IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Randy L. Zellefrow,	:	
	:	
Petitioner	:	
v.	:	No. 1146 C.D. 2010
	:	Submitted: October 22, 2010
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	
	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: December 23, 2010

Randy L. Zellefrow (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's denial of benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

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[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e) states that "[a]n employe shall be ineligible for compensation for any week…[i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work…." Our court has defined willful misconduct under Section 402(e) of the Law as:

> [A] wanton and willful disregard of an employer's interest, a deliberate violation of rules, a disregard of standards of behavior which the employer can rightfully expect from its

Footnote continued on next page…

Claimant was employed by Kittanning Borough (Employer), as a laborer from September 8, 1988 through January 21, 2010, when he was dismissed for failure to follow a directive. The referee found the following facts which were adopted by the Board:

> 1. From September 8, 1988 to January 21, 2010, the claimant was employed by Kittanning Borough, as a laborer, earning $17.20 per hour.
>
> 2. The claimant was specifically directed to provide his employer with a medical release so that his health history could be reviewed by Kittanning Borough's doctor.
>
> 3. The employer made this request based on the claimant's history of alcohol issues and whether the claimant was a safety issue to himself or others.
>
> 4. In October 2009, the claimant admitted himself for alcohol detoxification.
>
> 5. The employer required the claimant to have a psychiatric evaluation prior to his return to work.
>
> 6. The claimant was released for work without physical limitations by his own physicians.
>
> 7. The claimant was evaluated by a psychiatrist follow[ing] his detoxification and based on the claimant's refusal to verbally commit to stop

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> employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or the employee's duties and obligations.

Brady v. Unemployment Compensation Board of Review, 544 A.2d 1085, 1086 (Pa. Cmwlth. 1988).

> drinking, the psychiatrist advised a thorough psychological evaluation and no 'safety sensitive position."
>
> 8. The claimant was working regular duties until the borough council meeting on December 7, 2009 when this information was disseminated to council.
>
> 9. The claimant was asked to release his medical records and attend an independent medical evaluation with Dr. Burnstein at the expense of the employer.
>
> 10. The claimant verbally agreed to both requests at the council meeting.
>
> 11. The claimant reported to the appointment on December 11, 2009 but refused to sign a release for his medical history.
>
> 12. The claimant was given time off from work to arrange to sign the medical release.
>
> 13. The claimant never signed the release and has verbally refused to cooperate.
>
> 14. The employer discharged the claimant on January 21, 2010 for failure to follow a directive from the Borough council.

Referee's Decision, March 23, 2010 (Referee's Decision), Finding's of Fact Nos. 1-14, at 1-2. The referee found in pertinent part as follows:

> The employer has provided competent evidence that the claimant's admission to having "alcohol issues" was considered a safety concern at the job site. Following the claimant's admission to detoxification in October 2009, the employer had a reasonable concern that the claimant might present a safety issue to himself or to co-workers inasmuch as the claimant operated heavy equipment and

> performed other manual labor. The employer's request for a doctor's release and a subsequent evaluation is considered reasonable based on the facts of this case. The employer has the responsibility and the right to investigate any conduct which appears to be unsafe or not in the best interest of the employer. The claimant refused to provide the requested medical release for his records. The claimant has failed to provide any reason aside from the fact that he refused to cooperate. While this is obviously the claimant's choice, the claimant has not met his burden in showing that his decision to refuse the request was reasonable or that the request itself was unreasonable.

Referee's Decision, at 2. The referee found that Employer met its burden and denied Claimant benefits pursuant to Section 402(e) of the Law. Claimant appealed to the Board, which adopted the referee's findings and affirmed. Claimant now petitions this court for review.[2]

Claimant contends that the Board erred in determining that the request by Employer for the release of records was reasonable. Claimant sets forth that he began working for Employer in 1998, and that he was disciplined for being under the influence of alcohol at work on July 26, 2005. In October of 2009, while on vacation, Claimant became intoxicated and was eventually admitted to the Butler Hospital for detoxification. Claimant was released by a mental health provider on October 27, 2009, with no restrictions. There was no evidence provided that Claimant's actions in October of 2009 created any work-place issues. However,

[2] Our review in this matter is limited to a determination of whether constitutional rights have been violated, errors of law committed, or whether essential findings of fact are supported by substantial evidence. Brady v. Unemployment Compensation Board of Review, 544 A.2d 1085 (Pa. Cmwlth. 1988).

thereafter, Employer began to request further examinations. As part of that process, Claimant was asked to allow the release of his medical records to a doctor retained by Employer. Claimant refused and was terminated on January 21, 2010.

In Burger v. Unemployment Compensation Board of Review, 569 Pa. 139, 801 A.2d 487 (2002) and in Webb v. Unemployment Compensation Board of Review, 670 A.2d 1213 (Pa. Cmwlth. 1996), the Supreme Court and this court determined that absent a link between a claimant's off-duty drug or alcohol usage, a claimant cannot be denied unemployment benefits under the basis of willful misconduct.

In the present controversy, Claimant argues that there has been no evidence presented, other than the 2005 incident, that Claimant had been using or was under the influence of alcohol while on duty. Moreover, there was no testimony or evidence presented that Claimant was unable to perform his work duties as directed and, therefore, Employer has not shown that Claimant's off-duty alcohol use was affecting his work. Therefore, Claimant argues, that since his off-duty alcohol use cannot be the basis for a denial of benefits, the refusal to provide information concerning the same should not be allowable as a basis for denial of benefits. A showing of an actual impact upon his work ability is necessary. Further, due to the fact that Claimant had been released to full duty without restrictions, Claimant maintains that the request by Employer was unreasonable.

An employee's refusal to comply with an employer's reasonable directive will constitute willful misconduct. Eckenrode v. Unemployment Compensation Board of Review, 533 A.2d 833, 835 (Pa.

Cmwlth. 1987). When a claimant asserts that he has good cause for failing to comply with an employer's directive, the Court must first examine the reasonableness of the directive. Metropolitan Edison Co. v. Unemployment Compensation Board of Review, 606 A.2d 955, 958 (Pa. Cmwlth. 1992).

In the present controversy, the Board concluded that Employer had requested that Claimant see a psychiatrist based upon a medical recommendation. This court has previously held that an employer's instruction for an employee to have a psychiatric examination before returning to work was a reasonable request. Semon v. Unemployment Compensation Board of Review, 417 A.2d 1343 (Pa. Cmwlth. 1980). Furthermore, this court in Semon rejected the claimant's argument about lack of impact on job performance, noting that it would be unreasonable to expect employer to wait until another psychiatric episode occurred before requesting a medical evaluation. Id. at 1346. In Pryor v. Unemployment Compensation Board of Review, 475 A.2d 1350 (Pa. Cmwlth. 1984), this court reaffirmed the holding in Semon and further held that where a claimant's psychiatrist certified that she was able to return to work, an employer's directive for claimant to have an examination performed by an employer-appointed psychiatrist was reasonable.

Here, Employer received a report from a medical official raising serious safety and health concerns over Claimant's continued performance as a truck driver. Since Claimant also operated heavy equipment, Employer was acting reasonably and responsibly in attempting to ascertain whether claimant should be eligible to continue operating its vehicles and equipment that could pose a safety hazard to himself and

others. Employer simply did not have to wait until Claimant again engaged in conduct raising concerns before requesting that he attend an independent psychiatric examination. Devine v. Unemployment Compensation Board of Review, 429 A.2d 1243 (Pa. Cmwlth. 1981). The fact that Claimant's physician cleared him to return to work with no restrictions did not change the fact that Employer's directive was reasonable. Thus, the Board did not err in concluding that Employer's request to Claimant was reasonable.

Once Employer made out a *prima facie* case of willful misconduct, the burden shifted to Claimant to prove that his actions did not constitute willful misconduct under the facts or that he had good cause for his behavior. Jordon v. Unemployment Compensation Board of Review, 684 A.2d 1096, 1099 (Pa. Cmwlth. 1996). While Claimant attended the medical appointment, he refused to allow the release of his medical information to the physician and, as a result, the physician was unable to provide Employer with a professional opinion. The record is void of any specific reason as to why Claimant refused to release his medical records to Employer's physician. The Board did not err in determining that Claimant did not show good cause for his refusal to release his medial information.

Accordingly, we affirm.

JIM FLAHERTY, Senior Judge

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	:	
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	:	

O R D E R

AND NOW, this 23rd day of December, 2010 the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge

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BEFORE: HONORABLE DAN PELLEGRINI, Judge
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HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: December 23, 2010

Because the majority opinion is contrary to our Supreme Court's decision in *Burger v. Unemployment Compensation Board of Review*, 569 Pa. 139, 801 A.2d 487 (2002) and this Court's decision in *Webb v. Unemployment Compensation Board of Review*, 670 A.2d 1212 (Pa. Cmwlth. 1996), I respectfully dissent.

In *Webb*, the claimant was arrested for driving under the influence of alcohol while off-duty. Three years earlier, she had voluntarily entered an alcohol treatment program. Her employer terminated her employment for violating the terms of her employment, which included a

provision that any employee who has entered an alcohol detoxification program must remain alcohol free for five years. This was despite testimony from the employer that claimant's alcohol use had not in any way affected her job performance. We held that the work rule was unreasonable because it punished the claimant for behavior that did not affect her job performance. Furthermore, we held, "the refusal of an employee to comply with a work rule or demand which is unreasonable is not willful misconduct." *Id*. at 1215 (citing *Frumento v. Unemployment Compensation Board of Review*, 466 Pa. 81, 351 A.2d 631 (1976); *Dearolf v. Unemployment Compensation Board of Review*, 429 A.2d 1284 (Pa. Cmwlth. 1981); *Tisak v. Unemployment Compensation Board of Review*, 424 A.2d 635 (Pa. Cmwlth. 1981); and *Kindrew v. Unemployment Compensation Board of Review*, 388 A.2d 801 (Pa. Cmwlth. 1978)).

Our Supreme Court later adopted this same approach in *Burger*. In that case, an employee was dismissed from her job at a nursing home after admitting that she used marijuana every evening but that she never came to work high. Our Supreme Court held:

> Off-duty misconduct will not support a finding of willful misconduct under §402(e) [of the Unemployment Compensation Law][3] unless it extends to performance on the job; in such case the misconduct becomes work-related. For example, had Claimant appeared at work under the influence

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

> of marijuana ingested off-duty, §402(e) would apply. The referee's statement that Claimant's off-duty behavior was unacceptable is not sufficient. Behavior that may be unacceptable to an employer does not necessarily equate to §402(e) willful misconduct. . . . The conclusion that Claimant's off-the-job drug use constitutes willful misconduct is unsupported. It is not insignificant that absent her admissions, Claimant's performance was apparently satisfactory. Simply put, Employer failed to establish Claimant's conduct was work-related, so §402 does not provide grounds for denying benefits.

Id. at 144-45, 801 A.2d at 491.

Here, Claimant was engaged in an off-duty incident involving alcohol abuse. He did not drink while at work or come to work while under the influence of alcohol, and there was no evidence that the off-duty event had any affect on his job performance. Rather, Employer only expressed concerns of a *possible future effect* on job performance if he were to hypothetically drink on the job or come to work drunk, in other words, concerns that there *might be* a work-related issue in the future, not a present work-related issue. Because Claimant's off-duty alcohol use did not affect his job performance, it was not work-related, and the demand from Employer that he provide medical records was, therefore, unreasonable. *Burger*. Thus, although the proximate cause for his firing was violating the work rule of providing medical records, that work demand was as a matter of law unreasonable and, as such, can never be the basis for denying unemployment compensation benefits for the refusal to comply with it.

Webb; *Frumento*; *Dearolf*; *Tisak*; *Kindrew*. His refusal to comply with the unreasonable demand cannot, as a matter of law, be willful misconduct.[4]

Accordingly, I dissent.

DAN PELLEGRINI, JUDGE

[4] Moreover, the majority is incorrect in stating that Claimant did not undergo a psychiatric examination. Claimant did undergo a psychiatric examination; he merely refused to release his medical records.