IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Roy E. Knepp,	:	
	:	
Petitioner	:	
v.	:	No. 17 C.D. 2010
	:	Submitted: September 17, 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: December 7, 2010

Roy E. Knepp (Claimant) appeals from a decision of the Unemployment Compensation Board of Review (Board) affirming a Referee's determination denying unemployment benefits. We affirm.

Claimant worked for Northern Area Multi-Service (Employer) as a driver for nine years. He was required to transport senior citizens and disabled individuals. He earned $10.00 per hour. His last day of work was July 16, 2009. Claimant sought unemployment compensation benefits that were initially denied.

At an October 2, 2009 hearing before the Referee, Employer presented the testimony of Richard Bagwell, operations manager. He

explained that Claimant was terminated from his employment following numerous incidents of tardiness, repeated episodes of calling off work, and simply not showing up for duty. According to Mr. Bagwell, the final incident preceding Claimant's termination was an incident where Claimant did not appear for work and did not call off consistent with company policy. Per Mr. Bagwell, he had spoken with Claimant concerning his attendance problems before this final incident occurred.

Mr. Bagwell stated an employee may call off work by leaving a voice mail on Employer's answering machine prior to the start of his shift. Mr. Bagwell explained that no voice mail was received by Employer on July 17, 2009 indicating Claimant would not be in for work on that day. He agreed that he did not personally check the messages on the day in question. Rather, a dispatcher checked the messages.[1] Mr. Bagwell stated he spoke with Claimant on July 20, 2009 via telephone. The conversation, per Mr. Bagwell, went as follows:

> I asked Mr. Knepp if he had called and left a message. He evaded that question and changed the subject… I said I just want to make sure I didn't miss something. There was no message on the machine. Did you try to call? I'm asking because a few weeks ago the same thing happened and you said you'd called, but there was no message. Roy said I know this doesn't look good. The reason for I'm saying he evaded the question—*he didn't answer it.*

N.T. 10/2/09, p. 7. (Emphasis added).

[1] Claimant objected to Mr. Bagwell's testimony concerning what was or was not on Employer's voice mail. N.T. 10/2/09, p. 6.

Claimant testified that he was unable to report to work on July 17, 2009. He was scheduled to begin work at 5:30 a.m. According to Claimant, he was not feeling well leading up to the start of his shift. He stated that he called work at 3:00 a.m. and left a message on the answering machine indicating that he would be unable to come into work.

Following the submission of evidence, the Referee concluded that Claimant was ineligible for unemployment compensation benefits under Section 402(e) of the Pennsylvania Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2837, as amended, 43 P.S. §802(e). That provision states as follows:

> An employe shall be ineligible for compensation for any week--
>
> (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work...

The Board affirmed. The Board resolved all conflicts in testimony in favor of the Employer.[2] In denying benefits, the Board stated "[a]lthough the employer's operations manager testified that he learned from the employer's dispatcher that the claimant did not leave a message for the employer on July 17, 2009, the employer's operations manager credibly testified that when he questioned the claimant about whether he had called

[2] In unemployment compensation proceedings, the Board is the ultimate fact finder, and it is empowered to resolve all conflicts in the evidence and to determine the credibility of witnesses. Procito v. Unemployment Compensation Board of Review, 945 A.2d 261, 262 n. 1 (Pa. Cmwlth. 2008).

off for work on July 17, 2009, the Claimant evaded the question." Board Op. dated 12/10/09, p. 2. The Board found Claimant failed to properly report his absence consistent with company policy. Claimant appeals.[3]

Claimant argues on appeal that the Board's opinion is not supported by substantial evidence. He asserts that the Board erred in crediting Mr. Bagwell's testimony concerning the fact that Claimant failed to call off work on July 17, 2009 instead of requiring Employer to produce the actual answering machine tape.

The employer has the burden of demonstrating the claimant was terminated for willful misconduct in an unemployment compensation proceeding. Eshbach v. Unemployment Compensation Board of Review, 855 A.2d 943 (Pa. Cmwlth. 2004); McKeesport Hosp. v. Unemployment Compensation Board of Review, 625 A.2d 112 (Pa. Cmwlth. 1993). When a charge of willful misconduct is based on the violation of a work rule, the employer must prove the existence of the rule, the reasonableness of the rule, and the fact of its violation. Owens v. Unemployment Compensation Board of Review, 748 A.2d 794 (Pa. Cmwtlh 2000). An employer has the right to expect that its employees will attend work when they are scheduled, that they will be on time and that they will not leave work early without

[3] This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or necessary findings of fact are not supported by substantial evidence. Lee Hosp. v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994). Whether an employee's actions constitute willful misconduct is a question of law subject to plenary review by this Court. Glatfelter Barber Shop v. Unemployment Compensation Board of Review, 957 A.2d 786 (Pa. Cmwlth. 2008); see also Zimmerman v. Unemployment Compensation Board of Review, 836 A.2d 1074 (Pa. Cmwlth. 2003).

permission. Fritz v. Unemployment Compensation Board of Review, 446 A.2d 330 (Pa. Cmwlth. 1982). Once an employer meets its burden of proof, the burden shifts to the employee to show he had good cause for violating the work rule. ATM Corp. of America v. Unemployment Compensation Board of Review, 892 A.2d 859 (Pa. Cmwlth. 2006).

Rule 1002 of the Pennsylvania Rules of Evidence reads that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, *except as otherwise provided in these rules, by other rules prescribed by the Supreme Court, or by statute.*" Pa.R.E. 1002. "Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received." 2 Pa.C.S. §505. The best evidence rule is a technical rule of evidence not generally applicable to administrative hearings. DiLucente Corp. v. Pennsylvania Prevailing Wage Appeals Board, 692 A.2d 295 (Pa. Cmwlth. 1997).

We reject Claimant's argument that Employer was required to produce the answering machine tape as the best evidence to establish Claimant failed to leave a message calling off his shift that was to begin July 17, 2009. Rule 1002 of the Pennsylvania Rules of Evidence indicates that where a recording exists, the recording itself must be presented. That same rule, however, indicates that statutory authority may obviate the need to present the actual recording. Such statutory authority exists that is applicable to the instant matter. The Board, an administrative agency, is not bound by technical rules of evidence. 2 Pa.C.S. §505. Strict application to evidentiary rules, particularly the best evidence rule, is not required at an

administrative hearing. DiLucente Corp. Consequently, Employer was permitted to attempt to satisfy its burden of proof to establish Claimant was terminated for willful misconduct without the need to present an actual recording or tape from an answering machine.[4]

On a more basic level, we point out that Claimant's argument that Employer must present a recording to establish Claimant's willful misconduct is problematic in this instance. A factual issue was presented concerning whether Claimant actually did call off work on July 17, 2009. Employer disputed that Claimant called of and/or left a voice mail. Employer cannot be expected to produce a recording if one does not exist.

Claimant next argues that even if Employer was not required to produce evidence of an actual recording, Mr. Bagwell admitted he had no first-hand knowledge of whether Claimant did or did not call off work on the day in question. Rather, he relied on statements made by a dispatcher who did not testify. Claimant asserts that he objected to Mr. Bagwell's testimony

[4] Claimant cites two cases in support of his contention that the best evidence rule is applicable in unemployment cases, German v. Unemployment Compensation Board of Review, 489 A.2d 308 (Pa. Cmwlth. 1985) and Fera v. Unemployment Compensation Board of Review, 407 A.2d 942 (Pa. Cmwlth. 1979). In German, the claimant asked this Court to disregard a private investigator's testimony because he testified from his notes and those notes were never submitted into the record. The claimant argued there was a violation of the best evidence rule. We never addressed the applicability of the best evidence rule, however, finding the issue waived. Moreover, in Fera, we rejected the claimant's argument that the testimony of an employer's witness concerning the existence of a company rule absent submission of the actual written rule constituted a violation of the best evidence rule. We again did not address this argument as the testimony was submitted below without objection. Neither German nor Fera stand for the proposition that an actual writing is required in an unemployment compensation proceeding where applicable to comply with the best evidence rule espoused in Pa.R.E. 1002.

on this issue as hearsay and that there was no competent testimony to show he failed to properly call off work in accordance with the work rule.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Guthrie v. Workers' Compensation Appeal Board (Travelers' Club, Inc.), 854 A.2d 653 (Pa. Cmwlth. 2004). In Walker v. Unemployment Compensation Board of Review, 367 A.2d 366 (Pa. Cmwlth. 1976), this Court stated that hearsay evidence, properly objected to, is not competent evidence to support a finding of the Board. Hearsay evidence admitted without objection, however, will be given its natural probative effect and may support a finding of the Board if it is corroborated by any competent evidence in the record. Stop-N-Go of Western Pennsylvania Inc. v. Unemployment Compensation Board of Review, 707 A.2d 560 (Pa. Cmwlth. 1998). But, a finding of fact based solely on hearsay will not stand. Alessandro v. Workers' Compensation Appeal Board (Precision Metal Crafters, LLC), 972 A.2d 1245 (Pa. Cmwlth. 2009).

In Thompson v. Unemployment Compensation Board of Review, 723 A.2d 743, 745 (Pa. Cmwlth. 1999), a case cited by Claimant, we stated as follows:

> The Claimant counters that finding of fact number ten which stated that she failed to call off on November 5, 1997, is based upon unobjected to hearsay which is not corroborated by any other non-hearsay testimony in the record. Therefore, Claimant contends that the finding that she failed to call off on November 5, 1997, is not supported by substantial evidence. A review of the record reveals that Claimant's contention is correct.
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> The testimony from Employer's witness indicates that another employee told the witness that

> Claimant did not call off on November 5, 1997. Claimant was unrepresented at the hearing and did not object to this hearsay testimony. Later, the witness admitted that she could not confirm whether Claimant had called off or not on November 5, 1997. There is no other first-hand testimony or evidence in the record that indicates that Claimant did not call off that day. To the contrary, Claimant testified that she did call of (sic) that day to Kelly Pashok. This is the only first (sic) hand testimony about Claimant's call off on November 5, 1997.
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> This Court has stated that a finding of fact based solely on hearsay will not stand… Because the referee's finding that Claimant did not call off on November 5, 1997, is not based upon substantial evidence, but instead is based upon hearsay evidence which was not corroborated by any other competent evidence, this finding cannot be relied upon in this case.

