

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pellman Electric, Inc., :
Petitioner :
v. : No. 1434 C.D. 2010
Unemployment Compensation : SUBMITTED: December 17, 2010
Board of Review, :
Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: February 16, 2011

Pellman Electric, Inc. (Employer) petitions for review of the order of the Unemployment Compensation Board of Review (Board) that reversed the order of the Referee and granted benefits to Claimant Lee Perry. We affirm.

The facts, as found by the Board, are as follows. Perry worked for Employer as an electrical apprentice from 2007 until July 29, 2009, when he was discharged. In May of 2009, Perry suffered an injury to his hand and, after a claim had been filed and approved by Employer’s insurance carrier, was placed on light-duty work. On July 29, 2009, Lee Perry had been assigned to assist in “pulling wire” at a job site, to be supervised by Robert Perry, Lee Perry’s father and a

foreman for Employer. Lee Perry began the day pulling wire, but found it aggravated his injury. Robert Perry told him to stay busy by picking up after the rest of the crew. Some time later, Darren Pellman, president of Employer, arrived at the job site, and, seeing Perry cleaning up, said to him, “what the f--- are you doing?” Board’s Decision, mailed June 22, 2010, Finding of Fact 7. Pellman further told Perry that he was paid to pull wire, not clean up.

At the end of his shift, Perry was to pick up some sections of pipe, and deliver them to a job site. The pipe was to have been cut into sections before Perry arrived, so it could fit into his truck. Perry arrived to find that the pipe had not been cut. At this point, his shift was over, and he had an after-work medical appointment for his injured hand. Nevertheless, Pellman ordered Perry to cut and deliver the pipe. Perry explained that he needed to leave for his medical appointment, and that with his injury he could not hold the saw to cut the pipe. An argument ensued, and Perry left the premises. Unbeknownst to Perry, Pellman followed him out of the building and overheard him saying to himself, “f--- them, I’m not cutting the f---ing pipe.” Board’s Decision, Finding of Fact 16. At this point, Pellman discharged Perry.

Perry’s termination letter states that he was fired for insubordination, “wreckless [sic] driving of company vehicle,” use of a cell phone on company time, “use of abusive/vulgar language to owner of company,” and refusal to do work as directed. Reproduced Record at 6a. Before the Referee, Pellman testified that he had caught Perry using his personal cell phone on the job several times, and had afterwards filed disciplinary action forms. In addition, Pellman testified that on the day he fired Perry, he concluded that Perry was unsafely driving a company vehicle after hearing screeching tires from the parking lot. The Referee did not

focus on these allegations, but instead found that, based on the confrontation about the pipe, that Perry had committed insubordination, and was therefore ineligible for benefits.

The Board reversed. The Board found that Perry was discharged over the pipe incident, not the alleged reckless driving or cell phone use. The Board further found that Pellman was unreasonable in ordering Perry to cut the pipe when doing so would be in violation of Perry's medical restrictions, and that therefore Perry had good cause to refuse to comply. In addition, the Board did not find willful misconduct in Perry's use of profanity, when Pellman had used the exact same profane word towards Perry earlier that day, and Perry's profanity was not intended to be overheard nor was it directed at Pellman. An appeal to this court followed.

On appeal, Employer argues that the Board erred as a matter of law in finding that Perry's behavior on the day of his firing did not constitute willful misconduct. In addition, Employer argues that the Board's decision was not supported by sufficient evidence, because the Board ignored several of the stated reasons for Perry's firing, inappropriately focusing on the incident immediately preceding Perry's dismissal.

Whether an employee's conduct rises to the level of willful misconduct is a question of law subject to this court's plenary review. *Roberts v. Unemployment Comp. Bd. of Review*, 977 A.2d 12 (Pa. Cmwlth. 2009). When, as in this case, an employee is discharged for refusing to follow an employer's directive, both the reasonableness of the employer's demand and the reasonableness of the employee's refusal must be examined. *Dougherty v. Unemployment Comp. Bd. of Review*, 686 A.2d 53 (Pa. Cmwlth. 1996). The Board

correctly found that Pellman's demand that Perry cut the pipe was an unreasonable instruction that Perry had good cause to refuse because it was in violation of his medical restrictions for his prior work injury. Further, the refusal to follow the instruction occurred after his shift had ended, and, to comply with the instruction would likely have made him late for his medical appointment. In addition, as the Board found, Perry's profane outburst was not directed at Pellman and was not intended to be overheard. Pellman had directed similar profane language towards Perry only hours before. In light of these facts, the Board was correct to not find willful misconduct in Perry's actions.

Employer further argues that the Board ignored a number of the stated reasons for Perry's dismissal, including alleged personal cell phone use on company time, and reckless driving of a company vehicle. In cases such as this, the employer has the burden of establishing that the acts in question were the actual reason for discharge. *Panro v. Unemployment Comp. Bd. of Review*, 413 A.2d 772 (Pa. Cmwlth. 1980). However, the Board found as a fact that the reason for Perry's dismissal was the confrontation over the pipe. We are bound by the Board's factual findings when they are supported by substantial evidence of record. *Graham v. Unemployment Comp. Bd. of Review*, 840 A.2d 1054 (Pa. Cmwlth. 2004). In this case, the record demonstrates that Perry was dismissed in the heat of the argument about the pipe. While Employer provided some testimony that the earlier incidents had occurred, it is unable to point to anything in the record which demonstrates that the Board erred in finding that they were not the cause of

Perry's dismissal.¹ Therefore, we are bound by the Board's factual findings on this matter, and we give no consideration to the other alleged incidents.

For all the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

¹ We also note that many of the facts surrounding these alleged incidents were strongly disputed before the Referee, and that these disputes were not resolved by the Board. In addition, we note that Employer has included in the Reproduced Record eighty pages of what it alleges are Employee's personal cell phone records. We cannot consider these documents, however, because they were not made part of the record below. *See Lausch v. Unemployment Comp. Bd. of Review*, 679 A.2d 1385 (Pa. Cmwlth. 1996).

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 16th day of February 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge