IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Acero Precision, Petitioner	:	
v.	:	No. 1656 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	Submitted: March 25, 2011

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: May 31, 2011**

Acero Precision (Employer) petitions for review from the order of the Unemployment Compensation Board of Review (Board) granting unemployment compensation benefits to An Q. Tran (Claimant). Employer contends Claimant is ineligible for benefits because his excessive absenteeism was disqualifying misconduct under Section 402(e) of the Unemployment Compensation Law (Law)[1]. The Board found that Employer actually terminated Claimant for leaving work mid-shift and that Employer gave Claimant permission to leave work to pick up his son from daycare. Finding no error, we affirm.

Claimant worked for Employer as a machinist during the night shift for two years. In mid-January 2010, Employer changed the scheduling and

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

substance of Claimant's work. In particular, Employer began scheduling Claimant for day shifts as a custodian. In the ensuing four weeks, Claimant called off from work on at least eight different occasions. Employer provided Claimant with written warnings about his absenteeism.

On February 18, 2010, Employer instructed Claimant to perform a particular custodial task. Later that day, Claimant received a phone call from the daycare provider for his two month old son, who was ill. Claimant left work mid-shift to retrieve his son. Claimant called off work the next day.

Shortly thereafter, Employer terminated Claimant's employment, "due to [Claimant's] excessive absenteeism, walking off the job … and calling out of work" the next day. Employer's Letter of Termination to Claimant, 2/19/10. Claimant applied for benefits.

In his application materials, Claimant explained that he was available to work night shift but not day shift. Claimant explained that, prior to the shift change, he would watch his two month old baby during the day while his fiancée worked, and she would watch the baby at night while Claimant worked. Employment Separation Questionnaire (Questionnaire) at 3. He wrote that the shift change required him to find a full-time babysitter, and that he had difficulty paying for this expense. The local service center granted benefits.

Employer appealed, and a hearing followed. Claimant testified on his own behalf. Employer presented testimony from its general manager and

maintenance supervisor. Employer presented several documents chronicling progressive disciplinary actions Employer took against Claimant for excessive absenteeism.

Employer's witnesses testified Claimant told Employer the custodial work was beneath him. They testified that Employer did not authorize Claimant to leave work on February 18th.

In contrast, Claimant denied saying the position was beneath him. He testified that he told Employer he needed to pick up his son from daycare on February 18th, and that his supervisor gave him permission to do so.[2]

The referee issued a decision reversing the service center and denying Claimant benefits under Section 402(e) because of willful misconduct. The referee explained that "the record is clear that the Claimant abandoned his job. There is no evidence here that Claimant gave the Employer adequate explanation for his walking off his job at the time of the incident [which,] coupled with his refusal to perform assigned job duties, is tantamount to insubordination." Ref. Dec., 5/6/10, at 2.

[2] Claimant offered a letter from his son's daycare provider, Bao Tran Family Child Care Home. In the letter, the director of the facility wrote that Claimant's son showed signs of the flu and that the facility called Claimant to ask him to pick up his son. Claimant's Ex. 1, Letter of Bao Tran, undated. Employer objected to the admission of the letter on hearsay grounds. The referee sustained the objection.

Claimant appealed to the Board. The Board reversed and granted benefits to Claimant. The Board stated that there were factual conflicts between the testimony of Claimant and Employer's witnesses and that it primarily credited Claimant's testimony over Employer's evidence. Accordingly, the Board concluded Claimant's conduct did not rise to the level of disqualifying misconduct because Employer gave him permission to leave.

Employer petitions for review. Employer seeks reversal of the Board's decision on two bases. First, Employer contends the Board's decision is not supported by substantial evidence. Second, Employer argues Claimant should be deemed ineligible for benefits because he admitted that he is unable or unavailable for work.[3]

Section 402(e) of the Law states an employee shall be ineligible for compensation for any week in which his unemployment is due to willful misconduct connected to his work. 43 P.S. §802(e). Willful misconduct is behavior evincing a willful disregard of the employer's interests, a deliberate violation of the employer's work rules, or a disregard of the standards of behavior the employer can rightfully expect from its employees. Caterpillar, Inc. v. Unemployment Comp. Bd. of Review, 550 Pa. 115, 703 A.2d 452 (1997). Whether a claimant's actions rise to the level of willful misconduct is a question of law fully reviewable on appeal. Ductmate Industries, Inc. v. Unemployment

[3] We are limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Johnson v. Unemployment Comp. Bd. of Review, 869 A.2d 1095 (Pa. Cmwlth. 2005).

Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008). The Board is the ultimate fact-finder in unemployment compensation cases. Id.

Employer first asserts that the Board's decision is not supported by substantial evidence. Employer argues the Board ignored uncontradicted evidence of excessive absenteeism. Additionally, Employer contends the Board failed to account for Claimant's subsequent unexcused absence for another reason the next day, February 19, 2010. Employer contends this unexcused absence is only one component of a series of unexcused absences, and that the Board failed to consider it.

Excessive absences may constitute willful misconduct. See generally, Weems v. Unemployment Comp. Bd. of Review, 952 A.2d 697 (Pa. Cmwlth. 2008); Medina v. Unemployment Comp. Bd. of Review, 423 A.2d 469 (Pa. Cmwlth. 1980). However, an employer must prove it actually discharged the claimant for the act in question. Ductmate.

In this case, while there is uncontradicted testimony that Claimant missed several days of work, the record supports the Board's conclusion that Employer did not terminate Claimant for excessive absenteeism. Employer's general manager testified that Claimant's absenteeism was not the basis for Claimant's termination:

> R: Okay, if he had not walked out on his shift on 2/18 would he have been terminated for his absenteeism on that day?
> EW1: No.

> R: Okay. So the issue that triggered his discharge really occurred on the 18th when he refused a directive and walked off the job, is that right?
> EW1: Correct.
>
> R. Okay. So while his attendance was a concern, it wasn't the issue that triggered his termination.
> EW1: Correct.

Notes of Testimony (N.T.), 4/28/10, at 6. The Board credited this testimony and concluded that Employer failed to meet its burden. As the record supports it, we discern no error in the Board's conclusion that Employer failed to establish that excessive absenteeism was in fact the basis for Claimant's discharge.

Next, Employer relies on Walker v. Unemployment Comp. Bd. of Review, 367 A.2d 366 (Pa. Cmwlth. 1976) to contend the Board's decision lacks substantial evidence support because it is premised on inadmissible hearsay. In particular, Employer challenges the Board's finding that "[C]laimant received a phone call from his son's daycare center informing him that his son was sick and he needed to pick him up." Bd. Op., Finding of Fact No. 10, at 2. Employer argues this finding is inappropriately based on hearsay testimony derived from a telephone conversation. Employer also contends the Board relied on a hearsay letter from the son's daycare.

Additionally, Employer contends Claimant did not testify that he told Employer that his son was sick. Employer argues there is no competent evidence to establish good cause for Claimant's mid-shift departure.

Employer further argues that uncontroverted, admissible evidence clearly supports the referee's decision that Claimant did not provide a basis for his needing to leave work early. Employer contends that under such circumstances the Board may not make contrary findings unless its reason for doing so is clear from the record or is explained. Employer cites Oliver v. Unemployment Compensation Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010) (en banc).

Under Walker, properly objected-to hearsay evidence is not competent evidence to support a Board finding. Here, Employer objected to the letter, and the referee excluded it. However, the Board's decision is not based on this letter.

Rather, the Board based its decision on testimony from Claimant and Employer's witnesses about Claimant's intentions. Thus, Claimant testified, "I received a phone call from daycare … that my son was sick. And when I just left I told my supervisor I just had to pick [up] my son …." N.T. at 13. Although represented by counsel, Employer did not object to this testimony. Similarly, Employer's witnesses corroborated that Claimant told Employer he needed to pick up his son. N.T. at 6 (Employer's general manager); N.T. at 11 (Employer's maintenance supervisor). This satisfies Walker.

The Board is the ultimate fact-finder with authority to assess witness credibility and resolve evidentiary conflicts. Ductmate, 949 A.2d at 342. "It is irrelevant whether the record contains evidence to support findings other than those made by the factfinder; the critical inquiry is whether there is evidence to support

the findings actually made." Id. The Board's findings are conclusive on appeal when supported by substantial evidence. Id. Additionally, the party prevailing before the Board "is entitled to the benefit of all reasonable inferences drawn from the evidence." Id.

While Claimant testified Employer's maintenance supervisor gave him permission to leave, the supervisor and Employer's other witness testified to the contrary. The Board was faced with conflicting testimony. The Board appropriately acted as fact-finder and credited Claimant's testimony on this point over Employer's witnesses' testimony. We discern no error.

Employer also argues that the Board's decision conflicts with Oliver and its application of Treon v. Unemployment Compensation Board of Review, 499 Pa. 455, 453 A.2d 960 (1982) (Board may not ignore a referee's findings if they are supported by overwhelming evidence). In Oliver this Court concluded that the Treon issue was waived. Nevertheless, the Court restated that test: the Board must provide a reason when it disregards the findings of the referee which are based on consistent and uncontradicted testimony. The Court then determined the Board satisfied that test.

We reject Employer's arguments for three reasons. First, the referee's findings were not supported by overwhelming evidence. To the contrary, evidence from witnesses on both sides supports the Board's finding that Claimant told Employer of his need to pick up his son.

Second, there was conflicting evidence as to whether Claimant told Employer that his son was sick. While Employer's witnesses testified he did not, Claimant's own testimony suggests otherwise:

> EL: And you did not tell anybody that you were leaving because your son was sick, correct?
>
> C: I told him that I had to go pick up my son from daycare.
>
> EL. Right. And you didn't say that your son was sick, correct?
>
> C: I, I think I said my son was sick. Because that's the reason why I pick up my son. There's no reason why I going to pick up my son for no reason.

N.T. at 17. Claimant's hearing testimony is corroborated by Claimant's statement in his separation questionnaire: "My last day at work … I work for 4 hrs and had to pick my son up from daycare because he was sick. I spoke to [Employer's maintenance supervisor]. He gave me permission to leave. Please feel free to contact him." Questionnaire at 2. The Board credited Claimant's testimony and, affording favorable inferences, found that Claimant told Employer that he needed to pick up his son because he was sick. The Board acted within its authority as fact-finder, and its resolution of conflicting evidence does not initiate any further duty to explain its departure from a referee's earlier findings.

Third, the Board explained its ruling:

> A few minutes after being assigned the work, the claimant received a phone call from his son's daycare provider informing him that his son was sick and that he needed to pick him up.

> The claimant informed the employer of the situation and was told to leave. The claimant did so. Therefore the Board determines that the claimant did not refuse to do the assigned work and did not walk off the job.

Bd. Op. at 3. This explanation is sufficient.

For all these reasons, we reject Employer's arguments that the Board's decision is not based on substantial evidence.

Finally, Employer argues that Claimant should be ineligible for benefits under Section 401(d)(1) of the Law, 43 P.S. §801(d)(1), because, by his own admission, he is unavailable for work.

However, Employer first raises this issue in its brief before this Court. Employer did not identify this issue in the prior proceedings. Employer did not raise this issue in its reconsideration motion before the Board, and it did not raise the issue in its petition for review with this Court. Issues not preserved before the administrative tribunal are waived on appeal. Wing v. Unemployment Comp. Bd. of Review, 496 Pa. 113, 436 A.2d 179 (1981) (concluding this Court erred in failing to find an issue waived that was first raised before the Court on appeal).

For these reasons, we affirm the Board's order.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Acero Precision,	:	
Petitioner	:	
	:	
v.	:	No. 1656 C.D. 2010
	:	
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

O R D E R

AND NOW, this 31st day of May, 2011, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge