IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nikisha Johnson,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1607 C.D. 2009
	:	
Unemployment Compensation Board of Review,	:	Submitted: January 15, 2010
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: March 17, 2010**

Nikisha Johnson (Claimant), pro se, petitions for review of the order of the Unemployment Compensation Board of Review (Board), which affirmed a Referee's determination denying Claimant unemployment compensation (UC) benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] For the reasons that follow, we vacate and remand.

[1] Act of December 5, 1936, Second Ex. Sess. P.L. (1937) 2897, as amended, 43 P.S. § 802(e). This section provides that an employee shall be ineligible for compensation for any week "in which [her] unemployment is due to [her] discharge or temporary suspension from work for willful misconduct connected with [her] work." Id.

Claimant worked full-time as a medical assistant for the University of Pittsburgh Medical Center Health System (Employer) in its Monroeville orthopedic office from September 2008 until she was suspended without pay on December 31, 2008. Claimant subsequently was discharged from her employment on February 4, 2009. Claimant applied for UC benefits, which the Duquesne UC Service Center granted. Employer filed an appeal, and a hearing was held before the Referee.

Employer presented the testimony of Wendy Thunell, a senior human resources consultant for Employer and the custodian of Claimant's personnel file. (Hr'g Tr. at 4, April 3, 2009.) Ms. Thunell stated that Claimant was required to obtain Act 33 (Child Protective Services) and Act 73 (FBI Criminal Background) clearances because Claimant's supervisor preferred orthopedic medical assistants, like Claimant, to have the clearances so that they could fill in at Employer's pediatric offices. (Hr'g Tr. at 5-6, 14.) Ms. Thunell testified that, by letter dated November 21, 2008, Employer advised Claimant that she had to obtain these clearances by December 31, 2008. (Hr'g Tr. at 6-7.) The letter included the Act 33 clearance application and instructions on how to obtain the fingerprints required for the Act 73 clearance, which could only be obtained by going through Employer or an entity named Cogent. (Letter from Employer to Claimant (November 21, 2008), at Employer Ex. 2A.) Employer also presented an unsigned copy of the November 21, 2008 letter, to which Claimant objected, stating that she had never seen that letter. (Hr'g Tr. at 8.) Ms. Thunell acknowledged that she did not prepare the November 21, 2008 letter, she did not send the letter, and it was sent on her behalf. (Hr'g Tr. at 6.) Ms. Thunell stated that Employer sent a reminder letter on December 9, 2008, indicating that Employer had not yet received Claimant's clearances and advising

Claimant that she could be suspended without pay or terminated for failing to obtain the clearances by December 31, 2008. (Hr'g Tr. at 8-9.) That letter did not contain any instructions on how to obtain the clearances and stated, "[t]his is the only reminder you will receive concerning these clearances." (Employer Ex. 6.) When Employer offered the December 9, 2008 letter into evidence Claimant objected, noting that the copy presented to the Referee as evidence was unsigned and dated December 9, 2008, and the letter she actually received was signed and dated December 8, 2008. (Hr'g Tr. at 9, 15.) The Referee compared the two letters and acknowledged that, although the letters contained the same information, the letter Employer introduced was dated December 9, 2008 and did not have Ms. Thunell's signature on it. (Hr'g Tr. at 15.) Employer's counsel offered to replace its letter with the letter presented by Claimant; however, the Referee stated "It's all right." (Hr'g Tr. at 15.)

Ms. Thunell indicated that it normally takes two to four weeks to obtain the clearances, four weeks if the applicant forgets to complete a part of the Act 33 clearance application. (Hr'g Tr. at 14.) Ms. Thunell testified that Employer scheduled Claimant to obtain the required fingerprinting for the Act 73 clearance at its headquarters on December 23, 2008, but Claimant did not attend the appointment because she had to pick her children up from daycare. (Hr'g Tr. at 9.) Ms. Thunell acknowledged that Claimant obtained her fingerprints from her local police station and sent them to Employer, but she explained that the fingerprints alone were not an Act 73 clearance and she did not believe that one could obtain an Act 73 clearance using the form Claimant submitted. (Hr'g Tr. at 10-11.) Ms. Thunell testified that Employer suspended Claimant without pay when it did not receive Claimant's

clearances by December 31, 2008, but gave her thirty additional days, until January 31, 2009, to obtain the clearances and avoid discharge from her employment. (Hr'g Tr. at 11-12.) Ms. Thunell acknowledged that Claimant communicated with Employer regarding the status of her clearances on several occasions in January 2009, but she indicated that she advised Claimant that she had not received Claimant's clearances and that the clearances would be sent to Claimant, not Employer. (Hr'g Tr. at 12-13.) Ms. Thunell stated that Claimant did not obtain the required clearances by January 31, 2009 and, therefore, Employer terminated Claimant's employment. (Hr'g Tr. at 13.)

Claimant testified that, at the time she was hired in September 2008, Employer never told her that she needed the Act 33 and Act 73 clearances. (Hr'g Tr. at 15.) Claimant stated that she did not receive Employer's November 21, 2008 letter and that she first received notice of the clearance requirements in the letter dated December 8, 2008. (Hr'g Tr. at 8, 15.) Claimant testified that she could not get her fingerprints taken earlier in December because her supervisor would not allow her to leave work early. (Hr'g Tr. at 17.) Claimant stated that, with regard to the December 23rd fingerprinting session, she emailed a human resources representative to say that she could not make it and that she would have her fingerprints taken at her local police station; the email indicated that Claimant unexpectedly had to pick her daughters up from daycare on that day. (Hr'g Tr. at 17-18, Employer Ex. 7.) Claimant testified that she provided Employer her fingerprints obtained at the local police station, she was never told that those fingerprints were unacceptable for Act 73 clearance purposes, and she believed Employer never submitted her Act 73 application to the FBI. (Hr'g Tr. at 15-19.) Indeed, Claimant stated that she still had

not received her Act 73 clearance. (Hr'g Tr. at 16, 21.) With regard to her Act 33 clearance, Claimant testified that she did not obtain the form until Employer emailed it to her on December 17, 2008. (Hr'g Tr. at 19-20.) Claimant acknowledged that she did not mail the Act 33 application until December 26th and that the application was returned in mid-January 2009 because she had failed to fill out a section on the application. (Hr'g Tr. at 19-20.) Claimant stated that she completed a new application, submitted the application to the Department of Public Welfare, and received her Act 33 clearance on January 30, 2009. (Hr'g Tr. at 4, 16.)

After hearing this testimony, the Referee made the following findings of fact.

1. The claimant began working for [Employer] in September 2008 and last worked on December 31, 2008 as a full-time Medical Assistant in the Monroeville Orthopedic office at a final rate of pay of $11.50 per hour.
2. In November 2008, [Employer] issued a letter to claimant indicating that claimant was required to obtain Act 33 (Child Protective Services) and Act 73 (FBI Criminal Background) clearances by December 31, 2008.
3. On December 9, 2008, [Employer] issued a reminder letter to the claimant that claimant needed to obtain the above clearances by December 31, 2008 or claimant would be placed on suspension without pay and could possibly be terminated.
4. [Employer] scheduled claimant for FBI fingerprinting on December 23, 2008.
5. The claimant did not attend the FBI fingerprinting appointment scheduled on December 23, 2008.
6. Claimant did not obtain the Act 33 and Act 73 clearances by December 31, 2008.
7. On December 31, 2008, [Employer] issued a letter placing claimant on 30 day suspension subject to discharge if claimant failed to provide the clearances within 30 days.
8. The claimant was terminated by letter from [Employer] dated February 4, 2009 for failing to provide Act 33 and Act 73 clearances by January 31, 2009.

> 9. As of April 9, 2009, the claimant has not yet obtained the Act 73, FBI Criminal Background clearance.
> 10. Claimant has not established justification for failing to obtain the Act 33 and Act 73 clearances by December 31, 2008.

(Referee Decision, Findings of Fact (FOF) ¶¶ 1-10.)

Based on these findings, the Referee concluded that Employer had a reasonable policy that required Claimant to obtain the Act 33 and Act 73 clearances as a condition of her employment and that Claimant violated that policy by failing to obtain those clearances within the required time period. The Referee concluded that Claimant offered no reasonable explanation as to why she could not have obtained the requested clearances and only made excuses for both her failure to complete the Act 33 form properly, which delayed the receipt of that clearance, and for "attempting to circumvent the FBI clearance" by obtaining her own fingerprints from the local police department. (Referee Decision at 2.) The Referee further held that the Claimant obtaining fingerprints, alone, did not satisfy the requirement to obtain an FBI criminal background check. (Referee Decision at 2.) The Referee concluded that Claimant's unjustified violation of Employer's reasonable policy constituted willful misconduct and that she was ineligible for UC benefits. (Referee Decision at 2.)

Claimant appealed to the Board, which affirmed and adopted the findings and conclusions of law of the Referee. The Board held that Claimant had been informed of the process of obtaining the required clearances and received "approximately sixty days to submit the necessary paperwork." (Board Order at 1.) The Board found that "claimant . . . failed to offer a credible explanation for why she failed to complete the

necessary information and obtain the clearances." (Board Order at 1.) Claimant now petitions this Court for review.[2]

Claimant argues that her failure to obtain the necessary clearances by December 31, 2008 or, alternatively, by January 31, 2009, did not constitute willful misconduct under the law because she provided Employer with all of the necessary documents to apply for the clearances and was never advised that the fingerprints and documentation she obtained from her local police station were unacceptable for the Act 73 clearance. Claimant asserts that, at no time prior to the hearing, did Employer inform Claimant that the fingerprints she obtained from the police department were unacceptable and that she "did everything in [her] power to submit the required documentation to [her] employer prior to the deadline." (Claimant's Br. at 11.) Moreover, Claimant reiterates her contention that she did not receive the November 21, 2008 letter, which contained the instructions on how to obtain the required clearances. In other words, Claimant asserts that, if she violated Employer's policy, that violation was reasonable, justified, and she is eligible for UC benefits under Section 402(e) of the Law.

The Board initially asserts that its findings of fact are conclusive on appeal because Claimant has waived any challenge to its findings of fact where she did not specifically challenge any of its findings and did not develop this issue in her brief. Gibson v. Unemployment Compensation Board of Review, 760 A.2d 492, 494 (Pa.

[2] This Court's 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." Teets v. Unemployment Compensation Board of Review, 615 A.2d 987, 989 (Pa. Cmwlth. 1992).

Cmwlth. 2000). However, our review of Claimant's Petition for Review reveals that Claimant asserted that, "I do not believe the Board's decision was based on the substantial evidence that was presented to them in my appeal for unemployment compensation benefits." (Petition for Review ¶ 3.) Claimant further asserts in her Petition for Review that, "once [she] was notified (*on or about December 8, 2008*) that [she] did in fact need [the] clearance, [she] acted promptly to provide [Employer] the information they need in a timely fashion." (Petition for Review ¶ 3 (emphasis added).) A petition for review's statement of objections "will be deemed to include *every subsidiary question fairly comprised therein.*" Pa. R.A.P. 1513(d) (emphasis added). Moreover, it is obvious from Claimant's brief that she is reiterating her position that she did not receive the November 21, 2008 letter and that the first time she was informed that she had to obtain these clearances was in the letter dated December 8, 2008. (Claimant's Br. at 9-10.) Accordingly, we are satisfied that Claimant has adequately challenged the findings of fact regarding the November 21, 2008 letter and the December 9, 2008 reminder letter (FOF ¶¶ 2-3).

We first address Finding of Fact 3, in which the Referee found that Employer issued the reminder letter to Claimant on December 9, 2008. However, it is clear from the record that the letter introduced by Employer, dated December 9, 2008 and unsigned, was *not* the letter Employer sent to Claimant. Claimant's objection to this letter, which went unresolved, noted that the letter she received was dated December 8, 2008 and was signed by Ms. Thunell. Employer essentially conceded that the copy of an unsigned letter dated December 9, 2008, which Employer presented to the Referee, was not sent to Claimant, offering to substitute Claimant's signed letter for its own evidence. (Hr'g Tr. at 15.) Despite this interaction, which included the

Referee acknowledging the discrepancy, the Referee found, with no explanation, that Employer did issue a reminder letter to Claimant on December 9, 2008. After reviewing the record, we conclude that this finding is not supported by substantial evidence in the record, particularly given Employer's eagerness to substitute the signed letter Claimant received for the unsigned, incorrectly-dated document it had presented.

With regard to the finding on the November 21, 2008 letter, we note that the Referee did not find that Claimant *received* the letter. In fact, neither the Referee nor the Board resolved the conflicting evidence about whether Claimant received the November 21, 2008 letter. Rather, the Referee found that Employer "issued" a letter to Claimant in "November 2008" advising Claimant that she "was required to obtain Act 33 (Child Protective Services) and Act 73 (FBI Criminal Background) clearances by December 31, 2008." (FOF ¶ 2.) The Board acknowledges in its brief that it did not expressly resolve the conflict regarding Claimant's receipt of the November 21, 2008 letter. (Board's Br. at 10.) Nevertheless, the Board argues that, based on a statement in its Order that Claimant was informed about the process of obtaining the necessary clearances, the Board "implicitly found [Claimant] not credible that she did not receive the November 21, 2008, letter from Employer." (Board's Br. at 10.)

We decline to accept the "implicit" finding of fact that is critical to the outcome of this matter. Indeed, our Supreme Court has cautioned against such implicit findings stating, "[a]n appellate court or other reviewing body should not infer from the absence of a finding on a given point that the question was resolved in favor of the party who prevailed below, for the point may have been overlooked or

the law misunderstood at the trial or hearing level." Page's Department Store v. Velardi, 464 Pa. 276, 287, 346 A.2d 556, 561 (1975); see also Monroe G. Koggan Associates, Inc. v. Unemployment Compensation Board of Review, 472 A.2d 277, 280 (Pa. Cmwlth. 1984) (quoting Page's Department Store). Moreover, we have held that a remand is appropriate:

> where the findings of fact are inadequate and cannot be construed to resolve all of the factual issues necessary for proper appellate review, "[i]t is not for this Court . . . to make findings of fact because the duty to consider and evaluate testimony and to make findings of fact thereon is for the fact-finder. When the fact-finder in an administrative proceeding is required to set forth [its] findings in an adjudication that adjudication *must include all findings necessary to resolve the issues raised by the evidence which are relevant to the decision*."

Monroe G. Koggan, 472 A.2d at 280 (emphasis added) (quoting Lipchack v. Unemployment Compensation Board of Review, 383 A.2d 970, 972 (Pa. Cmwlth. 1978) (citations omitted)).

Here, the ultimate question is whether Claimant's actions in failing to obtain the required clearances by December 30, 2008 or January 31, 2009 constituted willful misconduct under Section 402(e) of the Law. In holding that Claimant's conduct rose to the level of willful misconduct, the Board reasoned that "[C]laimant *was informed about the process to obtain the necessary clearances that were required for her job. Additionally, she was given approximately sixty days to submit the necessary paperwork.*" (Board's Order at 1 (emphasis added).) If Claimant was, indeed, informed of how to go about filling out the necessary paperwork and obtaining the required fingerprints, and did, in fact, have approximately sixty days in which to do so, we can see how her conduct, such as repeatedly asking for instructions on how to

proceed, arranging for her own fingerprints, and ultimately failing to obtain the clearances, could be viewed as willful. However, if Claimant did not receive the November 21, 2008 letter as she contends, then Claimant never received the instructions on how to obtain the required clearances. Claimant admits receiving a letter dated December 8, 2008, but it contained *no* instructions on how to obtain the clearances, and no forms; it merely informed Claimant that she had to obtain the clearances by December 31, 2008 or risk negative employment consequences. Thus, if Claimant's actions are considered in the context that she had received *no* instructions from Employer on how to acquire the necessary clearances, her attempts to obtain those clearances could be cast in a different light. Accordingly, we conclude that whether Claimant received the November 21, 2008 letter is critical to the determination of whether Claimant's actions rose to the level of willful misconduct such that she would be ineligible for benefits under Section 402(e) of the Law.[3]

Because the Board did not resolve critical conflicts in the evidence and make adequate findings of fact regarding Claimant's receipt of the November 21, 2008 letter, we can not perform our appellate review of this matter and must, therefore,

[3] We note that, in light of the fact that the unsigned letter dated December 9, 2008, which Employer presented, was not the letter that Employer actually sent to Claimant, it is particularly important that the Board determine whether the unsigned letter dated November 21, 2008, which Employer similarly presented, was actually sent and received.

vacate the Board's order and remand the matter for the Board to make the findings of fact necessary to resolve this conflict.

RENÉE COHN JUBELIRER, Judge

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	:	
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O R D E R

NOW, March 17, 2010, the order of the Unemployment Compensation Board of Review (Board) in the above-captioned matter is hereby **VACATED AND THIS MATTER IS REMANDED** for the Board to make the necessary findings of fact to resolve the conflict of whether Nikisha Johnson received the November 21, 2008 letter from her employer.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge