IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary Ann Fortune, Petitioner	:	
v.	:	No. 1769 C.D. 2009
Unemployment Compensation Board of Review, Respondent	:	Submitted: May 21, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: February 4, 2011

Mary Ann Fortune (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board) which affirmed an order of a Referee disallowing benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] Also before this Court for disposition is Claimant's Application for Remand.

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

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

(Continued....)

Claimant was last employed as an acquisitions manager for Hooks Van Holm, Inc. (Employer) from October 1, 2004, through March 13, 2009. Claimant applied for unemployment compensation benefits with the Philadelphia Unemployment Compensation Service Center (Service Center) on March 30, 2009. The Service Center determined that Claimant was ineligible for benefits pursuant to Section 402(e) of the Law.

Claimant appealed and a hearing ensued before the Referee. Both Claimant and Employer appeared and presented testimony. In support of her appeal, Claimant testified on her own behalf and presented the testimony of Eric Bryant, a former co-worker. Employer presented the testimony of Carol Armstrong, program director, and Tricia Burgess, assistant contract manager.

Based on the evidence presented, the Referee concluded that Employer met its burden of proving that Claimant committed willful misconduct by being insubordinate toward the assistant contract manager. Accordingly, the Referee affirmed the Service Center's determination.

Claimant appealed the Referee's decision to the Board. Upon review of the entire record of the prior proceedings, including the testimony submitted at the Referee's hearing and the brief submitted by Claimant, the Board concluded that the Referee's determination was proper under the Law. The Board further concluded that the Referee properly curtailed the testimony and denied Claimant's

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> (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected

(Continued....)

request that the record be remanded for further testimony. Accordingly, the Board adopted and incorporated the Referee's findings and conclusions in affirming the Referee's decision. The findings as adopted by the Board as are follows.

Employer maintains a policy prohibiting insubordination, of which Claimant was aware. During her employment, Claimant had a history of being insubordinate to her managers. On January 29, 2008, and April 18, 2008, Claimant was issued separate disciplinary notices for insubordination and attendance.

Employer decided to crack down on managers reporting late for work. On March 12, 2009, Claimant's co-manager issued Claimant a written warning for a lateness that had occurred on February 23, 2009. Claimant became upset, and began to raise her voice towards her co-manager. The co-manager told Claimant that she was concerned about Claimant's physically aggressive behavior because Claimant was coming across the co-manager's desk. The co-manager informed Claimant that the written warning had been issued upon instruction from Employer's assistant contract manager.

Claimant then confronted, and began arguing with, the assistant contract manager over the issued warning, accusing the assistant contract manager of attempting to get rid of her and a coworker. The assistant contract manager informed Claimant that the warning had been issued upon the owner's instructions. Because Claimant was arguing loudly with the assistant contract manager over the

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with his work, irrespective of whether or not such work is "employment" as defined in the act.

issue, the assistant contract manager excused herself to report the situation to the owner. Claimant then returned to her co-manager's office.

Following her telephone conversation with the owner, the assistant contract manager returned to the co-manager's office and informed Claimant that if she was late again, she would be terminated, and that the conversation regarding the issue was over. Claimant, however, followed the assistant contract manager and continued to loudly argue the issue, which behavior occurred in front of other employees. During this argument, Claimant became so physically close that the assistant contract manager had to tell Claimant to back off three times. Because Claimant would not stop following her and arguing with her, the assistant contract manager instructed Claimant to go home. When Claimant asked if she was being fired, the assistant contract manager informed her that she was not being fired but she needed to either return to her desk or go home.

The next day, on March 13, 2009, the assistant contract manager reported Claimant's behavior to the owner. As a result, Claimant was discharged on the same date for insubordination.

Based on the foregoing findings, the Board adopted the Referee's conclusion that Employer established that the final March 12, 2009 incident of insubordination contained an element of willful misconduct. The Board pointed out that the incident which lead directly to Claimant's discharge occurred on March 12, 2009, when Claimant engaged in aggressive, confrontational, disrespectful and insubordinate behavior toward the assistant contract manager.

The Board further stated that even if Claimant's testimony that the

vigorous confrontation of managers was not unusual in Employer's workplace were true, Claimant's behavior towards the assistant contract manager on March 12, 2009, was clearly over the line, and not the type of behavior an employer has a right to expect of an employee, especially one who is a manager. Accordingly, the Board concluded that Employer met its burden of proving that Claimant's insubordination rose to the level of willful misconduct rendering Claimant ineligible for benefits under Section 402(e) of the Law. This appeal followed.[2], [3]

We will first address Claimant's March 11, 2010 Application for Remand to this Court.[4] We note that despite this Court's April 21, 2010 order

[2] This Court's review of the Board's decision 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). An adjudication cannot be in accordance with the law if it is not decided on the basis of law and facts properly adduced; therefore, appellate review for the capricious disregard of material, competent evidence is an appropriate component of appellate consideration if such disregard is properly before the reviewing court. Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002). When determining whether the Board capriciously disregarded the evidence, the Court must decide if the Board deliberately disregarded competent evidence that a person of ordinary intelligence could not conceivably have avoided in reaching a particular result, or stated another way, if the Board willfully or deliberately ignored evidence that any reasonable person would have considered to be important. Id. at 203 n.12, 812 A.2d at 487 n. 12; Porco.

[3] We note that Claimant has presented multiple issues, as well as considerable legal argument, within the Statement of the Case section of her brief in violation of Pennsylvania Rule of Appellate Procedure 2117(b) ("The statement of the case shall not contain any argument.") Accordingly, all issues and argument set forth within Claimant's Statement of the Case will not be considered.

[4] We note that this Court initially denied Claimant's Application for Remand by order entered March 16, 2010. However, by order of April 21, 2010, this Court granted Claimant's Application for Reconsideration, vacated that portion of our March 16, 2010 order denying the

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directing Claimant to present an argument in support of her Application for Remand in her brief to this Court on the merits in this matter, Claimant has failed to do so. Claimant does raise the issue of whether this Court should remand this matter to the Board for reconsideration and/or further proceedings, based upon newly discovered evidence, in her Statement of Questions Involved. However, Claimant advances no legitimate argument as to why the evidence now sought to be introduced on remand was not, or could not have been, introduced during the original hearing in this matter.[5] Accordingly, Claimant has waived the issue of whether this matter should be remanded to the Board. See Pa.R.A.P. 2116(a); County of Venango v. Housing Authority of Venango, 868 A.2d 646 (Pa. Cmwlth. 2005); Van Duser v. Unemployment Compensation Board of Review, 642 A.2d 544 (Pa. Cmwlth. 1994) (Issues not briefed are waived.).

As such, Claimant's Application for Remand is denied. We now turn to the merits of Claimant's petition for review.

The Board asserts that Claimant has waived any challenge to certain findings of fact by failing to preserve the challenges in her petition for review. We agree.

Application for Remand, and ordered that Claimant's Application and the Board's response thereto be considered with the merits of this matter.

[5] See Flores v. Unemployment Compensation Board of Review 686 A.2d 66, 75 (Pa. Cmwlth. 1996) ("Generally, a remand hearing is granted to allow a party the opportunity to adduce evidence not offered at the original hearing because it was not then available.").

In her brief, Claimant expressly challenges findings of fact 5, 6, 7, 14, 16, and 17 on the basis that the findings either are not supported by substantial evidence[6] or are supported by impermissible hearsay.[7] However, as pointed out by the Board, Claimant failed to challenge the foregoing findings in her petition for review. Accordingly, the challenges have been waived.[8]

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[6] Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. Hercules v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992).

[7] The challenged findings of fact state as follows:

> 5. On January 29, 2008 the [C]laimant was issued a disciplinary notice for insubordination and attendance
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> 6. On April 18, 2008 the [C]laimant was issued a disciplinary notice for insubordination and attendance.
>
> 7. The [E]mployer decided to crack down on Managers reporting to work late.
>
> 14. The Assistant Contract Manager told the [C]laimant that the written warning was issued upon the instructions of the Owner.
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> 16. After making the telephone call to the Owner, the Assistant Contract Manager returned to the Co-Program Managers [sic] office and told the [C]laimant that the Owner said that if she was late again she would be terminated and that any conversation about the issue was over.
>
> 17. Despite being told that any conversation about the issue was over, when the Assistant Contract Manager left the Co-Program Managers [sic] office, the [C]laimant followed her and continued to argue with her in a loud tone of voice.

[8] It is axiomatic that issues that are not raised in a petition for review, or that are not fairly comprised therein, are waived and will not be addressed by this Court. Pa.R.A.P. 1513(d); McDonough v. Unemployment Compensation Board of Review, 670 A.2d 749 (Pa. Cmwlth. 1996) (an issue argued in the brief on appeal, but not raised in the petitioner's petition for review or fairly comprised therein will not be considered.).

We now turn to the issues that Claimant has preserved for our review. First, Claimant argues that the Board's credibility determinations in favor of Employer are not supported by substantial evidence of record. Claimant's arguments on this issue are entirely comprised of "evidentiary inconsistencies" that Claimant argues "undermine the [E]mployer witnesses' credibility." However, the Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985). Therefore, credibility determinations regarding witnesses are exclusively within the province of the Board as the fact finder in unemployment cases; this Court will not disturb the Board's credibility determinations on appeal. Melomed v. Unemployment Compensation Board of Review, 972 A.2d 593 (Pa. Cmwlth. 2009).

We also reject Claimant's arguments that certain selected portions of the testimony and evidence favor her preferred credibility determinations in opposition to those actually determined by the Board. It is irrelevant whether the record contains evidence to support findings other than those made by the Board in its role as fact-finder. The critical inquiry is whether substantial evidence of record exists supporting the findings that were actually made. Ductmate Industries, Inc. v. Unemployment Compensation Board of Review, 949 A.2d 338 (Pa. Cmwlth. 2008). Where substantial evidence supports the Board's findings, they are conclusive on appeal. Id.

Herein, the Board clearly rejected Claimant's testimony and accepted Employer's testimony as credible. Thus, substantial evidence supports the Board's finding that Claimant's insubordination amounted to willful misconduct under the Law.[9]

Next, Claimant argues that the Board disregarded competent evidence and that the Board failed to properly consider the entirety of the record. Claimant contends that because the Board did not find Claimant's witnesses and evidence more credible than Employer's, and weighed the record as a whole in Employer's favor, the Board disregarded Claimant's evidence. In short, Claimant argues that her evidence is so credible that it could not have been disbelieved.

Claimant cites to Johnson v. Unemployment Compensation Board of Review, 869 A.2d 1095 (Pa. Cmwlth. 2005),[10] for the proposition that the Board must "apply a 'more visible' role" in reviewing Claimant's presented evidence because the Board has "disregard[ed] a significant portion of the record evidence, i.e., the testimony of [Claimant] regarding the events which precipitated her termination." Claimant's Brief at 15. Claimant clearly misapprehends the

[9] 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).

proposition for which Johnson stands,[11] and the proper application of the capricious disregard standard.

A review of the record in this matter reveals that the evidence presented by Claimant was not improperly disregarded. We again remind Claimant that it is the Board's role to be the arbiter of evidentiary weight and determiner of credibility. As such, we cannot agree that the Board capriciously disregarded Claimant's evidence in this matter.[12]

Next, Claimant argues that the Board's finding of fact 4, which states that "[d]uring this employment the claimant had a history of being insubordinate to

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[10] Petition for allowance of appeal denied, 585 Pa. 699, 889 A.2d 90 (2005).

[11] The full quotation in Johnson from which Claimant extracts the two words "more visible," in relation to appellate review of a credibility determination, reads as follows:

> We note that "the capricious disregard standard of review," previously applicable where only the party with the burden of proof presented evidence and did not prevail before the administrative agency, is now "an appropriate component of appellate consideration in every case in which such question is properly brought before the court." . . . **This standard will generally assume a more visible role on consideration of negative findings and conclusions. . . Nevertheless, it is not to be applied in such a manner as would intrude upon the agency's fact-finding role and discretionary decision-making authority**. . . . Where a party does not argue that the fact-finder capriciously disregarded competent evidence, the standard is not applicable.

Johnson, 869 A.2d at 1103, n.2 (citations omitted; emphasis added).

[12] Claimant also appears to argue that the Board's failure to expressly describe the evidence presented in her favor in its decision constitutes a capricious disregard of that evidence. We disagree. There is no requirement that the Board expressly reference every piece of evidence presented by either or both parties. The pertinent question is whether the Board's findings are supported by substantial evidence.

her managers", should be stricken.[13] In support of this assertion, Claimant contends that the Referee refused to permit questioning of Employer's witnesses regarding the prior disciplines, including the one related to March 12, 2009.[14]

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[13] Claimant preserved this issue in paragraph 20 of her petition for review.

[14] Claimant cites to the following portions of the testimony presented at the Referee's hearing as support for her contention that finding of fact 4 should be stricken:

> Referee (R): Okay. Any other questions?
>
> CL: Yes. What does [Employer's] policy say with respect to write-ups in terms of the timing of write-ups for tardiness and lateness?
>
> EW2: It …
>
> R: Just so you know before we go on, I'm not – I don't care about the write-ups. I don't care. The only thing I'm concerned about is her behavior that caused her termination. I don't care what's in the write-ups. Do you have any questions for her on that particular issue? And let me have those back unless you need them further.
>
> CL: I don't think I have any questions on that particular issue. No.
>
> R: Okay. All right. Do you have any other questions for Ms. Burgess?
>
> CL: I wanted to ask her about the policy with respect to the write-ups. Both of those notices have a laundry list of prior offenses down below where it references part of the basis for the discipline and the termination.
>
> R: Well, some of these have to do with insubordination. Do you want to question her about the prior warnings of insubordination?
>
> CL: I wanted to question her about the prior warnings on the tardiness and absence.
>
> R: I don't care about tardiness and absence.
>
> CL: Okay.
>
> . . . .

(Continued....)

However, the record shows that at no time did Claimant's counsel raise any objection to the Referee's direction regarding the relevance of the testimony being presented or to the exclusion of any evidence of which Claimant now complains. Where an unemployment compensation claimant fails to object to an evidentiary determination at a hearing before a Referee, that legal issue is waived for future appellate review. Schaal v. Unemployment Compensation Board of Review, 870 A.2d 952 (Pa. Cmwlth. 2005). Claimant, therefore, has waived this issue.

Claimant next argues that the Board improperly considered any purported prior disciplinary actions.[15] Claimant argues that since the Notice of Determination in this case cites only insubordination and a failure to timely arrive at work as the bases for Claimant's termination, any prior disciplinary action or history of disciplinary actions cannot be considered. Claimant concedes that the Board expressly stated in its decision that "where a claimant has [a] history of work-related misconduct the employer must nevertheless prove that the final incident contained an element of willfulness." Claimant argues that

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> R: She wasn't terminated for that so it's not relevant. Do you have questions for her on her behavior that Ms. Burgess is alleging that she did on March 12 that led to her termination?
>
> CL: I don't believe so. No.

Certified Record (C.R.), Transcript of Testimony, at 17-18.

[15] See Lecker v. Unemployment Compensation Board of Review, 455 A.2d 234 (Pa. Cmwlth. 1983) (Referee on appeal of determination of application for unemployment compensation benefits must consider only those charges of willful misconduct as delineated in the determination notice).

notwithstanding the Board's statement, the fact that testimony was received at the hearing concerning Claimant's purported disciplinary history, and that the Board made findings thereon, indicates that the Board did consider Claimant's history, which mandates a reversal. We disagree.

The Board's decision merely demonstrates that the Board was cognizant of, and did not rely upon, Claimant's purported past history of discipline in arriving at its disposition. The testimony regarding Claimant's history, and the findings in regards to that history, are of no moment when the entirety of the record is considered in this matter. The remainder of the Board's decision makes expressly clear that the "the [C]laimant's behavior on March 12, 2009 was clearly … not the type of behavior that an employer has a right to expect of an employee, especially a Manager." Thus, Claimant's argument on this point is without merit.

Next, Claimant asserts that Employer's disciplinary write up dated March 12, 2009, is too remote in time from the incidents of February 23, 2009, to constitute a basis for the denial of benefits under the Law.[16] However, as both the record and the Board's decision make clear, the incident on February 23, 2009, was not the basis for Claimant's termination. It was the incidents of March 12, 2009 – namely, Claimant's reaction to the receipt of the write-up, in the form of her aggressive, confrontational, disrespectful and insubordinate behavior towards her supervisors – that resulted in her termination on March 13, 2009. The record, as

[16] See Tundel v. Unemployment Compensation Board of Review, 404 A.2d 434 (Pa. Cmwlth. 1979) (denial of unemployment benefits reversed where claimant was terminated 25 days after falling asleep on the job, where that incident of willful misconduct was temporally

(Continued....)

well as Claimant's own arguments on other issues presented to this Court, make the fact that Claimant was dismissed on March 13, 2009, for incidents that occurred on March 12, 2009, indisputable. Accordingly, Claimant's argument on this point is meritless.

Finally, we turn to Claimant's arguments that her conduct did not constitute willful misconduct under Section 402(e) of the Law. Claimant argues that her testimony and that of her witness, contradicts the testimony and evidence found credible by the Board. Claimant again argues that her credible evidence supports that her conduct was *de minimis*, and did not constitute willful misconduct. As noted in our foregoing analysis, we will not revisit the Board's credibility determinations, or its weighing of the conflicting evidence presented in this matter. Melomed.

Claimant argues further that her conduct on March 12, 2009, was provoked, in that the late arrival to work that formed the basis for the March 12 write-up occurred approximately three weeks earlier. Claimant argues that the write-up was unwarranted and thus justified her reactions.

Claimant's argument on this point, even accepted *arguendo*, does not constitute a provocation justifying Claimant's aggressive, confrontational, and insubordinate behavior. We have held:

> Where an employee and his supervisor meet to discuss the former's job performance, the employer may rightfully expect that the employee will act in a reasonable manner to attempt to resolve any concerns or

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remote from the dismissal without explanation for the delay).

> disputes which may arise. The employer may also rightfully expect that the employee will not become abusive or obstructive.

Dinkins v. Unemployment Compensation Board of Review, 424 A.2d 606, 607 (Pa. Cmwlth. 1981). Thus, Claimant's reactive behavior cannot be seen as a reasonable attempt to resolve any existing concern or dispute that had arisen, and as such, constituted willful misconduct under the Law. Frumento; Dinkins.

Claimant also argues that Employer's actions in the immediate wake of the events of March 12, 2009, demonstrate that Claimant did not engage in willful misconduct. Claimant notes that following the heated events of March 12, 2009, and on March 13, 2009, she was allowed to return to her desk where she continued working for a period of time. Additionally, Claimant argues that in the wake of her termination, Employer paid her the value of her accrued paid time off. This, Claimant contends, contradicts Employer's written policy which states that an employee terminated for misconduct or failure to comply with company policies will not be paid for any accrued paid time off.

Again, Claimant's assertions are misplaced. The Board properly found that Claimant's insubordinate behavior on March 12, 2009, constituted willful misconduct under the Law. The foregoing actions on Employer's part do not change the nature of the behavior for which Claimant was terminated. It is that behavior that controls the disposition of this matter, when measured against the applicable law.

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary Ann Fortune, Petitioner	:	
v.	:	No. 1769 C.D. 2009
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 4th day of February, 2011, upon consideration of the Application for Remand and the Board's response thereto, the Application is denied. It is further ordered that the order of the Unemployment Compensation Board of Review dated August 17, 2009, at Decision No. B-487237, is affirmed.

JAMES R. KELLEY, Senior Judge