

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jennifer Milliner,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 113 C.D. 2011
	:	Submitted: June 10, 2011
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON

FILED: September 2, 2011

Petitioner Jennifer Milliner (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which reversed the Unemployment Compensation Referee's (Referee) award of benefits. The Board held that Claimant was ineligible for unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)¹. For the reasons set forth below, we affirm.

Claimant applied for unemployment compensation benefits after being discharged from her employment as a house manager at McGuire Memorial (Employer). The Duquesne Unemployment Compensation Service Center (Service Center) issued a determination, finding Claimant ineligible for unemployment

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e).

compensation benefits under Section 402(e) of the Law. Claimant appealed the Service Center's determination, and a Referee conducted an evidentiary hearing at which both parties testified.

Employer presented the testimony of Tonia Benden (Community Home Technician (CHT)), Audrey Rousseau (Group Home Manager), and John Dobi (Vice President (VP) of Human Resources) in support of its position. The CHT, who worked in the same community home as Claimant, testified that at approximately 1:15 p.m. on July 29, 2010, after Claimant's lunch break, Claimant came upstairs and sat in a recliner chair. (Certified Record (C.R.), Item 8.) Initially, the CHT spoke with Claimant about a client and then about a show that was on the television. (*Id.*) The CHT testified that Claimant informed her that she woke up early that day, and, therefore, she was tired. (*Id.*) Claimant did not inform the CHT that she had a headache. (*Id.*) The CHT testified that shortly after Claimant sat down in the chair, the CHT noticed that Claimant was sleeping. (*Id.*) The CHT testified that she believed that Claimant was sleeping because her eyes were closed for a prolonged period of time and her hand was on her face supporting her chin. (*Id.*) The CHT then sent a text message to her Group Home Manager, and the Group Home Manager directed her to take a picture of Claimant, which the CHT did with her cellular phone. (*Id.*) The CHT reported that Claimant slept for approximately fifteen to twenty minutes. (*Id.*) The CHT did not attempt to wake Claimant; Claimant woke up on her own, and, shortly thereafter, left work for the day. (*Id.*) The CHT testified that she never observed a safety or health risk in the basement working environment. (*Id.*)

The Group Home Manager testified that she shared the basement office with Claimant and that she was not present in the home when the incident

occurred. (*Id.*) The Group Home Manager was the CHT's direct supervisor, but she was not Claimant's supervisor; the Group Home Manager and Claimant had the same position but managed different community homes. (*Id.*) The Group Home Manager stated that she asked the CHT to take a picture of Claimant sleeping for evidentiary purposes. (*Id.*) The Group Home Manager also testified that she never saw or experienced any condition in the basement office that was unsafe or a health risk and noted that the home was subject to inspections. (*Id.*) She further testified that Claimant never complained to her about the working environment. (*Id.*)

The VP of Human Resources testified that after he was informed that Claimant was sleeping during work, he placed Claimant on an indefinite suspension, which was common practice for Employer when investigating any allegations against an employee. (*Id.*) He stated that he was notified there was a picture of Claimant sleeping, and he requested written statements describing the incident from the CHT and the Group Home Manager. (*Id.*) The VP of Human Resources testified that during his investigation, he obtained Claimant's electronic time sheet which indicated that on the day of the incident, Claimant took her lunch break between 10:30 and 11:00 a.m. (*Id.*) The day after the incident, the VP of Human Resources called Claimant and advised her that she was indefinitely suspended for sleeping while on duty. (*Id.*) He testified that during the conversation, Claimant did not advise him that she had a headache nor did she admit or deny the allegation that she was sleeping while on duty. (*Id.*) Claimant's suspension was converted to a discharge on August 26, 2010, after Employer was unsuccessful in arranging a meeting with Claimant to discuss the allegation. (*Id.*) The VP of Human Resources reported that the Commonwealth of

Pennsylvania inspects the community home, and that a health or safety hazard in the basement was never discovered during an inspection. (*Id.*) Further, he noted that Claimant had not previously complained about the working environment. (*Id.*)

Claimant testified to the circumstances surrounding her separation from employment. Claimant testified that she was not sleeping while on duty. (*Id.*) She stated that on the day of the incident, she was working in the basement while the washer and dryer were running and there was a musty smell. (*Id.*) Claimant developed a headache, and, therefore, went upstairs to get some fresh air and rest her eyes. (*Id.*) She noted that it was around 1:15 or 1:30 p.m. when she went upstairs and started talking with the CHT about a client and sat down in the recliner chair. (*Id.*) Claimant testified that she then closed her eyes while nursing her headache, and, after a few minutes, she opened her eyes and went back downstairs to resume her paperwork. (*Id.*) Claimant noted that she had been suffering from headaches and that she had advised Lori Shay (Director of Community Homes) about her medical condition. (*Id.*)

Following the hearings, the Referee reversed the Service Center's determination and awarded benefits pursuant to Section 402(e) of the Law. (C.R., Item 9.) The Referee concluded that Employer failed to meet its burden to establish Claimant was sleeping during working hours. (*Id.*) Employer appealed the Referee's decision to the Board. The Board made the following relevant findings:

1. For the purpose of this appeal, Claimant was last employed full-time by McGuire Memorial, where she performed the job duties of house manager at a final hourly rate of \$15.30. She began this employment January 2, 2006, and her last day of work was July 29, 2010.

2. On July 29, 2010, Tonia Benden, a community home technician, was in the living room with a client.
3. Claimant maintains an office in the community home's basement.
4. At approximately 1:15 p.m. on July 29, 2010, Claimant came upstairs and sat down in the same room as Ms. Benden. Claimant sat down in a recliner.
5. Claimant had a conversation with Ms. Benden. Claimant informed Ms. Benden that she got up early and was tired. Claimant did not indicate that she had a headache or that she was suffering from any adverse medical condition.
6. Afterward, Claimant stopped talking. Thereafter, Ms. Benden observed Claimant with her eyes closed for approximately fifteen to twenty minutes.
7. Ms. Benden contacted Employer's group manager. Ms. Benden was advised to take a picture.
8. Ms. Benden had taken a picture of Claimant in the recliner with her eyes closed. The picture depicts Claimant holding her chin with her hand.
9. Claimant was not on break at the time the picture was taken.
10. Claimant alleges that she was not sleeping. Rather, Claimant contends that she [was] in the recliner chair with her eyes closed because she was suffering from a headache. Claimant attributed her headache to working downstairs in the basement.
11. On July 30, 2010, Claimant was suspended indefinitely. At the time of her suspension, Claimant did not inform Employer that she had a headache.
12. On August 26, 2010, Claimant was discharged for sleeping while on duty.

(C.R., Item 12.)

The Board reversed the Referee's determination and concluded that Claimant was ineligible for benefits under Section 402(e) of the Law. The Board resolved conflicting testimony, in relevant part, in favor of Employer and found the testimony of Employer's witnesses to be credible. (C.R., Item 12.) The Board specifically rejected as not credible Claimant's testimony that she was not sleeping and that she merely closed her eyes because she was suffering from a headache. (*Id.*) The Board reasoned that Claimant's action of sleeping while on duty fell below the standards of behavior an employer has a right to expect from an employee. (*Id.*) The Board concluded that Claimant was terminated due to willful misconduct, and, therefore, Claimant was ineligible for benefits under Section 402(e) of the Law. (*Id.*) Claimant now petitions this Court for review of the Board's order.

On appeal,² we initially note that Claimant has not included a statement of questions presented in her brief. Nevertheless, Claimant essentially argues that (1) the Board's findings of fact are not supported by substantial evidence, and (2) the Board erred in concluding that Claimant's conduct rose to the level of willful misconduct under Section 402(e) of the Law.

First, we will address whether the Board's findings of fact are supported by substantial evidence. Substantial evidence is defined as relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp.*

² This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704. Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules, Inc. v. Unemployment Comp. Bd. of Review*, 604 A.2d 1159, 1161 (Pa. Cmwlth. 1992).

Bd. of Review, 502 A.2d 738, 740 (Pa. Cmwlth. 1986). In determining whether there is substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn from the evidence. *Id.* A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record as a whole. *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The Board's findings of fact are conclusive on appeal only so long as the record taken as a whole contains substantial evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 286, 485 A.2d 359, 365 (1984).

Claimant argues that Employer only established that Claimant's eyes were closed while she was on duty and failed to establish that Claimant was actually sleeping during work. Despite Claimant's testimony to the contrary, the Board found credible the testimony of Employer's witness, the CHT, that Claimant was observed sleeping during working hours. In an unemployment case, it is well settled that the Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight.³ *Peak*, 509 Pa. at 272, 501 A.2d at 1386. The Board is also empowered to resolve conflicts in the evidence. *DeRiggs v. Unemployment Comp. Bd. of Review*, 856 A.2d 253, 255 (Pa. Cmwlth. 2004). Here, the Board resolved any conflicts in testimony in favor of Employer and rejected the testimony of Claimant as not credible. (C.R., Item 12.) The testimony of Employer's witness, as summarized above, supports the Board's finding that Claimant

³ Claimant also contends that the Board's reversal of the Referee's decision was arbitrary, capricious, and without merit because the Referee could discern witness demeanor. This argument is contrary to law. *See Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 501 A.2d 1383 (1985).

was sleeping during working hours.⁴ When viewed in a light most favorable to Employer, our review of the record demonstrates that there is substantial evidence to support the Board's findings.

Second, we address Claimant's contention that the Board erred in concluding that her conduct rose to the level of willful misconduct.⁵ Section 402(e) of the Law provides, in part, that an employee shall be ineligible for compensation for any week in which "his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." The employer bears the burden of proving that the claimant's unemployment is due to the claimant's willful misconduct. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 369 (Pa. Cmwlth. 2008). The term "willful misconduct" is not defined by statute. The courts, however, have defined "willful misconduct" as:

- (a) wanton or willful disregard of employer's interests,
- (b) deliberate violation of the employer's rules,
- (c) disregard of standards of behavior which an employer can rightfully expect of an employee, or
- (d) negligence indicating an intentional disregard of the employer's interest or an employee's duties and obligations.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003). An employer, seeking to prove willful misconduct by showing that the claimant violated the employer's rules or policies, must prove the existence of the rule or policy, and that the claimant violated it. *Walsh*, 943 A.2d at 369.

⁴ Further, a picture included in the Certified Record depicts Claimant in a recliner chair with her eyes closed and with her chin in her hand. This picture, while not necessary to support the Board's finding because Employer's testimony was sufficient, provides additional support for the Board's finding that Claimant was sleeping while on duty. (C.R., Item 3.)

⁵ Whether or not an employee's actions amount to willful misconduct is a question of law subject to review by this Court. *Nolan v. Unemployment Comp. Bd. of Review*, 425 A.2d 1203, 1205 (Pa. Cmwlth. 1981).

This Court has consistently held, however, that regardless of the existence of a written workplace rule or policy on the subject, sleeping on the job constitutes willful misconduct sufficient to disqualify a claimant from receipt of unemployment compensation benefits under Section 402(e) of the Law.⁶ *See, e.g., L. Washington & Assocs., Inc., v. Unemployment Comp. Bd. of Review*, 662 A.2d 1148, 1149 (Pa. Cmwlth. 1995) (“It is without question that if Claimant was, in fact, sleeping on the job, such behavior would constitute willful misconduct disqualifying him from receiving unemployment compensation benefits.”); *Biggs v. Unemployment Comp. Bd. of Review*, 443 A.2d 1204, 1205 (Pa. Cmwlth. 1982) (holding that sleeping, or dozing, on job constituted willful misconduct even in the absence of a written employment rule prohibiting it).

Here, Employer sustained its burden to establish a *prima facie* case of willful misconduct. The Board found that Claimant was sleeping while on duty, which, even in the absence of written policy,⁷ in and of itself constitutes *prima facie* evidence of willful misconduct. Accordingly, the record establishes that Employer met its burden in making out a *prima facie* case for willful misconduct.

Claimant relies only on *Philadelphia Parking Authority v. Unemployment Compensation Board of Review*, 1 A.3d 965 (Pa. Cmwlth. 2010), in her brief, and alleges that Employer “established nothing except [Claimant’s] eyes were closed and could not and did not even allege ‘willful misconduct.’”

⁶ “An employer need not have an established rule where the behavioral standard is obvious and the employee’s conduct is so inimical to the employer’s best interests that discharge is a natural result.” *Biggs*, 443 A.2d at 1206 (citing *Spare v. Unemployment Comp. Bd. of Review*, 432 A.2d 283, 285 (Pa. Cmwlth. 1981)).

⁷ Employer did not offer evidence of the existence of a work rule prohibiting sleeping during work. Further, employer did not discharge Claimant based on a violation of a work rule, Employer discharged Claimant for sleeping while at work.

(Claimant's Brief, pg. 9.) The *Philadelphia Parking Authority* case is easily distinguishable. In *Philadelphia Parking Authority*, this Court held that there was insufficient evidence to support the employer's claim that the claimant deliberately or intentionally violated a *work rule* by sleeping during her shift. *Phila. Parking Auth.*, 1 A.3d at 969 (Emphasis added).⁸ In that case, the employer apparently only invoked the violation-of-a-work rule basis for discharging the claimant for willful misconduct,⁹ and did not rely on those cases in which sleeping on the job, in and of itself, constituted *prima facie* evidence of willful misconduct, and in which a showing of deliberateness was not required.¹⁰ This case, however, falls directly in line with those cases discussed above, in which we denied benefits based solely on the claimant's conduct of sleeping during work because sleeping while on duty is inimical to an employer's interests. Claimant's act of sleeping while at work was a

⁸ In *Philadelphia Parking Authority*, the claimant recognized she had a problem staying awake and attempted to address the problem with her employer by asking for additional work to keep her busy and alert. The claimant's position required her to sit in a money room for hours with nothing to do. With the exception of two small assignments, the employer did not provide the claimant with additional work or take any other action to remedy the situation. This Court reasoned that although the claimant fell asleep during her shift, the claimant attempted to resolve her drowsiness problem in a responsible manner that protected the interests of the employer. *Phila. Parking Auth.*, 1 A.3d at 969. In that case, the burden of proof did not shift to claimant, and, therefore, we declined to address whether the claimant had good cause for sleeping on the job based on her medical problems. *Id.*

⁹ In a work rule violation case, the employer must prove (1) the existence of a work rule, (2) the claimant was aware or should have been aware of the work rule, and (3) the claimant's actions were intentional or deliberate, before the burden shifts to claimant to establish good cause. *Id.* at 968.

¹⁰ We note that even if Employer in this case had a work rule that Claimant was or should have been aware of, Claimant, nonetheless, met the deliberateness requirement. Unlike the claimant in *Philadelphia Parking Authority*, Claimant made no attempt to resolve her problem with Employer. Claimant did not contact Employer and request to leave early due to her headache or even notify Employer she was not feeling well and needed to rest her eyes. Claimant's act of sleeping while on duty, without regard to Employer's interests, was, therefore, deliberate.

disregard of the standard of behavior Employer had the right to expect.¹¹ Employer, therefore, met its burden of proof that Claimant's unemployment is due to Claimant's willful misconduct.

