

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Northeast Industrial Services, Corp., :
Petitioner :
v. : No. 2342 C.D. 2010
Unemployment Compensation : Submitted: February 25, 2011
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: March 24, 2011

Northeast Industrial Services, Corp. (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) granting Ralph A. Jones (Claimant) unemployment compensation benefits on the basis that he is not ineligible pursuant to Section 402(e) of the Unemployment Compensation Law.¹ We affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e). Section 402(e) provides in pertinent part:

An employe shall be ineligible for compensation for any week---

(e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected

(Continued....)

Claimant was employed by Employer as a driver/laborer and his last day of work was June 9, 2009, when he was discharged from work due to allegedly stealing from Employer. Claimant filed a claim for unemployment compensation benefits in April 2010 wherein he alleged he was discharged after being accused of theft. In the separation information filed by Employer in response to Claimant's claim for benefits, Employer stated that Claimant was fired for stealing.

By determination mailed May 6, 2010, the Scranton UC Service Center (Service Center) found that Claimant was discharged for alleged dishonesty and that Claimant failed to show that he had good cause for his actions. As such, the Service Center determined that Claimant had committed willful misconduct and deemed Claimant ineligible for benefits pursuant to Section 402(e) of the Law.

Claimant appealed the Service Center's determination and a hearing ensued before a Referee. Both Claimant and Employer appeared *pro se*. Claimant testified on his own behalf and Gail Klinger, Office Manager, testified on behalf of Employer. During the hearing, both Claimant and Klinger agreed that Claimant was discharged for alleged dishonesty. Reproduced Record (R.R.) at 2a.

Claimant testified that he needed about \$20 in order to refill the fluid levels in the company truck that he was driving to Reading. Id. at 2a-6a. Claimant testified that when he was ready to depart, the office was closed and he was not sure if the office had any money to give him for the cost of the fluids he needed for the company truck. Id. at 7a-8a. Claimant testified that he asked his job supervisor what he should do, and was told to do what he had to do. Id. Claimant testified that there was scrap in the yard and that when the employees were low on

with his work, irrespective of whether or not such work is "employment" as defined in the act.

cash, they would sometimes cash the scrap in to get the money for materials or things that they needed to do the job, and then turn the receipts into the scrap yard. Id. Claimant testified that he gathered enough of what he thought he would need of the scrap, which was copper and brass, to sell in order to get \$20 to refill the fluid levels in the company truck on his trip to Reading. Id.

Claimant testified further that he decided then to wait until the office opened to just get the cash he needed rather than take the time to stop at a junk yard and sell the scrap. Id. Claimant testified that the person who answered the office phone told him to just come over and get the money so he immediately went to get the money. Id. Claimant testified that when his boss brought him the \$20, the boss looked in his truck and saw the scrap. Id. At that point, his boss started screaming that Claimant was stealing from him, which Claimant testified was not true. Id. Claimant testified that the scrap was in the company truck and he was not hiding it. Id. at 10a. Claimant testified that Employer filed criminal charges against him for theft but he pled guilty only to a summary offense of disorderly conduct. Id. at 3a.

Klinger testified that she was not there when Claimant was discharged for dishonesty but she brought a copy of a letter that the boss had given to the police station describing the incident that led to Claimant's discharge. R.R. at 2a. Klinger offered the letter that the boss wrote to the police into evidence as Exhibit E-2. Id. at 4a. Klinger testified further that Claimant called her on the morning of June 9, 2009, and asked to borrow \$20 from Employer, which she agreed to, and asked Claimant to come pick up the money. Id. at 6a. Klinger testified that she did not give the \$20 to Claimant but rather the boss decided to take the money to Claimant. Id. Finally, Klinger testified further that Employer had a policy that employees were not to take scrap without permission. Id.

By decision mailed July 23, 2010, the Referee reversed the Service Center's determination and granted Claimant benefits. Employer appealed the Referee's decision to the Board. Therein, Employer stated that it did not agree with the Referee's "decision that an employee who was fired for stealing, qualifies to collect unemployment." Certified Record at Item 10 – Employer's Petition for Appeal from Referee's Decision/Order dated July 15, 2010, with Attachment.

The Board made the following findings of fact. Claimant was discharged from work with Employer due to allegedly stealing from Employer. Claimant did not steal from Employer as alleged. With regard to the incident that led to Claimant's discharge, Claimant plead guilty to a summary offense of disorderly conduct. Claimant was not discharged for disorderly conduct.

The Board resolved the conflicts in the testimony, in relevant part, in favor of Claimant and found his testimony to be credible. The Board concluded that Employer failed to meet its burden of proving that Claimant's actions rose to the level of willful misconduct. The Board stated that it in no way questioned Employer's right to discharge Claimant; however, the Board could not hold that Claimant's discharge was for willful misconduct in connection with his work.²

² Willful misconduct has been judicially defined as that misconduct which must evidence the wanton and willful disregard of employer's interest, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from his employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional substantial disregard for the employer's interest, or the employee's duties and obligations. Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 351 A.2d 631 (1976). Whether an employee's conduct constituted willful misconduct is a matter of law subject to this Court's review. Miller v. Unemployment Compensation Board of Review, 405 A.2d 1034 (Pa. Cmwlth. 1979). The burden of proving willful misconduct rests with the employer. Brant v. Unemployment Compensation Board of Review, 477 A.2d 596 (Pa. Cmwlth. 1984).

Accordingly, the Board granted Claimant unemployment compensation benefits. This appeal followed.³

Herein, Employer raises two issues in its Statement of Questions: (1) Whether the Board erred in not finding that Claimant left employment voluntarily; and (2) Whether the Board erred in finding that Claimant was not stealing from Employer.

With respect to the first issue raised by Employer, we conclude that this issue has been waived. The certified record in this matter shows that from the very beginning of Claimant's claim, Employer took the position that Claimant was fired and/or discharged for theft. Employer did not raise this issue before the Referee or in its appeal to the Board. In fact, Employer's witness agreed during the hearing before the Referee that Claimant had been discharged. In addition, in its appeal to the Board, Employer specifically states that it does not agree with the Referee's decision that an employee who was *fired* for stealing, qualifies to collect benefits. See Pa.R.A.P. 1551 (No question shall be heard or considered by the Court which was not raised before the government unit.). Therefore, we will not address the issue of whether Claimant voluntarily terminated his employment.

Next, Employer asserts that the Board erred in finding that Claimant was not stealing from Employer. Notwithstanding the fact that Employer has also failed to preserve this issue by failing to raise it in its petition for review filed with this Court, Employer's contention is without clearly merit. See Pa.R.A.P. 1513(a);

³ Initially, we note that this Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See *Porco v. Unemployment Compensation Board of Review*, 828 A.2d 426 (Pa. Cmwlth. 2003).

Tyler v. Unemployment Compensation Board of Review, 591 A.2d 1164 (Pa. Cmwlth. 1991) (issue not raised in the stated objections in petition for review nor "fairly comprised therein" in accordance with Pa.R.A.P. 1513(a) is waived).

As stated previously herein, the Board accepted Claimant's testimony as credible that he did not steal any of Employer's scrap as alleged by Employer. It is well settled that the Board findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. Hercules v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). The Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

Thus, it is simply not within this Court's province to overturn the Board's credibility determinations. Accordingly, the Board's order is affirmed.

JAMES R. KELLEY, Senior Judge

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Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

ORDER

AND NOW, this 24th day of March, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge