IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Angie B. Kiraly,	:	
	:	
Petitioner	:	
	:	
	:	
v.	:	No. 169 C.D. 2010
	:	Submitted: July 2, 2010
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	
	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: August 25, 2010

Angie B. Kiraly (Claimant) petitions for review from the order of the Unemployment Compensation Board of Review (Board) that affirmed the referee's denial of benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(e). Section 402(e) of the Law provides that:

> An employe shall be ineligible for compensation for any week-
>
> ***

Footnote continued on next page…

The facts as found by the referee are as follows:

1. The claimant was last employed by Laurel Crest Rehab & Specialty Care Center as an LPN full-time at $18.10 per hour plus shift differential from March 7, 2007 to August 2, 2009.

2. The employer discharged the claimant for improper administration of patient medications.

3. On August 2, 2009 an employer community nurse conversed with the claimant regarding a nurse aide allegation that the claimant had instructed said nurse aide to insure that medications placed in food and/ or drink were consumed by the resident.

4. During the conversation, the claimant conveyed to the co-worker her concern that the nurse aide would report the claimant for said practice.

5. The conversation between the two ended with an argument involving whether the claimant should have left a (patient's) room before the medication was consumed by the patient.

6. For difficult patients, a nurse is allowed to place the medication in a small portion of the patient's favorite food, i.e. applesauce, provide [it] to the patient, and remain until the portion with the medication is consumed.

7. An example would be to place the pills in a tablespoon of applesauce and feed [it] to the patient and should the patient not consume the

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(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….

> applesauce with the medication in [it], that should be documented on the medication administration record as well as the particular medication being destroyed versus being provided to the patient.

(Referee's decision at 1.)

In concluding that Claimant engaged in willful misconduct, the referee stated in pertinent part as follows:

> [T]he Employer did bring forth a per diem nurse that had a conversation with the claimant in regards to the allegations by the nurse's aide on August 2, 2009. In the opinion of the Referee, that per diem nurse received an admission from the claimant that in fact she was improperly administering medications to the residents by placing it in said food and leaving the room. . . . The claimant's practice was beyond the reasonable scope of her nursing practice to insure the acutely ill residents received the medications to which they were prescribed by a physician or properly annotating when said medication was not consumed by the resident. Therefore, Claimant's actions constitute disqualifying willful misconduct and Employer has met their burden as contemplated under Sections 402(e) of the Law.

(Referee's decision at 2.) Claimant appealed to the Board, which adopted the referee's findings and affirmed. Claimant now petitions this court for review.[2]

Claimant contends that the Board erred in determining that her conduct amounted to willful misconduct, and that the Board improperly

[2] Our review in this matter is limited to a determination of whether constitutional rights have been violated, errors of law committed, or whether essential findings of fact are supported by substantial evidence. Brady v. Unemployment Compensation Board of Review, 544 A.2d 1085 (Pa. Cmwlth. 1988).

relied upon hearsay testimony to support the finding that Claimant had admitted that she violated Laurel Crest Rehab & Specialty Care Center's (Employer) medication policy. Claimant argues that Employer did not present any direct evidence to establish that Claimant had improperly placed any medications into the food or drink of patients. Claimant also argues that Employer did not present any direct evidence to establish that Claimant did not remain in the presence of any patient prior to confirming that any medication dispensed was consumed by patient.

This court has defined willful misconduct under Section 402(e) of the Law as:

> [A] wanton and willful disregard of an employer's interest, a deliberate violation of rules, a disregard of standards of behavior which the employer can rightfully expect from its employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or the employee's duties and obligations.

Brady, 544 A.2d at 1086. An employer has the burden of proving that willful misconduct was committed by an employee. Hartley v. Unemployment Compensation Board of Review, 397 A.2d 477 (Pa. Cmwlth. 1979). A review of the record reveals that Employer met its burden of proving willful misconduct.

In this case, Employer established that it had a practice that when a patient was given medicine in food or water, the nurse was required to stay and make sure all medications were taken and, if they were not consumed, to mark the charts accordingly.

The Board concluded that Claimant admittedly violated Employer's policy and provided no justifiable reason for why she did so. Where the employer proves the existence of the rule, the reasonableness of the rule, and the fact of its violation, the burden shifts to the claimant to prove she had good cause for her actions. Gutherie v. Unemployment Compensation Board of Review, 738 A.2d 518 (Pa. Cmwlth. 1999).

Claimant argues here, however, that the finding that she violated Employer's policy is based solely on hearsay evidence. This court stated in Walker v. Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976), that where hearsay evidence is admitted without objection, it will be given its natural probative effect and may support a finding of fact if it is corroborated by any competent evidence in the record. A finding of fact based solely on hearsay will not stand. Id.

In this case, there was no objection to the following testimony:

> EW3 And a nurse aide came running up the hall yelling that she did not have time to sit in the lounge while residents had medication in their drink and watch them drink it all. That they had to do other residents.
>
> ***
>
> EW1 And so it's two people, two resident, or two employees, nurse aides who are telling you something about what Angie had done and had put upon them. They knew they weren't allowed to do it, is that right?
>
> EW3 Right.
>
> EW1 And also that they had to stay there and it was making them not do their own work.

EW3 Right.

(R.R. 17-18.)

Although we recognize Employer's witness testimony was hearsay, Claimant never objected to it and Employer presented other testimony to support the finding that Claimant violated Employer's medication policy. Claimant's co-worker, testified as follows:

> EW3 When Angie came back from supper, I told, I asked her why she put medication into the drinks, which she admitted to, and then, because we had the little argument about the fact that you never, ever put medication in somebody's drink. Or even if you do put it in a ice cream or a pudding, you never put it in and then leave the room. You have to wait until the medication is finished or if they don't finish it, you dispose of it.
>
> EW1 And what did she say to you?
>
> EW3 Basically she said she did it, but she was more concerned about whether the nurse aides were going to turn her in.

(R.R. 18.)

In Wright v. Unemployment Compensation Board of Review, 465 A.2d 1075 (Pa. Cmwlth. 1983), a representative of the employer testified that he had met with the claimant and that the claimant had admitted taking the property of her employer. This court determined that the representative's testimony about what the claimant had admitted to the representative was properly allowed in, as it fell within the exception to the hearsay rule as an admission of a party. Id.

Here, Claimant admitted to Employer's witness that she did put medication into drinks and did not stay in the room to see if the medication was taken properly. An admission is admissible into evidence as an exception to the hearsay rule. L. Washington & Associates, Inc. v. Unemployment Compensation Board of Review, 662 A.2d 1148 (Pa. Cmwlth. 1995). The Board found Employer's witness credible. All credibility determinations are made by the Board and the weight given the evidence is within the discretion of the factfinder. Fitzpatrick v. Unemployment Compensation Board of Review, 616 A.2d 110 (Pa. Cmwlth. 1992).

Moreover, the record is void of evidence or testimony to support that Claimant had good cause for her actions. Where nothing in the record indicates that a claimant's actions were reasonable or justifiable under the circumstances, the Board does not err when it concludes that a claimant's conduct constitutes willful misconduct. Estate of Fells by Boulding v. Unemployment Compensation Board of Review, 635 A.2d 666 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 539 Pa. 651, 647 A.2d 905 (1994).

In accordance with the above, the decision on the Board is affirmed.

JIM FLAHERTY, Senior Judge

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Respondent	:	
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O R D E R

AND NOW, this 25th day of August, 2010 the order of the Unemployment Compensation Board of Review, in the above-captioned matter, is affirmed.

JIM FLAHERTY, Senior Judge