Because Employer established a *prima facie* case for willful misconduct, the burden shifted to Claimant to establish good cause for her actions of sleeping while at work. While the employer bears the burden of proving that a claimant's behavior constitutes willful misconduct, it is the claimant who bears the burden of proving good cause for her actions. *Kelly v. Unemployment Comp. Bd. of Review*, 747 A.2d 436, 438-39 (Pa. Cmwlth. 2000). To prove good cause, the claimant must demonstrate that her actions were justifiable and reasonable under the circumstances. *Id.* Claimant appears to argue that she had good cause for sleeping while at work because a poor working environment led Claimant to develop a headache, and, therefore, she needed fresh air and time to rest her eyes. The Board may either accept or reject a witness's testimony, whether or not it is corroborated by other evidence of record. *Peak*, 509 Pa. at 275, 501 A.2d at 1388. Here, the Board resolved any conflicting testimony in favor of Employer and specifically rejected as not credible Claimant's testimony that she merely closed her eyes because she was suffering from a headache. Employer's testimony, as summarized above, and as accepted by the Board, established that Claimant was sleeping while on duty because she woke up early and was tired. Based on the

¹¹ Claimant's allegation that Employer failed to address the fact that Claimant had never before been accused of or found sleeping on the job, is also without merit. This Court has repeatedly held that even a single incident of misconduct may support a denial of benefits. *Jones v. Unemployment Comp. Bd. of Review*, 373 A.2d 791, 792 (Pa. Cmwlth. 1977); *Schafer v. Unemployment Comp. Bd. of Review*, 378 A.2d 1044, 1045 (Pa. Cmwlth. 1977); *Biggs*, 443 A.2d at 1206.

facts here and in view of the relevant case law, we conclude that Claimant failed to justify her actions of sleeping while at work.

For the reasons stated above, Claimant's action of sleeping while on duty fell below the standards of behavior an employer has a right to expect from an employee. The Board, therefore, properly concluded that Claimant's actions rose to the level of willful misconduct without good cause.¹²

¹² Based upon our resolution of Claimant's appeal, we need not address Employer's contention that this appeal should be quashed for defects in Claimant's brief relating to failure to comply with Pa. R.A.P. 2114-2116. *See Swope v. Unemployment Comp. Bd. of Review*, 497 A.2d 289 (Pa. Cmwlth. 1985). We wish to make clear, however, despite Claimant's contention to the contrary, that Claimant's brief fails to comply with Pa. R.A.P. 2111. Pa. R.A.P. 2111 provides, in part:

The brief of the [petitioner], except as otherwise prescribed by these rules, shall consist of the following matters, separately and distinctly entitled and in the following order:

- (1) Statement of jurisdiction.
- (2) Order or other determination in question.
- (3) Statement of both the scope of review and the standard of review.
- (4) Statement of the questions involved.
- (5) Statement of the case.
- (6) Summary of argument.
- ...
- (8) Argument for [petitioner].
- (9) A short conclusion stating the precise relief sought.

Additionally, Pa. R.A.P. 2111(10) requires that the opinion of the government unit below be appended to the brief. Furthermore, Pa. R.A.P. 2114-2119, set forth specific requirements for certain portions of petitioner's brief, identified above. In fact, Pa. R.A.P. 2116 provides that "[n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby." Regardless, although this Court may refuse to consider arguments that a petitioner addresses in his brief if his brief fails to include a statement of questions involved, we have exercised our discretion in the past to address issues subsumed elsewhere in briefs when the petitioner has clearly identified the issue. *Sun Oil Co. v. Workmen's Comp. Appeal Bd.*

Accordingly, the order of the Board is affirmed.

P. KEVIN BROBSON, Judge

(Thompson), 631 A.2d 1084, 1088 (Pa. Cmwlth. 1993). We have done so in this case, but Claimant's counsel is cautioned to review the Pennsylvania Rules of Appellate Procedure when practicing before this Court.

