

Because of Mrs. Geddas's call, Marshall was met upon his return by Mobil Martin employees Paul Orgill and Larry Clancy. Orgill and Clancy told Marshall about the allegation that he smoked in the van with Geddas and the oxygen present and asked Marshall to complete a written report of his version of events. Marshall said that Geddas had asked if he were smoking in the van and that he told Geddas he had not, but Marshall did acknowledge that while smoking outside the van he briefly leaned inside it to get his coffee. He also noted in the report that "when I got on freeway to go to St. John I lit a cigrett up and took a couple puff (*sic*)."

Meanwhile, Orgill and Clancy examined the van and both thought that its inside smelled strongly of cigarette smoke.

Mobil Martin procured statements from Geddas, Geddas's wife and Clancy. Geddas and his wife both said that Marshall had been smoking in the van while Geddas was a passenger. Clancy's statement recounts the conversation to that same effect that he had with Geddas's wife.

Marshall was suspended on the day of the incident and terminated the next day.

After his termination, Marshall filed an application for determination of unemployment benefit rights with the Ohio Department of Job and Family Services for a benefit year beginning July 10, 2011. The ODJFS denied the application on the basis that Marshall had been discharged with just cause in connection with work. Marshall appealed that decision, and the ODJFS issued a redetermination that affirmed the denial of benefits.

Marshall then appealed the redetermination, and jurisdiction was transferred to the Unemployment Compensation Review Commission. A telephone hearing was conducted by hearing officer Robert Bush on October 12, 2011. Marshall and Orgill both testified during the hearing.

Orgill testified that Mobil Martin received a complaint from Geddas's wife about

Marshall's smoking and that Marshall, when confronted about the complaint, was apologetic.¹ Orgill also confirmed that he and Clancy could smell the odor of cigarette smoke in the vehicle.²

Marshall testified that he was aware of the danger of smoking near liquefied oxygen. He testified that he never smoked inside the vehicle when Geddas was there, yet he also testified that he had never smoked while operating a Mobil Martin vehicle. He explained that, although his written statement says he smoked while "on the freeway," he had in fact pulled over just before entering the freeway and then stepped out of the van to have the cigarette.³

On October 17, 2011, the hearing officer issued an opinion affirming the ODJFS's redetermination that Marshall was not eligible for benefits because he had been terminated with just cause. The hearing officer commented on the testimony and found, as a matter of fact, that Marshall had smoked in the van with Geddas, thereby endangering Geddas's safety and constituting just cause for termination under Mobil Martin's work rules.

Marshall then sought a review of the hearing officer's decision by the commission. That request was denied and he filed this appeal. Having reviewed the record evidence and the briefs of the parties, I affirm the decision of the commission.

STANDARD OF REVIEW

This appeal is brought pursuant to Ohio Revised Code section 4141.282, which provides, in pertinent part:

If the court finds that the decision of the [review] commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

The hearing officer determines purely factual questions. See, *e.g.*, *Irvine v. Unemploy*.

¹ Tr., p. 8.

² Tr., p. 5.

³ Tr., p. 16.

Comp. Bd. of Review, 19 Ohio St. 3d 15, 17 (1985). As such, a reviewing court is not permitted to make factual findings or determine the credibility of witnesses. *Hall v. American Brake Shoe Co.*, 13 Ohio St. 2d 11, 13 (1968). The court's duty is limited to determining "whether the decision of the board is supported by the evidence in the record." *Kilgore v Bd. of Review*, 2 Ohio App.2d 69, 71 (4th Dist. 1965). A hearing officer's decision cannot be reversed as being against the manifest weight of the evidence if it is supported by some competent, credible evidence going to each element of the controversy. See, e.g., *DiGiannantoni v. Wedgewater Animal Hospital, Inc.*, 109 Ohio App. 3d 300, 305 (10th Dist. 1996).

LAW AND ANALYSIS

Marshall claims by this appeal that the hearing officer's finding that he was discharged with just cause is against the manifest weight of the evidence. As long as a decision is supported by some competent, credible evidence going to each element of the controversy, it cannot be reversed as against the manifest weight of the evidence. *Id.*

The evidence in this case is that Mobil Martin notified Marshall, and its other employees, through section 3.03 of the company handbook, that endangering the safety of a client would result in immediate termination. Additionally, Marshall agreed he received the manual and acknowledged that smoking in a van with a patient on oxygen would be "suicidal," and that it would be "just like playing Russian roulette."⁴ There is no dispute, then, that smoking near an oxygen tank in the van, if proved, would justify immediate termination. That left for the hearing officer's decision only the question of whether Marshall did smoke in the van with Geddas and his oxygen tank present.

That question of fact is entirely within the hearing officer's purview. See, e.g., *Irvine*, supra. Based upon the evidence, the hearing officer found that Marshall did smoke in the van

⁴ Tr., p. 17.

while with Geddas and the oxygen. Because I am not permitted to make factual findings or determine the credibility of witnesses, I must accept that factual finding. *Hall*, supra, at 13. Not only that, but there is a solid basis for the hearing officer's evidentiary determination given Geddas's statement, Geddas's wife's phone call made immediately upon Marshall leaving with her husband, Geddas's wife's statement, Orgill's testimony that the van smelled like cigarette smoke, and Marshall's inconsistent statements about whether he ever smoked in the van at all. Taking all of these things into account, the hearing officer could rationally find the weight of the evidence against Marshall and conclude, first, that he had smoked in the van, and second, that his conduct endangered Geddas's safety, thereby providing just cause form Mobil Martin to terminate Marshall.

CONCLUSION

Because there is competent, credible evidence supporting the hearing officer's decision that Marshall was terminated for just cause, the decision is not against the manifest weight of the evidence and is affirmed.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: _____

SERVICE

A copy of this journal entry was sent by email, this _____ day of October 2013 to the following:

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