documents including the Employee Handbook Acknowledgement signed by the Appellant. Section 4.09 Disciplinary Procedures, Coaching Form dated February 12, 2015, Verbal Warning dated May 12, 2015 (including employee statement), Written Warning dated May 14, 2015 (including employee statement and incident report), 3 Day Suspension dated July 20, 2015 (including employee statements, investigation notes and incident reports) and Termination Letter dated August 6, 2015 (including incident report, investigation notes and employee statements). Job Hazard Analysis for Bin Cleaning and employee sign off of Job Hazard Analysis of Bin Cleaning. The employer noted that the information was translated into employee's first language to ensure understanding of safe work procedures (GD3-23 to GD3-81).

[10] On September 25, 2015 the Commission spoke to the Appellant who stated he provided his employer with a written statement and the investigation was made on false complaints, they did not take his written explanation into account. He stated regarding the final incident there was something in the crane he didn't check. He stated the emergency button was activated and he explained. He stated the supervisor said to stop the crane and he moved the crane. He stated there was nobody else to move and the crane was doing that. The Appellant stated he came to work three hours later because he was writing a written explanation about being unfairly accused but his employer didn't consider it was a false complaint. He stated he had never used the emergency button and did not check it. He stated it wasn't possible to figure out why his

crane was not moving properly and he does not know what happened. He stated in this incident when the supervisor said stop, he stopped. He stated that the crane was moving but they always move in pairs of two people. He stated he signalled to the other to stop but his crane was still going. He stated he made the signal to go again and they went again and then finally stopped (GD3-82).

[11] The Commission requested the Appellant to clarify the incident when the supervisor said stop and he stopped. He stated the first time he thought his crane was moving and asked the other to stop. He stated he signalled to him to continue and the same thing happened. He stated he stopped definitely. He gave his control to someone else. He stated he stopped the second time he realized it was an issue with the emergency button. The Appellant stated that his supervisor and his friend were looking for something else wrong and were trying to withdraw his operator license. His supervisor didn't like him and the warehouse supervisor set up the hook and didn't advise him of the emergency button. He stated his supervisor came and asked if someone was going to pick up the controls and move the bin, but no one wanted to so he did it. The Appellant stated that the information provided by the employer regarding the May 13, 2015 incident is absolutely wrong (GD3-82 to GD3-83).

[12] The Commission asked the Appellant about the incident on July 14, 2015, he explained the process for moving the bin and he was on one side and a co-worker was on the other. He stated that he was using the button labeled up but it was written wrong on the controls because he was told he was turning in the wrong direction. He stated his co-worker was trying to get the controls but he felt there were no worry and no rush. His co-worker witnessed the May crane incident. He stated nobody can say how the emergency button stayed on. He stated he made complaints and they stayed on his HR file. He stated his employer gave him time, and he was writing previous complaints and explaining (GD3-83).

[13] On September 28, 2015 the Commission spoke with the Appellant and asked about the May 12, 2015 incident. The Appellant stated that there were three of them working in the same station. He stated two of his co-workers went to the lunch room and he took the pedal controls. He stated he seen the two coming back and he knocked on the bin 2 times. He stated after he knocked he looked around to see where the foot pedal was. He stated he was not in a rush and

sometimes it takes him too much time so he knocks more, but at that him he did not. He stated that it was an inappropriate time for his co-worker to try and put a brace on the wheel of the front jig, He stated he hadn't seen his co-worker coming, and couldn't have seen him. He stated he had seen his other co-worker was passing but that he didn't advise him his other co-worker. He stated they called this unsafe work form him and filed against him. The Appellant stated that the one co-worker should have advised him that the other co-worker was there or prevented the co- worker from going there. He stated he wrote an explanation but they didn't apply it. The Appellant stated after his dismissal his employer gave him information about the safety incidents, written that he wouldn't sign the verbal written warning. He stated it's is just invented from May 12 to 14, 2015. He stated that he was writing his written statement to HR and came late, there was a crane incident on May 14, 2015 but they didn't talk about it because it looked like they understood it was nothing. He stated he did sign the form because it wasn't presented to him (GD3-84).

[14] The Commission asked the Appellant about the July 14, 2015 incident. He stated that he was working on the bin and he stepped on the pedal and he heard someone knock so he stopped immediately but the bin moved a little bit. He stated his supervisor told him that his co-worker had put his hand inside the view glass hole trying to set it up. He stated you are not supposed to put your hand inside and it is not permitted. He stated the supervisor told him that jig had taken the co-workers glove off but he didn't see it on the floor. The Appellant stated that he experimented to see if it would take his own glove off but believes if it moved it would not have taken the glove off. He stated he believes this was created to cover how the other co-worker had tried to take the controls from him earlier. He stated this was the same co-worker who provided false statements about him relating to the crane incident on May 14, 2015. He stated the team leader and supervisor invented the complaints. The Appellant stated after the warnings he continued to work as he worked, very safety consciously, but they wanted to dismiss him so they continued to invent other things (GD3-84 to GD3-85).

[15] The Appellant stated to the Commission there was another incident that they said it was his fault. He stated he the other had finished their work so he was able to turn the bin, so knocked two times, went around to the side wall then went back to the pedal, knocked another couple times before stepping on the pedal. He stated someone showed him that someone had

the crane hook on the hopper leg. He stated it was very high. He stated when they join the bin someone is supposed to check if there is someone on the hopper. He stated someone was there but they were not checking the roof. He stated he could not have seen what was happening on the top of the bin. He stated he couldn't have seen someone was going to set the hopper's crane because he was working. He stated he should have been advised if the crane had been set when it shouldn't be. He stated the crane was set and impeding him from doing his job. He stated he was always checking but not on the top of the crane. He stated his co-worker didn't speak to him at that time and was not cooperating. The Appellant stated the co-worker did what he wanted because he wasn't his boss. He stated there was no need to set the crane at that time. He stated he asked his supervisor who set the crane but he asked him instead if he wasn't informed. He stated he replied that if he had been informed he wouldn't have stepped on the pedal and turned the bin. The Appellant stated that he was suspended and the Health and Safety manager told him there was no need for a written statement. He stated that after his suspension his co-workers were saying he wasn't hitting the bin but he always hit/knocked the bin before turning it (GD3-85).

[16] On October 5, 2015 the Appellant stated to the Commission on July 24, 2015 he and his co-worker were working on a hopper and the co-worker was looking after the controls. He stated the co-worker was turning he was coming out of the leg area and the co-worker failed to check and he (the Appellant) sustained a small injury and could not work for a few minutes. He stated he believes a supervisor was passing by at the same time and seen it. He stated he later reported to the supervisor what had happened and he said he would be speaking to the Health and Safety manager. He stated later the supervisor asked his partners aside and then him aside and determined he worked unsafe. He stated that his supervisor didn't tell him when or how he worked unsafe (GD3-86).

[17] On October 6, 2015 the Commission notified the Appellant they were unable to pay him benefits as it was determined he lost his employment by reason of his own misconduct (GD3-87).

[18] On November 17, 2015 the Appellant made a request for reconsideration stating he was sending copies of statement provided to his employer at the time of their investigations. He

reiterated that his employer has misrepresented facts about all the incidents, false complaints and false testimonies were encouraged by the employer administration. They are inventing cover- stories (GD3-88 to GD3-97).

[19] On January 7, 2016 the Commission contacted the employer and spoke with HR manager. The HR confirmed the Appellant was dismissed due to cumulating events involving unsafe practices and failing to follow the Job Hazard Analysis. The HR manager explained the Appellant's position and that it is the crane operators always had to ensure the area was clear to ensure no one got injured. The crane operator would have to tap the bin to tell everyone to clear the area. Before the crane operator could turn/move the bin he has to check to make sure it is clear. She stated the Appellant repeatedly failed to do so, even though the employer talked to him and he was trained how to ensure the crane was operated safely. The HR stated they responded to an incident that took place July 27 & 28, 2015 and she provided a copy of a near miss report. She stated she spoke to the Appellant about it since he was already claiming all the prior allegations were false. She stated the team leader spoke to other employees, not about the Appellant, but about the safety at the work place, and a few did speak about their concerns about working with the Appellant because he was not following safety procedures. She stated that everyone got along but some didn't want to work with the Appellant since he was not following safety procedures (GD3-98).

[20] On January 29, 2016 the Commission spoke with the Appellant and the Appellant's representative regarding the reason for dismissal and reviewed the employer's documentation. The representative stated that when the first incident took place no one talked the Appellant about it. For the second incident, he had to move a bin and there was a problem with the emergency button. When it came to fill out the incident report they change their story. The representative noted he was not dismissed for the crane incident but suspended. She stated that the issue is that there were no incidents from July 20, 2015 to his last day of work. The Commission read the near miss report submitted by the employer for an incident report from July 27, 2015 to July 30, 2015 that was written on August 4, 2015 by the supervisor. The Appellant stated that the employee was not grinding at that time, he was on light duties and that this statement is false. He stated the statement for July 28, 2015 that he did do a visual check and hit the bin. He tried to attach the bin and stopped it on time, he did not hit him. His co-

worker is the one that did not hit the bin at times and he did not complain about it. The agent reviewed the statements from employees that worked in the same area. The Appellant stated they were false and that his co-worker hated him. The representative stated that these are general statements and they do not talk about specific incidents. The statements are not credible and there are no incidents where he failed to follow safety procedures from July 20, 2015. The Appellant stated that he was not given a copy of the witness statements, all the Appellant was told on August 5, 2015 that some employees complained about him. The Appellant stated that the employees were instructed by the supervisors and that the employer wanted to dismiss him plus there was not that much work and some employees were getting laid off (GD3-101 to GD3-102).

[21] On February 11, 2016 the Commission notified the parties that the original decision on misconduct is maintained and advised of the right to appeal to the Tribunal (GD3-103 to GD3-106).

[22] On March 16, 2016 the Appellant filed a Notice of Appeal stating that the employer manipulated the facts when they dismissed him. He submitted safety violations performed by coworkers who were not disciplined. He submitted that his crane suspension was coming to an end and the employer would have to retrain him where he would have been handed the Handbook and would have discovered the proper reason while still being employed. He submitted that the company was preparing for lay-offs and although his supervisors hated him he was among the most experienced workers so he should not be laid off. The Appellant included a summary of the MB Overhead Crane Safety Program (GD2-1 to GD2-10).

[23] On June 29, 2016 the Appellant submitted an additional statement in support of his appeal stating he was dismissed because of a conspiracy and provided his reasons for this belief (GD7-1 to GD7-2).

EVIDENCE AT THE HEARING

[24] The Appellant's representative provided the facts of the matter are:

a) The Appellant worked for this employer for a year;

b) He was accused of enforcing safe practices and was suspended without pay from July 20, 2015 to July 22, 2015 and he resumed his daily tasks;

c) On July 29, 2015 the Appellant's supervisor wrote a "Near Miss Report" (GD3-72), which was based on the accusations made by 2 of the Appellant's co-workers. They accused him of almost hitting them with the bins he was working on because he did not warn them before he had to move the bins;

d) Neither H. G. (HG) nor J. J. (JJ) provided written and signed statements describing in detail what when on between July 27 and 28th, which the Appellant denies these accusations;

e) The Appellant just returned from a suspension when these infractions allegedly occurred and during this time he was being extremely careful as to how he performed his job because he knew he was under a final warning agreement. He also knew that the supervisor was looking closely at his actions. If he was such a careless worker why was he still allowed work after the near miss incident;

f) The Appellant was unaware of this investigation started on July 29th. He worked normally without any reprimands in his same position until August 5, 2015 and the exhibits (GD72 and GD3-74 to GD3-81 show several general statements from other co-workers that were not involved in the incident referred in the Near Miss Report. These statements are not handwritten and talk about other incidents without indicating when did they happen (before or after his July 20, 2015 suspension);

g) The Commission only contacted the HR manager regarding the incidents. She was not involved or witnesses any of the incidents to get first-hand information of the events;

h) The Appellant has provided extensive written and verbal statements about the multiple accusations against him;

i) The Commission failed to contact any of the witnesses or S. M. who did the investigation and gather all of the relevant information and decided to believes the employer instead of considering the Appellant's first-hand recollection of the events;

j) Since his termination, the Appellant filed a complaint with the Manitoba Labour Board and he went through a mediation process. The Mediation Agreement establishes that the employer will pay him $350.00 as payment in lieu of notice if the Appellant signs a Release form to not pursue the matter forward in court or any other instance;

k) The Commission summarized their argument as "The Commission respectfully submits that the nature of the safety errors are not at issue; rather the claimant knew if he failed to follow proper safety practices, he would be dismissed. The employer has proven misconduct and their credibility is not questioned";

l) The Appellant has denied repeatedly any wrong doing in this case. He has provided the Commission plenty of written statements as well at the reconsideration 3 hours were spent trying to explain the facts to the agent and why she should give the benefit of the doubt to the Appellant because the accusations on the employer's part were not conclusive and was not first-hand information;

m) The Appellant stated he denies the allegations on July 27th and 28th and that he worked without any issues until August 5, 2015;

n) The Appellant stated in regards the crane issue he tried to provide the true facts and he explained in his letter as well as in a private conversation with the supervisor it was because of the other supervisor had not made him aware there was an issue with the emergency button, but they didn't take his side into consideration, but rather spoke to his co-workers and believed them instead. The Appellant confirmed that he believed because of this there was a conspiracy against him and they asked other workers to provide statements that were not true;

o) In regards the employers statement (GD3-22) that he was dismissed for accumulating events, he did not sign the statement in (GD3-28) because he didn't agree with the incident of May 12, 2015;

p) The representative stated that in (GD3-44) the Commission stated in (GD4-2) that this was an open discussion with the Appellant, however at no time is there any recorded statements, it is only a monologue from the employer, and there are no signature that the Appellant agreed with this. The Commission should not have considered to start with as this to be a frank and open discussion;

q) The representative stated that the incident on July 27, 2015 does not involve a crane. It involves Mr. H. G. almost being hit by a bin because it was alleged that the Appellant failed to advise him of moving the bin. She stated that was the final incident and it doesn't involve a crane because the Appellant wasn't allowed to use the crane because of his previous suspension;

r) The representative stated on July 24, 2015 he sustained a small injury when he was hit and it was caused by another co-worker. In regarding this incident on (GD3-73) on August 5, 2015 when he spoke to the HR manager the incident of being hurt was mentioned and this was after he came back from his suspension;

s) The representative stated there is no incident report on file of the Appellant's injury and the employer did not provide one nor did the Commission ask for one. The Appellant confirmed that he had told his supervisor of the injury;

t) The representative stated that the Appellant was not made aware that there was anything wrong until August 5, 2015 and the only thing that he knew that had happened since he returned from his suspension was his injury on July 24, 2015. The Appellant was not aware of anything until he was interviewed on August 5, 2015 of an investigation that supposedly began on July 27, 2015, and again they accuse him of almost hitting H. G. and J. J. the day after;

u) The Appellant stated that the incident didn't happen as H. G. was on light duties and he wasn't supposed to be working in this area. He stated he and J. J. were grinding the hopper bin, and he was working on the leg, H. G. was to be scraping the gusset and he wasn't supposed to be this area. He stated that he saw H. G. rush into his area and this could be dangerous for him, so he tried to stop him by hitting the bin twice. He stated he

was very aware of his last chance so he was being extra careful. He stated H. G. was looking at him and he was signalling for him to get out of the area. After he left he continued his work;

v) (GD3-71 to GD3-72) is the Near Miss Report, it should be noted the Appellant did not sign it because he didn't agree with;

w) (GD3-74 to GD3-75) The Appellant stated that S. M. was the supervisor in the metal area and line supervisor in the wash bay. He spent most his time in the wash bay and would only come and go in his area. The statements were provided by others and it would not have been something S. M. would have seen for himself;

x) The statements in (GD3-76 to GD3-80) are general statements made by co-workers who were not involved in the final incident or the statements do not include any dates to which these would have happened. There are no statements from H. G. or J. J. who were supposedly directly involved in the alleged incident on the final date. How can this be credible if there is no first-hand information? S. M. was not there to witness it but only to write up the investigation;

y) The representative stated when she had the conversation with the agent on the request for reconsideration she asked the agent if she had statements from H. G. or J. J. and she said no. The representative stated she told the agent this was critical information and the agent said she would go back to the employer and discuss this information with them and get back to her. However the agent never did and she made her decision. Obviously she didn't get any information from the employer because there is nothing in the docket; and

z) The representative stated the credibility of the Appellant needs to be considered, there has been first-hand information from the Appellant. The Appellant returned to work from his suspension, knew he was under a final warning. He was being extremely careful and he continued to work and was not aware of any issues until August 5, 2015 when he was called into the office for an interview and terminated.

SUBMISSIONS

[25] The Appellant along with his representative submitted that:

a) They believe the employer's credibility should be in question based on the fact that they only provided general statements from co-workers. Most of these statements are not signed and all of them provide information of alleged incidents without dates. There is no specification as to when did they happen; before or after the Appellant's suspension on July 20, 2015;

b) In addition the Commission agrees with the termination letter (GD3-70). This letter says the reason for the termination is "due to cumulating events involving unsafe work practices and failing to follow the Job Hazard Analysis procedures". However, that statement is not accurate. The Appellant already received a suspension for the incidents prior to July 20, 2015. Therefore, these prior incidents should not have been considered as part of the alleged misconduct that caused the termination;

c) The onus of proof falls to the Commission to demonstrate that on the balance of probabilities misconduct has been established and proven through the employer's evidence. Moreover, if the totality of the evidence shows a balance of probabilities, the benefit of the doubt should be given to the Appellant;

d) The Digest of Benefit Entitlement Principals, on section 7.2.1 says the following about the Commission's misconduct investigations: "Often the claimants are the first contact for fact-finding as they file the claim for benefits and provide basic information as to the reason for separation. This fact finding by the officer will follow with the employer to obtain his or her own version as to the reasons, then with the claimant, if necessary, or event with anyone else who is able to shed light on the loss of employment. Naturally, the information will as much as possible be sought from those directly involved or eyewitnesses to the events, particularly when there are discrepancies between the versions already obtained". In this case the agent failed to interview directly the co-workers that were witness of the Appellant's actions that supposedly caused hazardous

situations at work. Also the Commission did not interview Mr. S. M. at any point, even though he was the person who filled out the reports and wrote down the statements;

e) In addition, section 7.2.2 of the Digest of Benefit Entitlement Principals says that following regarding the evaluation of information without prejudice: "The officer will determine the credibility of the information by assessing what information is genuine, reasonable, plausible, and based on the facts, rather than mere presumptions, suppositions or opinions. Particular attention will be paid to the source of the information. Statements from someone with direct knowledge of events will prevail over statements from another who was not a participant. Statements from the employer carry neither more nor less weight than those from the claimant. It is necessary to objectively examine all statements.

f) The information gathered should enable the officer to objectively ascertain the reason for the separation from employment, whether the actions or omissions attributed to the claimant are in fact more a pretext or excuse, or whether they are the direct cause of the termination of employment. Only when the officer is satisfied that all the relevant information is on file and both the claimant and the employer have been given the opportunity to provide their statement and/or rebuttal, can the decision be made, regarding whether or not the claimant was dismissed due to misconduct. The officer must determine the point at which the information ceases to be an issue of contradiction and becomes an issue of credibility or weight of evidence;

g) It is our position that the Commission is simply relying on the numerous statements from co-workers that were not directly involved and did not witness the final incident for with the Appellant was terminated. Also, these statements were only provided in writing through the employer, not directly gathered from these employees. Moreover, the Commission never asked to speak to S. M., the supervisor in charge of the investigation that led to the Appellant's dismissal. In the docket there is no written statement or record of conversations with H. G. and J. J. who are the employees who participated directly in the final incident, according to S. M.'s incident report; however the Commission did not ask to speak with any of them;

h) In CUB 56842 Umpire Goulard rules as follows: " Umpires have held on several occasions that, where there is a direct contradiction, ignoring clear oral evidence in preference for hearsay statements can amount to an erroneous finding of fact made by the Board without regard for the material before it (CUB 10720, 36927, 37391)'. In the present case there is erroneous finding of fact on the Commission's part. The disqualification was based on hearsay information provided by the employer;

i) In CUB 70703 where the Umpire ruled the fact of the case is that the claimant was dismissed from his employment due to damaging another employee's personal tool box and eating in an area that was not designated as an eating area. In the case at hand, the conduct which was wilful, which the case was certainly here, and secondly, that it was harmful to the employer's interest and discipline are both in evidence in this case. During deliberation, the Board concluded that the employer's statement had more credibility. It has been said that evidence obtained by the Commission in a telephone conversation with someone who does not have first-hand knowledge or personal observation of the alleged behaviour must be accorded little weight;

j) Similarly, in present case, the agent also failed to explain why he found the employer more credible than the Appellant. The agent also disregarded the fact that the Appellant provided verbal and written first-hand information regarding the accusations against him. The employer only collected hearsay information and no statements were issued from the co-workers that were allegedly affected by the Appellant's actions; and

k) They strongly believe that the Appellant should have been considered more credible in this case. He has denied all the accusations through extensive explanations. All this information was completely disregarded by the employer upon termination and again ignored by the Commission. The employer has not provided any first-hand information regarding the accusations of misconduct.

[26] The Respondent submitted that:

a) The Commission submits that the nature of the safety errors is not at issue; rather the Appellant knew that if he failed to follow proper safety practices, he would be dismissed. The employer has proven and their credibility is not questioned;

b) Subsection 30(2) of the Act provides for an indefinite disqualification when the claimant loses his employment by reason of his own misconduct. For the conduct in question to constitute misconduct within in the meaning of the Act, it must be wilful or deliberate o or so reckless as to approach wilfulness. There must also be a causal relationship between the misconduct and the dismissal;

c) The Commission submits that jurisprudence supports its decision. The Federal Court of Appeal upheld the principal that there will be misconduct where the conduct of the claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional (*Mishibinijima v. Canada* 2007 FCA 360); and

d) The Federal Court of Appeal defined the legal notion of misconduct for the purposes of subsection 30(1) of the Act as wilful misconduct, where the claimant knew or ought to have known that his misconduct was such that would result in dismissal. To determine whether misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must constitute a breach of employment or implied duty resulting from the contract of employment (*Canada (AG) v. Lemire*, 2012 FCA 314).

ANALYSIS

[27] The relevant legislative provisions are reproduced in the Annex to this decision.

[28] The Tribunal must decide whether the Appellant should be imposed an indefinite disqualification under sections 29 and 30 of the Act because he lost his employment due to his own misconduct.

[29] The Federal Court of Appeal defined the legal notion of misconduct for the purposes of subsection 30(1) of the Act as wilful misconduct, where the claimant knew or ought to have known that his misconduct was such that would result in dismissal. To determine whether misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must constitute a breach of employment or implied duty resulting from the contract of employment (*Canada (AG) v. Lemire*, 2012 FCA 314).

[30] As Justice Nadon wrote in (*Mishibinijima v. Canada* 2007 FCA 36), there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[31] The Tribunal must first identify if the alleged act constituted misconduct and if the Appellant's conduct complained of was the cause of the dismissal and not merely an excuse for dismissal (*Davlut v. Canada (A.G),* A-241-82).

[32] In this case, the Tribunal finds that the alleged breach of safety policies would constitute misconduct; however, in this case the Tribunal cannot find the evidence supports that the Appellant committed the alleged misconduct and that his actions were willful and of such disregard that a breach in the employer-employee relationship and was cause for the Appellant's dismissal.

[33] The Respondent presents the argument that the nature of the safety errors is not at issue; rather the Appellant knew that if he failed to follow proper safety practices, he would be dismissed. The employer has proven misconduct and their credibility is not questioned.

[34] The Appellant along with his representative present the argument that they believe the employer's credibility should be in question based on the fact that they only provided general statements from co-workers. The onus of proof falls to the Commission to demonstrate that on the balance of probabilities misconduct has been established and proven through the employer's evidence. Moreover, if the totality of the evidence shows a balance of probabilities, the benefit of the doubt should be given to the Appellant.

[35] The Appellant along with his representative further argue that Commission failed to comply with The Digest of Benefit Entitlement Principals, on section 7.2.1 as it regards to the Commission's misconduct investigations and in addition, section 7.2.2 of the Digest of Benefit Entitlement Principals regarding the evaluation of information without prejudice.

[36] The Appellant along with his representative argue that it is our position that the Commission is simply relying on the numerous statements from co-workers that were not directly involved and did not witness the final incident for with the Appellant was terminated. Also, these statements were only provided in writing through the employer, not directly gathered from these employees. Moreover, the Commission never asked to speak to S. M., the supervisor in charge of the investigation that led to the Appellant's dismissal. In the docket there is no written statement or record of conversations with H. G. and J. J. who are the employees who participated directly in the final incident, according to S. M.'s incident report; however the Commission did not ask to speak with any of them.

[37] The Appellant and his representative argue that CUB 56842 supports their appeal where Umpire Goulard rules as follows: "Umpires have held on several occasions that, where there is a direct contradiction, ignoring clear oral evidence in preference for hearsay statements can amount to an erroneous finding of fact made by the Board without regard for the material before it (CUB 10720, 36927, 37391)'. In the present case there is erroneous finding of fact on the Commission's part. The disqualification was based on hearsay information provided by the employer;

[38] They further argue that CUB 70703 supports the appeal where the Umpire ruled "The fact of the case is that the claimant was dismissed from his employment due to damaging another employee's personal tool box and eating in an area that was not designated as an eating area. In the case at hand, the conduct which was wilful, which the case was certainly here, and secondly, that it was harmful to the employer's interest and discipline are both in evidence in this case. During deliberation, the Board concluded that the employer's statement had more credibility. It has been said that evidence obtained by the Commission in a telephone conversation with someone who does not have first-hand knowledge or personal observation of the alleged behaviour must be accorded little weight.

[39] The Appellant along with his representative argue that in present case, the agent also failed to explain why he found the employer more credible than the Appellant. The agent also disregarded the fact that the Appellant provided verbal and written first-hand information regarding the accusations against him. The employer only collected hearsay information and no statements were issued from the co-workers that were allegedly affected by the Appellant's actions.

[40] There is a heavy burden upon the party alleging misconduct to prove it. To prove misconduct on the part of the employee, it must be established that the employee should not have acted as he did. It is not sufficient to show that the employer considered the employees conduct to be reprehensible or that the employer reproached the employee in general terms for having acted badly.

[41] The Tribunal finds from the employer's evidence on the file the Appellant was terminated due to cumulating events involving unsafe practices and failing to follow the Job Hazard Analysis procedures. The evidence shows that following a suspension the Appellant returned to work and he allegedly was involved in incidents that occurred on July 27 and July 28th. The employer provided a Near Miss Report and from co-workers who made statements regarding the Appellant and his work habits.

[42] The Tribunal finds that the employer's evidence there is nothing to support the information provided in the Near Miss Report was confirmed. The Tribunal finds that there is no statements from the two individuals who alleged they were directly involved in the Near Miss Report on the file.

[43] The Respondent presents the argument that misconduct has been proven because the Appellant knew that if he failed to follow proper safety practices, he would be dismissed and states that (*Mishibinijima v. Canada* 2007 FCA 36) supports their position.

[44] The Tribunal finds the Appellant has provided lengthy explanations as the events that led up to his suspension on July 20, 2015 as well as in his statements to the Commission at the time of his dismissal. In his statements the Appellant argues that the allegations are untrue.

[45] The employer provided evidence to support their disciplinary actions against the Appellant that led up to his suspension, however the evidence that was provided at the time of the termination is inconclusive, and that the Commission failed to fully investigate the evidence that was presented at the time of the dismissal.

[46] The employer did not attend the hearing and the Appellant along with his representative submitted that the Commission based its decision on the hearsay evidence provided by the HR Manager and the general statements made by the Appellant's co-workers. The Tribunal finds it unfortunate the employer did not attend and that the Appellant's evidence on the file and from his oral testimony supports that he was not aware the final incident happened.

[47] The Tribunal finds that the Appellant was a credible witness as he was able to provide detailed oral evidence that was consistent with his initial statements he made to the Commission as well as his statements throughout the entire investigation. He provided lengthy detailed information to the Commission through the investigation and request for reconsideration. The representative argues that during the request for reconsideration the Commission agreed to speak to the employer regarding the facts that there was pertinent information to clarify and as well to request why there were no statements submitted by the two individuals that were supposedly involved in the near miss report as well as why the Commission did not interview S. M., who was the investigator but instead relied on third party evidence from the HR Manger.

[48] The Tribunal finds there is no evidence on the file to supports that the Commission fully investigated the information that was brought forward from the Appellant and his representative at the request for reconsideration. The Tribunal finds the evidence clearly supports the Commission failed to investigate very get clarity to very pertinent facts raised by the Appellant and his representative when specifically asked to do so.

[49] The Tribunal finds that the evidence supports the Appellant's argument that the Commission relied on the numerous statements from co-workers that were not directly involved and did not witness the final incident for with the Appellant was terminated. The Commission never asked to speak to S. M., the supervisor in charge of the investigation that led to the Appellant's dismissal. In the docket there is no written statement or record of

conversations with H. G. and J. J. who are the employees who participated directly in the final incident, according to S. M.'s incident report; however the Commission did not ask to speak with any of them.

[50] As cited in (*Canada (A.G.) v. Tucker*) A-381-85, misconduct requires a mental element of willfulness, or conduct so reckless as to approach willfulness on the part of the claimant for a disqualification to be imposed. Willful has been defined in a 1995 Court of Appeal case as consciously, deliberately or intentionally. In addition a 1996 Court of Appeal indicated that the breach by the employee of a duty related to his employment must be in such scope that the author could normally foresee that it would likely to result in his dismissal. Mere "carelessness.

[51] The Tribunal finds the Appellant provided convincing evidence to support that following his suspension he was making every effort to follow all safety rules and was very diligent. He provided oral evidence that he had no idea that there were any issues or that there had been a near miss incident and an investigation was going on. He testified that his co-worker had hit him ith the bin and he received a small injury but was still able to work and he had informed his supervisor, but there was no report or investigation. The representative stated that the alleged incident occurred on July 27th and 28th but the Appellant was not terminated until August 5, 2015 when a conversation took place with the HR Manger which only documents "Regarding the incidents from last week". The Tribunal finds the information provided in (GD3-73) does not provide any evidence to what the incident was from last week or how the Appellant had violated the safety policy as stated on his termination letter.

[52] The Tribunal finds that the fact the alleged incident was to have happened on July 27th and 28th and the Appellant remained working until August 5, 2015 can support his statements that he was unware that he had done anything wrong or that an investigation was held.

[53] The Tribunal finds there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility. However in this case the Tribunal finds the Appellant has provided detailed evidence that disputes the incident occurred and the Tribunal finds that the evidence of the final incident is inconclusive and does not meet the standard of willfulness required to support a finding of misconduct.

[54] The Appellant and along with his representative argue that the Commission failed to fully investigate as per The Digest of Benefit Entitlement Principals, on section 7.2.1 and regarding the evaluation of information 7.2.2 failed to give particular attention to the source of the information. The representative stated that CUB's 56842 and 70703 support their appeal.

[55] The Tribunal finds the evidence supports the Commission failed to investigate fully when it did not contact the employer and request information from S. M. who was the investigator and also from H. G. and J. J. who were directly involved in the alleged incident that led to the Appellant's terminate. The Tribunal finds that statements from someone with direct knowledge of events will prevail over statements from another who was not a participant. In this case the Appellant provided detailed written and oral evidence to support that his first-hand statements should have been given more weight.

[56] The Tribunal finds that the CUB's 56842 support the appeal as in this case the Commission ignored clear oral evidence in preference for hearsay statements which is erroneous finding of fact on the Commission's part. The disqualification was based on hearsay information provided by the employer and in CUB 70703 the Commission relied on the information from the HR Manger in a telephone conversation who was someone who does not have first-hand knowledge or personal observation of the alleged behaviour and therefore must be accorded little weigh.

[57] The Tribunal finds the Commission did not provide any explanation as to why it found the employer to be credible and why it preferred to accept the indirect hearsay evidence.

[58] The Tribunal finds the Appellant to be credible and provided detailed written evidence as well as oral evidence that was consistent with his version of the events that took place.

[59] The Tribunal finds that the Commission failed to discharge the burden of proving the Appellant's misconduct within the meaning of the Act. Therefore with the evidence before it, the Tribunal finds the Appellant should not be disqualified from benefits because his dismissal was not caused by his own misconduct (*Meunier v. Canada (A.G.)* A-130-96); and (*Choinier v. Canada (A.G.)* A-471-95).

[60] The Tribunal notes that the role of Tribunals and Courts is not to determine whether a dismissal by the employer was justified or was the appropriate sanction (*Caul* 2006 FCA 251).

[61] Determining whether dismissing the claimant was a proper sanction is an error. The Tribunal must consider whether the misconduct it found was the real cause of the claimant's dismissal from employment (*Macdonald* A-152-96).

CONCLUSION

[62] The appeal is allowed.

Teresa Jaenen

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

29 For the purposes of sections 30 to 33,

(a) *employment* refers to any employment of the claimant within their qualifying period or their benefit period;

(b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

(vii) significant modification of terms and conditions respecting wages or salary,

(viii) excessive overtime work or refusal to pay for overtime work,

(ix) significant changes in work duties,

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

(xi) practices of an employer that are contrary to law,

(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,

(xiii) undue pressure by an employer on the claimant to leave their employment, and

(xiv) any other reasonable circumstances that are prescribed.

30 (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.