

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allison, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1669 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: January 28, 2011
Board of Review,	:	
	:	
Respondent	:	

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: April 4, 2011

Allison, Inc. (Employer) petitions for review from an order of the Unemployment Compensation Board of Review (Board) that granted Sherman W. Johnson (Claimant) unemployment benefits. The Board determined Claimant's actions did not rise to the level of disqualifying willful misconduct under Section 402(e) of the Unemployment Compensation Law (Law).¹ Because substantial evidence supports the Board's determination and it is in accordance with the Law, we affirm.

Claimant was a truck driver who worked for Employer, a corporation that provides crane, rigging and trucking services to natural gas businesses. Because of the dangerous nature of natural gas wells and Employer's customers'

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

zero tolerance policies for mistakes, Employer held regular and frequent “toolbox talks” with its drivers to emphasize safety issues. Claimant attended Employer’s safety meetings, and he knew to stay away from gas well heads.

In the early morning of his last day, Claimant drove a vacuum truck to an unfamiliar job site. Claimant drove Employer’s tractor trailer in close proximity to a gas well head at the job site. As a result, the front of the truck became stuck in a hole surrounding the well head. Employer discharged Claimant.

Claimant applied for unemployment benefits, which were initially granted. Employer appealed.

At hearing, Claimant, representing himself, and Employer both appeared and presented evidence. Ultimately, the referee denied benefits on the ground Claimant’s actions rose to the level of willful misconduct. Claimant appealed to the Board.

The Board made the following relevant findings:

9. When the claimant arrived to the site, he noticed two trucks parked to his right. The claimant proceeded to come around the corner and stopped the water truck.
10. At the time, a gentleman on the property asked the claimant if his pickup was in the way. The claimant asked the gentleman to move his pickup.
11. The claimant was having problems seeing because it was still dark and, as a result, got out of the water truck to determine the location of the well head.

12. The claimant's truck was about 10 feet away from the well head at the time he stopped his truck.
13. The claimant was unable to back up the water truck because other equipment was in his way, and no one had the keys to move the equipment. In addition, the claimant did not have the requisite number of spotters to allow him to back up the trailer.
14. The claimant asked for assistance from the gentleman as he was moving the water truck because [of] the amount of equipment that was around and also because of the length of the water truck.
15. As the claimant was turning the water truck around, the headlights of the water truck caught the well head, resulting in a tire dropping into the hole.

Bd. Op., 8/5/10, Findings of Fact (F.F.) Nos. 9-15 (emphasis added).

In its decision, the Board determined Employer did not meet its burden of proving Claimant committed willful misconduct. Specifically, the Board credited Claimant's testimony, and it determined Claimant's actions were unintentional. Thus, the Board granted benefits. Employer petitions for review.

On appeal,² Employer asserts Findings of Fact Nos. 13 and 15 lack record support.³ It also argues the Board erred in determining Claimant's actions did not rise to the level of willful misconduct.

² Our review is limited to determining whether necessary findings of fact were supported by substantial evidence, whether errors of law were committed or whether constitutional rights were violated. Oliver v. Unemployment Comp. Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010).

³ Although Employer challenged Findings of Fact Nos. 5 and 14 in its petition for review, Employer does not address those findings in its brief; therefore, any challenge to those findings **(Footnote continued on next page...)**

Employer first challenges the Board's finding that Claimant "was unable to back up his truck" and that Claimant did not have enough spotters to back up his truck. F.F. No. 13. Employer argues the record does not support Claimant's inability to backup, only the difficulty in doing so. Employer submits Claimant should have backed out the way he entered. Moreover, Employer asserts Claimant could have waited for assistance. Employer further points out that Robert Landerer, the person in charge of all water trucks, disputed that Claimant needed a spotter. Notes of Testimony (N.T.), 5/5/10, at 13-14, 24, 27-30.

Employer further challenges the Board's finding that "the headlights of the water truck caught the well head, resulting in a tire dropping into the hole." F.F. No. 15. Contrary to the Board's finding, Employer argues the well head never came into contact with any part of Claimant's truck. N.T. at 10-11, Ex. E1 (photograph of Claimant's front truck tire approximately half an inch away from the well head); Ex. E2 (photograph of well head and surrounding area after removal of the truck).

Contrary to Employer's assertions, the Board credited Claimant's testimony regarding the accident. Claimant's credited testimony supports Board Finding of Fact No. 13 that he could not back the tractor trailer out of the well area because of the attendant circumstances. In particular, Claimant testified regarding the presence of other vehicles and equipment on the site as well as problems with

(continued...)

is waived. See, e.g., Commonwealth v. Montalvo, 598 Pa. 263, 956 A.2d 926 (2008) (failure to brief issues results in waiver).

visibility, both of which prevented him from backing the tractor trailer out of the area. N.T. at 23-25. Also, because the reverse course required backing out at a 90 degree angle, Claimant testified he needed more than one spotter. Id. at 24-25.

Claimant's credited testimony also supports Board Finding of Fact No. 15 that the truck's headlights caught or illuminated the well head as Claimant started to stop, and the truck came to rest in the hole surrounding the well head. Id. at 18-19, 22. Because substantial evidence supports the challenged findings, we reject Employer's argument. See Bruce v. Unemployment Comp. Bd. of Review, 2 A.3d 667 (Pa. Cmwlth.), appeal denied, __ Pa. __, 12 A.3d 753 (2010) (if substantial evidence supports Board's findings, a different view of the testimony does not merit reversal).

Employer also argues the Board erred in determining Claimant's actions were unintentional and therefore not willful. Employer asserts Claimant intentionally violated Employer's safety policies when he drove Employer's truck closer to the gas well head after his initial assessment of the situation. We disagree.

"Willful misconduct" is "behavior evidencing a wanton or willful disregard of the employer's interests; a deliberate violation of the employer's work rules; a disregard of standards of behavior the employer can rightfully expect from its employee; [or], negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations." Dep't of Corr. v. Unemployment Comp. Bd. of Review, 943 A.2d 1011, 1015 (Pa. Cmwlth. 2008). Whether a

claimant's conduct rises to the level of willful misconduct is a question of law fully reviewable on appeal. Id.

Willful misconduct requires a certain state of mind. Myers v. Unemployment Comp. Bd. of Review, 533 Pa. 373, 625 A.2d 622 (1993). In Myers, our Supreme Court explained:

[A]n employee's negligence constitutes willful misconduct only if it is of such a degree or recurrence as to manifest culpability, wrongful intent or evil design, or show[s] an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. Therefore, it follows that an employer cannot demonstrate willful misconduct by merely showing that an employee committed a negligent act, but instead must present evidence indicating that the conduct was of an intentional and deliberate nature.

Id. at 378, 625 A.2d at 625 (emphasis added) (citations and quotations omitted).

Here, Claimant, an experienced driver, worked for Employer for approximately 10 months without incident until the accident on his last day of employment. N.T. at 5, 19, 31. Once near the well head, Claimant made a decision to try to safely distance the truck from the well head by moving around it. Id. at 31. Claimant did not attempt to move the truck without help; rather, he used a spotter because he knew Employer's safety rules. Id. at 25, 31. In turning around rather than backing out, Claimant stated "I took the only option that I thought was safe." N.T. at 31.

Based on Claimant's credited testimony, the Board found insufficient evidence to establish Claimant's actions rose to the level of willful misconduct.

Because substantial evidence supports the Board's findings, which in turn support the conclusion that Claimant's actions did not rise to the level of willful misconduct, we discern no error in the Board's decision. Accordingly, we affirm.

ROBERT SIMPSON, Judge

