IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bensalem Township School District, Petitioner	:	
	:	No. 1068 C.D. 2010
v.	:	
	:	Submitted: November 24, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: March 17, 2011

Bensalem Township School District (Employer) petitions for review of the May 7, 2010, order of the Unemployment Compensation Board of Review (Board), which held that Lora Streeper (Claimant) is not ineligible for benefits under section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

Claimant was employed as a certified school nurse with Employer from January 20, 2002 to October 29, 2009. (WCJ's Finding of Fact No. 1.) The local service center determined that Claimant was ineligible for benefits as a result of

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended 43 P.S. §802(e). Pursuant to section 402(e) of the Law, an employee is ineligible for benefits if she is terminated or suspended for willfull misconduct.

willful misconduct pursuant to section 402(e) of the Law.[2] Claimant appealed, and on February 12, 2010, a referee issued a notice indicating that a hearing would be held at 10:20 a.m. on February 23, 2010. On February 22, 2010, following Employer's request for a continuance, the referee issued a second notice indicating that the hearing would be held at 9:00 a.m. on March 8, 2010.

On March 8, 2010, the referee opened the record at approximately 9:15 a.m. Employer was not present at the hearing. During the brief proceeding,[3] the referee excluded a number of documents submitted by Employer, and presumably relied upon by the local service center, on the grounds that they were hearsay. (R.R. at 242a-44a.) Thereafter, in response to the referee's questions, Claimant testified that she did not knowingly violate any of Employer's work rules and that she performed her job duties to the best of her ability. (R.R. at 246a.)

Employer and its witnesses arrived at approximately 10:00 a.m., after the referee had concluded the hearing and closed the record. Employer's counsel explained to the referee that he mistakenly looked at the February 12, 2010, notice indicating a hearing time of 10:20 a.m. rather than the February 22, 2010, notice indicating a hearing time of 9:00 a.m. The referee responded that there was little he could do since Claimant had already left and the record had been closed. The

[2] Whether the conduct for which an employee has been discharged constitutes willful misconduct is a question of law subject to this Court's review. Kelly v. Unemployment Compensation Board of Review, 747 A.2d 436, 438-439 (Pa. Cmwlth. 2000). The employer bears the burden of proving willful misconduct in order to disqualify a claimant from receiving benefits under the Law. Id.

[3] The transcript is four and a half pages in length, suggesting that the hearing did not take much time.

following day, Employer submitted a written request to the referee to reopen the hearing.

On March 11, 2010, the referee issued a decision and order reversing the decision of the local service center. The referee found as fact that Employer terminated Claimant's employment but observed that Employer did not appear at the hearing and, consequently, did not present any competent evidence necessary to determine the cause of Claimant's termination. (Findings of Fact, Nos. 2-3.) The referee also found that Claimant credibly testified that she performed her duties to the best of her ability. (Finding of Fact No. 4.) Based on these findings, the referee concluded that Employer did not meet its burden to demonstrate that Claimant was terminated for willful misconduct under section 402(e) of the Law. The referee also concluded that there was not proper cause to reopen the hearing because Employer missed the hearing as a result of its own negligence. Employer appealed to the Board, which affirmed the referee's decision, adopting and incorporating the referee's findings and conclusions.

On appeal to our Court,[4] Employer asserts that the Board erred in denying its request to reopen the hearing because Employer's counsel mistakenly believed that the hearing started at 10:20 a.m. and otherwise acted in a reasonable, non-negligent manner. Employer relies on our decision in Gadsden v. Commonwealth of Pennsylvania, 479 A.2d 74 (Pa. Cmwlth. 1984),[5] for the

[4] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

[5] In Gadsden v. Commonwealth of Pennsylvania, 479 A.2d 74 (Pa. Cmwlth. 1984), the referee dismissed the claimant's appeal due to his nonappearance at the hearing and the Board affirmed the referee's decision. On appeal, we observed that 34 Pa. Code §101.51 permits a referee to hold a hearing in a party's absence and to issue a decision based on the evidence of record. **(Footnote continued on next page…)**

proposition that there is a strong policy against dismissal of unemployment compensation matters and on our Supreme Court's decision in Martin v. Evans, 551 Pa. 496, 711 A.2d 458 (1998),[6] for the proposition that not every honest mistake constitutes negligence. Thus, Employer contends that the Board should have found that proper cause existed to reopen the hearing in order that Employer might present its case. We disagree.

> Pursuant to 34 Pa. Code §101.51:
>
> If a party notified of the date, hour and place of a hearing fails to attend a hearing without proper cause, the hearing may be held in his absence. In the absence of all parties, the decision may be based upon the pertinent available records. The tribunal may take such other action as may be deemed appropriate.

According to 34 Pa. Code §101.24(a), the record must be reopened if a party provides the referee with a written explanation of the reasons for missing the hearing and the referee determines that the reasons presented constitute proper cause. However, it is well-settled that a party's own negligence is not sufficient proper cause for failing to

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Noting that dismissals are disfavored when remedial statutes are involved, we held that the referee should have rendered a decision on the merits with findings of fact based on the evidence of record. We note that Employer mistakenly cites this case as "Gadson."

[6] In Martin v. Evans, 551 Pa. 496, 711 A.2d 458 (1998), a truck driver struck a motorist with his tractor trailer at a rest stop and the motorist brought a personal injury suit against the truck driver and his employer. The parties presented conflicting testimony and, based on its own credibility determinations, the jury concluded that the truck driver was not negligent. The trial court granted a new trial, concluding that the verdict was against the weight of the evidence. The Superior Court affirmed. Our Supreme Court reversed, holding that the trial court abused its discretion by substituting its own credibility determinations for those of the jury. In its discussion of the law pertaining to negligence, the Court also observed that the mere occurrence of an accident does not establish negligent conduct. Thus, contrary to Employer's contention, Martin does not stand for the proposition that an "honest mistake" does not constitute negligence.

attend a hearing. Savage v. Unemployment Compensation Board of Review, 491 A.2d 947 (Pa. Cmwlth. 1985).

Like Employer here, the claimant in Savage missed his hearing before a referee because he misread the date on the hearing notice. The Board refused the claimant's request to remand the matter to the referee to reopen the record. On appeal, we observed that the notice provided to the claimant included the date, hour, and place of the hearing and that the claimant admitted that he missed the hearing because he misread the notice. Affirming the Board's order, we held that the claimant's own negligence was insufficient proper cause to justify his failure to appear and, thereby, warrant a new hearing:

> In his administrative appeal, Claimant admitted receipt of timely notice. However, he also stated that his absence from the hearing was due to his misreading the date on the notice whereby he thought the referee's hearing was to be held on March 25, 1982 rather than on March 17, 1982. Claimant does not assert that the notice itself was incorrect or misleading, only that he misread it. Simply put, Claimant's own negligence was the sole cause of his not appearing at the March 17, 1982 referee's hearing. We hold that a claimant's own negligence is insufficient 'proper cause,' as a matter of law, to justify his failure to appear at a referee's hearing and warrant a new hearing. Claimant's contention that his absence from the referee's hearing was for 'proper cause' must be rejected.

Id. at 949-50; see also Eat'N Park Hospitality Group, Inc. v. Unemployment Compensation Board of Review, 970 A.2d 492 (Pa. Cmwlth. 2008);[7] Kelly v. Unemployment Compensation Board of Review, 747 A.2d 436 (Pa. Cmwlth. 2000).[8]

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[7] In Eat'N Park Hospitality Group, Inc. v. Unemployment Compensation Board of Review, 970 A.2d 492 (Pa. Cmwlth. 2008), the employer requested permission for its witness to testify by phone. The referee issued a notice indicating the date and time of the hearing and that the employer's witness would be contacted by phone. The day of the hearing, the referee called the witness twice at the number provided by the employer but reached the witness' voicemail both times. The employer did participate in the hearing, and the referee affirmed the service center's

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Employer contends that the negligence standard cited in Savage should not be applied so rigidly as to include every honest mistake. Employer asserts that doing so unfairly treats parties that are truly careless the same as parties that have acted in a reasonable though mistaken manner. We reject Employer's suggestion that the "proper cause" required by 34 Pa. Code §101.51 may be interpreted to include varying degrees of negligence.

While we recognize that dismissals of appeals involving remedial statutes are disfavored, Employer's appeal was not dismissed; in accord with Gadsden and 34 Pa. Code §101.51, the referee issued a decision based on the evidence presented. We conclude that although Employer made every effort to

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decision based on the claimant's unopposed testimony. On appeal, the Board remanded to the referee to determine if the employer's witness had proper cause for missing the initial hearing and the referee held a second hearing at which the employer's witness testified. Based on that testimony, the Board determined that the employer's witness did not have good cause for failing to appear at the initial hearing because the witness did not advise the referee on how to reach the witness through his voice mail system. Consequently, the Board excluded the witness' testimony. Our Court affirmed the Board, holding that any miscommunication was the result of the witness' own negligence and that the employer, therefore, did not establish proper cause as required to reopen the record for a second hearing.

[8] In Kelly v. Unemployment Compensation Board of Review, 747 A.2d 436 (Pa. Cmwlth. 2000), the Board found that the employer had proper cause for failing to attend a hearing because the employer's personnel director had emergency surgery and, consequently, did not receive notice of the hearing. On appeal to our Court, the claimant asserted that the Board erred in concluding that the employer had proper cause to reopen the hearing and, therefore, that the testimony presented by employer at the second hearing should be excluded. Our Court observed that the personnel director was present in her office for several days during the month the notice was received, that the person receiving the personnel director's mail in her absence should have been aware of the hearing, and that a second employee also received notice of the hearing. We held that the Board erred in allowing the employer to present testimony at a second hearing because the employer was negligent in missing the initial hearing and, therefore, did not establish proper cause for its absence.

rectify its misstep in a prompt manner, the referee did not err in denying Employer's request to reopen the record because Employer's own negligence in misreading the notice was insufficient proper cause to justify its failure to appear at the initial hearing. Savage. Thus, the Board properly denied Employer's subsequent request for a remand to the referee in order that Employer might present its case.

Accordingly, we affirm.

PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 17th day of March, 2011, the order of the Unemployment Compensation Board of Review, dated May 7, 2010, is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge