

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Miriam Guadalupe, :
 :
 Petitioner :
 :
 v. : No. 1032 C.D. 2010
 : Submitted: March 4, 2011
 Unemployment Compensation :
 Board of Review, :
 Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: April 13, 2011

Miriam Guadalupe (Claimant) petitions for review of the May 4, 2010, order of the Unemployment Compensation Board of Review (UCBR), which affirmed a referee's decision to deny her claim for unemployment compensation benefits. The UCBR determined that Claimant was ineligible for benefits because her discharge was the result of willful misconduct under section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.

Claimant worked as a group leader for E G Emils & Son, Inc. (Employer) from January 9, 1990, through her termination on December 15, 2009. (Findings of

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). Section 402(e) of the Law provides that an employee shall be ineligible for compensation for any week in which his unemployment is due to his discharge for willful misconduct connected with his work. 43 P.S. §802(e).

Fact, No. 1.)² Employer has a progressive disciplinary policy for absenteeism and tardiness, which imposes increasing levels of discipline for each instance of absenteeism or tardiness. Employer's policy also provides that, if an employee knows that she is going to be late for work, she must inform her supervisor at least one hour before the start of her scheduled shift. (Findings of Fact, Nos. 2, 4.) Claimant was aware of Employer's absenteeism/tardiness policy. (Findings of Fact, Nos. 3-4.)

Before her termination, Claimant received one verbal warning, two written warnings, and a three-day suspension for her absenteeism/tardiness. (Findings of Fact, No. 5.) In June 2009, Employer counseled Claimant about her persistent tardiness and advised her that any further absenteeism or tardiness would result in her discharge. (Findings of Fact, Nos. 6, 8.) Claimant was late for work nineteen times between October 2, 2009, and December 14, 2009. (Findings of Fact, No. 7.) On December 15, 2009, Claimant was again late for work and failed to notify her supervisor one hour before the start of her shift that she would be late. (Findings of Fact, Nos. 9-10.) Employer discharged Claimant in accordance with its policy. (Findings of Fact, No. 11.)

Claimant filed a claim for unemployment benefits, which was denied by the local service center. Claimant appealed to the referee, who held an evidentiary hearing at which Claimant and her supervisor, Alecia Morris, testified about what transpired on Claimant's last day of work. The referee disbelieved Claimant's testimony that she called Morris before the start of her shift to tell her that she would be

² The UCBR adopted the referee's findings of fact and conclusions of law in their entirety. Thus, any citations herein to the findings of fact may be found in the referee's February 16, 2010, decision.

late and believed Morris's testimony that she never received a phone call or a voicemail message from Claimant. (Referee's Decision/Order at 2.) Therefore, the referee concluded that Claimant's repeated tardiness in violation of Employer's policy constituted willful misconduct under section 402(e) of the Law.

Claimant appealed to the UCBR, which affirmed. The UCBR concluded that Claimant's failure to timely report for work on December 15, 2009, without proper notice, was willful misconduct. The UCBR also denied Claimant's request for a remand for additional testimony. Claimant now petitions for review of that decision.³

In her petition, Claimant asserts that the UCBR erred in finding that she failed to properly report her tardiness to her supervisor on her last day of work. Claimant asserts that she called Morris's cellular phone more than one hour prior to her shift and left a voicemail message stating that she would be late because she had to register her son for school that morning. In support of this claim, Claimant attaches to her petition and brief various documents, including a telephone record and three affidavits. Although Claimant acknowledges that none of these documents was entered into evidence at the hearing, she urges this court to consider them "in the interests of justice." (Claimant's Brief at 9.) Unfortunately for Claimant, we cannot do so.

When reviewing matters in its appellate capacity, this court is bound by the facts in the certified record on appeal. *Grever v. Unemployment Compensation Board of Review*, 989 A.2d 400, 402 (Pa. Cmwlth. 2010). Documents appended to a brief, but

³ Our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

not included in the certified record, may not be considered on appeal. *Croft v. Unemployment Compensation Board of Review*, 662 A.2d 24, 28 (Pa. Cmwlth. 1995). Therefore, we will not consider the extra-record evidence attached to Claimant's petition for review and brief.

Alternatively, Claimant asks this court to remand the matter for a new hearing so that the referee may consider this additional evidence. (Claimant's Brief at 11.) She asserts that: (1) she was unable to obtain the records from her telephone service provider before the hearing; and (2) one of her proposed witnesses, Jessica Soto, lives in Florida and was unable to attend the hearing. (*Id.* at 9.)

It is within the UCBR's discretion whether to grant a request for a remand, and we will not reverse its decision absent an abuse of discretion. *Fisher v. Unemployment Compensation Board of Review*, 696 A.2d 895, 897 (Pa. Cmwlth. 1997). The UCBR may deny a remand request if there is no showing that the evidence sought to be introduced could not be obtained, with due diligence, at the time of the initial hearing. *Delaware County Prison v. Unemployment Compensation Board of Review*, 455 A.2d 790, 792 (Pa. Cmwlth. 1983).

Here, the UCBR concluded that Claimant failed to establish good cause for a remand in this case. In her petition for appeal, Claimant's only assertion regarding additional evidence was:

I also know that I wasn't the only one coming in late or being absent and I can't understand why these other . . . people are still working there. I have a witness that can testify to that.

(Certified Record, Item No. 12.) Claimant then filed supplemental documentation with the UCBR, in which she stated, “[A]t the hearing I did not get a chance to explain my side of the story and the reason I was ‘late.’” (Certified Record, Item No. 13.) Claimant failed to explain what type of new or additional evidence she wished to present or why such evidence was unavailable at the time of the hearing. Thus, the UCBR did not abuse its discretion in denying Claimant’s remand request.

Finally, in her brief, Claimant asserts that the UCBR’s decision is unsupported by substantial evidence and that the UCBR erred in crediting the testimony of Employer’s witness. Because Claimant did not raise these issues in her petition for review, they are waived. *See Tyler v. Unemployment Compensation Board of Review*, 591 A.2d 1164, 1168 (Pa. Cmwlth. 1991); Pa. R.A.P. 1513(d).⁴

Accordingly, we affirm the UCBR’s order.

ROCHELLE S. FRIEDMAN, Senior Judge

⁴ In any event, issues of witness credibility are within the sole discretion of the UCBR, which is the ultimate factfinder. *Walsh v. Unemployment Compensation Board of Review*, 943 A.2d 363, 368 (Pa. Cmwlth. 2008).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Miriam Guadalupe,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1032 C.D. 2010
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 13th day of April, 2011, we hereby affirm the May 4, 2010, order of the Unemployment Compensation Board of Review.

ROCHELLE S. FRIEDMAN, Senior Judge