

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Karl Breazeale, :
Petitioner :
v. : No. 1554 C.D. 2010
Unemployment Compensation Board : Submitted: December 17, 2010
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 SENIOR JUDGE KELLEY

FILED: May 5, 2011

Karl Breazeale (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board) affirming an order of a Referee denying benefits to Claimant pursuant to Section 402(e) of the Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e). We affirm.

The following are the facts as adopted by the Board in this matter. For more than ten years prior to the incident at issue, Claimant worked as a carpenter for R.P. Getts Builders, Inc. (Employer), a small three person construction company. Employer had recently noticed an erratic pattern of behavior from Claimant, whereby Claimant was continuously taking time off

without prior notification. Due to a drinking problem, Claimant had entered into a recent pattern of self-admission to an alcohol rehabilitation program, followed by normal work functioning, followed by relapse.

On February 22, 2010, Claimant had been assigned by Employer to a particular work site at an office. On that date, Employer went to the site, found that Claimant was not there, and discovered that Claimant had left the site in a hazardous condition with a ladder erected and unfixed ceiling tiles causing a safety issue. Due to an episode of crying and depression, Claimant had left the site at 11:00 a.m., and had thereafter admitted himself back into rehabilitation due to his continuing drinking problem. Employer attempted to contact Claimant via the work Nextel telephone system, and was unsuccessful. Claimant repeatedly did not pick up when contacted via the Nextel system, did not call Employer on Employer's cellular phone, and did not leave any message at Employer's office to inform Employer that Claimant had left the job site. Employer thereafter discharged Claimant for leaving the work site in a hazardous condition, abandoning his position in the middle of a job without informing Employer, and for continuing to take unscheduled leave.

Claimant subsequently applied for benefits under the Law at his local Unemployment Compensation Service Center, which found Claimant eligible for benefits under Section 402(e)¹ of the Law, and ineligible for benefits under Section

¹ Section 402(e) reads:

Ineligibility for compensation

(Continued....)

401(d)(1)² of the Law, 43 P.S. §801(d)(1). Claimant appealed to a Referee, and a hearing ensued at which both parties appeared and offered testimony and evidence.

The Referee thereafter issued a decision and order in which she found that Employer had presented credible evidence that Claimant had a drinking problem, causing him to miss work in a repeated unscheduled manner for his rehabilitation efforts, which efforts were considered essential to Claimant's health. The Referee noted that Claimant had never been disciplined for the previous unscheduled time off, although those absences became a frequent pattern and were

An employe shall be ineligible for compensation for any week—

* * *

(e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in this act[.]

43 P.S. §802(e).

² Section 401(d)(1) reads:

Qualifications required to secure compensation

Compensation shall be payable to any employe who is or becomes unemployed, and who--

* * *

(d)(1) Is able to work and available for suitable work: Provided, That no otherwise eligible claimant shall be denied benefits for any week because he is in training with the approval of the secretary nor shall such individual be denied benefits with respect to any week in which he is in training with the approval of the secretary by reason of the application of the provisions of this subsection relating to availability for work or the provisions of section 402(a) of this act relating to failure to apply for or a refusal to accept suitable work.

causing difficulties for Employer. The Referee accepted Employer's testimony and evidence that Claimant had abandoned the job site on the date at issue, leaving it in an unsafe condition exposing Employer to potential liability, and that Claimant had failed to contact Employer prior to leaving the site in the middle of his shift. The Referee noted that when Claimant finally contacted Employer thereafter, he was not responsive to questions about his whereabouts. The Referee noted Claimant's admission that he had left the site at 11:00 a.m. due to his depression and crying, and had thereafter self-admitted into rehabilitation due to his illness.

The Referee concluded that Claimant's frequent absences were disruptive to Employer's business, and that Claimant's abandonment of a hazardous worksite without seeking prior permission was inimical to Employer's interests and exhibited a disregard of the standards of behavior that an employer has the right to expect of an employee. Accordingly, the Referee concluded that Claimant's conduct rose to the level of willful misconduct, and denied benefits pursuant to Section 402(e) of the Law.

Claimant appealed to the Board, which adopted and incorporated the Referee's findings and conclusions, and affirmed by order dated July 6, 2010. Claimant now petitions for review of the Board's order.

This Court's scope of review of the Board's order is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions

relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003).

Willful misconduct has been judicially defined as that misconduct which must evidence the wanton and willful disregard of employer's interest, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from his employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional substantial disregard for the employer's interest or the employee's duties and obligations. Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 351 A.2d 631 (1976). Whether an employee's conduct constituted willful misconduct is a matter of law subject to this Court's review. Miller v. Unemployment Compensation Board of Review, 405 A.2d 1034 (Pa. Cmwlth. 1979). The burden of proving willful misconduct rests with the employer. Brant v. Unemployment Compensation Board of Review, 477 A.2d 596 (Pa. Cmwlth. 1984).

Claimant presents two issues for review. First, Claimant argues that the Board erred in determining that Claimant engaged in willful misconduct in connection with his separation from employment.³ Claimant argues that Employer

³ Within his argument under this stated issue, Claimant attempts to challenge two of the Board's findings of fact. However, Claimant has failed to preserve these issues for appellate review, and they are thusly waived. Claimant failed to preserve these issues in both his Petition for Review, and in the Statement of Questions Involved section of his brief. Each of these two procedural errors on Claimant's part is independently dispositive of these issues. Diehl v. Unemployment Compensation Board of Review, 4 A.3d 816 (Pa. Cmwlth. 2010) (an issue not raised in a petition for review to this Court results in a waiver of that issue); Long v.

(Continued....)

did not meet its burden of proving that Claimant disregarded the standards of behavior that an employer has a right to expect. In support, Claimant asserts that his actions in leaving the work site mid-shift and checking himself into a rehabilitation facility did not exhibit an intentional disregard of Employer's standards, did not disregard any specific work rules, and were not wanton or willful. Claimant notes that he informed the work site's receptionist, who does not work for Employer, that he was leaving early, and that he made several attempts to contact Employer to no avail.

We disagree that Employer did not meet its burden to prove willful misconduct. Even accepting Claimant's arguments *arguendo*, Claimant has failed to address the facts, accepted as credible by the Board, that Claimant: left the work site without notice to Employer; continued a recent course of unscheduled absenteeism after warnings therefor; left the work site in a hazardous condition; failed to avail himself of Employer's cellular or office telephones to notify Employer of his abandonment, and; failed to articulate any rationale for his abandonment when Employer did finally communicate with Claimant in the wake of his abandonment. Each of those actions is a factor in determining willful misconduct. See, e.g., Giant Eagle, Inc. v. Unemployment Compensation Board of

Unemployment Compensation Board of Review, 696 A.2d 876 (Pa. Cmwlth. 1997) (an issue not raised in the Statement of the Questions Involved is deemed waived pursuant to Pa. R.A.P. 2116(a)).

Review, 705 A.2d 523 (Pa. Cmwlth. 1998) (claimant discharged for leaving work site without authorization was terminated for willful misconduct, and is ineligible for benefits under Section 402(e) of the Law); Moore v. Unemployment Compensation Board of Review, 483 A.2d 1062 (Pa. Cmwlth. 1984) (repeated unscheduled absenteeism, even in conjunction with rehabilitation efforts, in combination with a failure to notify employer of continued absences, constitutes willful misconduct); Raheem v. Unemployment Compensation Board of Review, 431 A.2d 1112 (Pa. Cmwlth. 1981) (claimant's reckless creation of a safety hazard at work site is one factor in conclusion of willful misconduct); Melignano v. Unemployment Compensation Board of Review, 409 A.2d 495 (Pa. Cmwlth. 1979) (an employer has a right to expect an employee alleging sickness to, *inter alia*, notify his employer of his reasons for failing to return to work); Mula v. Unemployment Compensation Board of Review, 407 A.2d 477 (Pa. Cmwlth. 1979) (on-the-job actions by claimant putting surrounding non-employees in danger of physical harm are one factor in conduct that fell far below the standard which employer had a right to expect).

Additionally, notwithstanding his unsupported assertions on this issue, Claimant's actions in this matter when considered as a whole unquestionably constitute a clear disregard of the standards of behavior which an employer can rightfully expect from his employee. Frumento. As such, the Board did not err in concluding that Employer met its burden of proving willful misconduct, in consideration of Claimant's aggregated actions. Id.

Claimant also argues that even if Employer met its burden, Claimant demonstrated that his actions were justifiable and reasonable. In support, Claimant cites to Maldonado v. Unemployment Compensation Board of Review, 503 A.2d 95 (Pa. Cmwlth. 1986), and Green v. Unemployment Compensation Board of Review, 433 A.2d 587 (Pa. Cmwlth. 1981). In Maldonado, the claimant's wife suffered from severe depression including suicidal ideation for a period spanning two years, during which claimant was repeatedly excused to attend to her with claimant consistently notifying employer of the need and reason for his absences. Maldonado, 503 A.2d at 96-98. In the absence of a finding regarding the one unreported absence that occasioned the claimant's termination, but where the claimant had testified that his wife had suffered an exigent medical emergency requiring hospitalization, we remanded for findings as to whether the absences, and the one failure to report off, were justified by medical or other emergencies occasioned by the claimant's marital situation. Id. at 98.

In Green, an employer discharged the claimant for having accumulated more than seven "unauthorized" absences in violation of the employer's rule that eight such absences in a twelve-month period would merit termination. Green, 433 A.2d at 587. We found the claimant eligible for benefits where the facts showed that the claimant's accumulated unauthorized absences included repeated absences for actual illness, which were not delineated on employer's narrow list of authorized reasons for an absence. Id. at 587-589. We found those illness-related absences to be reasonable, where the final and precipitating unauthorized absence involved claimant leaving his job to attend to a

hospital emergency involving his son. Id. Therein, although the claimant did notify his immediate supervisor, he did not notify the general supervisor one level above his immediate supervisor, which technical notification defect formed another stated ground for employer's termination. Id. at 589.

Both Maldonado and Green are distinguishable from the instant matter. Herein, Claimant established no accepted credible evidence that his abandonment of his position was of such an exigent medical emergency nature as to justify leaving without notifying Employer on one of the three separate phone lines available therefor. Further, neither of those precedents addresses a claimant leaving a job site in a hazardous condition, potentially endangering surrounding non-employees, and potentially exposing Employer to considerable liability. Additionally, neither Maldonado nor Green addressed, or excused, a claimant who flatly failed to provide a reasonable and timely explanation of both where he was, and why he had left his job, in the immediate wake of his abandonment where such timely explanation was feasible. Most dispositively, neither of those precedents addresses the totality of the factors involved herein that preceded, accompanied, and resulted from Claimant's actions. As such, we find Claimant's citation to the precedents relied upon unpersuasive.⁴

Finally, in his second stated issue Claimant argues that the Board erred as a matter of law in failing to evaluate Claimant's eligibility for benefits

⁴ Further, we deny Claimant's request that we remand this matter for further testimony on whether his abandonment was necessitated by an exigent medical emergency; the record herein reveals that Claimant was afforded a full and fair opportunity to present any and all such

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under Section 402(b) of the Law, 43 P.S. §802(b), which provides that an employee who voluntarily terminates his employment without cause of a necessitous and compelling nature is ineligible for benefits. Claimant, however, has again failed to preserve this issue for appellate review by failing to advance it in his petition for review, and thus it is waived.⁵ Diehl.

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

evidence before the Referee in the hearing held in this matter.

⁵ We note that, notwithstanding Claimant's dispositive waiver of this issue, no argument (or related finding) has been made in this matter, by either party, that Claimant voluntarily terminated his employment.

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	:	
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ORDER

AND NOW, this 5th day of May, 2011, the order of the Unemployment Compensation Board of Review dated July 6, 2010, at Decision No. B-502489, is affirmed.

JAMES R. KELLEY, Senior Judge