Mr. Bagwell acknowledged he did not personally check the answering machine that Claimant purportedly called to confirm that Claimant did not call off work on July 17, 2009. Rather, he received this information second-hand from a dispatcher. Mr. Bagwell was without first-hand knowledge of the contents of the answering machine. Claimant objected to Mr. Bagwell's testimony as to what was or was not on Employer's voice mail on July 17, 2009. Hearsay evidence, properly objected to, is not competent evidence to support a finding of fact. Walker. Similar to Thompson, Employer failed to present a witness with first-hand knowledge as to what message, if any, Claimant left for it concerning his availability for work on July 17, 2009.

The content of the preceding paragraph, however, does not end our inquiry. The Board did not determine that Employer met its burden of proof based on Mr. Bagwell's testimony concerning what a dispatcher told Mr. Bagwell about whether Claimant had called off work. Rather, it found Employer established Claimant was terminated for willful misconduct based upon the telephone conversation Mr. Bagwell had with Claimant where, according to Mr. Bagwell, Claimant "evaded the question" as to whether he called off work on July 17, 2009. Claimant contends that the Board erroneously relied solely on his silence or refusal to answer this question to support its finding of willful misconduct.

A claimant's failure to deny an assertion where the nature of the assertion, and the circumstances under which it was made, render a reply natural and proper, constitute an admission by silence. McIntyre v. Unemployment Compensation Board of Review, 687 A.2d 416 (Pa. Cmwlth. 1997). This is particularly true when the person presenting the information that would warrant denial is in a supervisory position with ability to terminate the employee. Id. at 419. An admission by silence is admissible evidence and is an exception to the hearsay rule. L. Washington & Assoc., Inc. v. Unemployment Compensation Board of Review, 662 A.2d 1148 (Pa. Cmwlth. 1995). It can be used as substantive evidence to prove the truth of the matter asserted. Id. at 1150.[5]

[5] Claimant cites Harring v. Unemployment Compensation Board of Review, 452 A.2d 914 (Pa. Cmwlth. 1982) in support of his argument that an employee's silence alone cannot support a finding of willful misconduct. That case, however, concerned a claimant who declined to testify at hearing believing the employer failed to satisfy its burden of proof in its case-in-chief. That matter is distinguishable from the present

In the instant matter, Claimant, per Mr. Bagwell failed to answer the question when asked if he called off work prior to not reporting for duty on July 17, 2009. As indicated in the excerpt above, Claimant was asked if he called off and failed to offer a response. Mr. Bagwell rehashed his thought process and gave Claimant another opportunity to tell him whether or not he properly called off work on the day in question. No answer was received. Mr. Bagwell is in a position of authority and previously warned Claimant that his attendance problems were jeopardizing his continued employment. Claimant was not confronted with a *statement* whereupon a reply would be natural and proper. But, he was directly asked a question as to whether he called off work in accordance with Employer's policy prior to the start of his shift on July 17, 2009. The circumstance of this question, similar to the circumstances in McIntyre, would warrant a response from Claimant. Claimant failed to offer a response to Mr. Bagwell's questioning. In this case, like in L. Washington & Assoc. Inc., Claimant's silence constitutes an admission and can be used to support a finding of fact.[6]

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matter where Claimant failed to answer a direct question by Employer's operations manager in the workplace.

[6] Claimant suggests that, similar to the "Walker rule" mentioned above dealing with hearsay evidence, Employer was required to produce some other competent evidence to establish Claimant engaged in willful misconduct aside from his admission by silence. He contends that in L. Washington Assoc. Inc., the claimant was confronted by the employer's owner who told him that he was accused of sleeping on the job. The owner testified that claimant failed to deny he was sleeping. We found this lack of a denial to be an admission by silence capable of supporting a finding of willful misconduct. Claimant suggests that the employer in L. Washington Assoc. Inc. "also produced non-hearsay evidence from others who saw claimant sleeping." Petitioner's brief, p. 12. Claimant misreads L. Washington Assoc. Inc. The only person to testify

Employer had the burden in this proceeding to show the claimant was terminated for willful misconduct. Eshbach; McKeesport Hosp. Because Employer sought to establish willful misconduct due to a violation of a work rule, it was required to prove the existence of the rule, the reasonableness of the rule, and the fact of its violation. Owens. The only factor subject to dispute in this matter was whether Claimant violated a work rule in regard to the calling off policy. While Claimant testified he called and left a voice mail on Employer's answering machine at 3:00 a.m. on July 17, 2009 stating he would not be at work thereby satisfying Employer's policy, his testimony was not found credible below. Instead, the Board credited Employer's evidence. Specifically, the Board credited Mr. Bagwell's testimony that Mr. Bagwell spoke with Claimant over the phone on July 20, 2009, that he questioned Claimant as to whether he called off work three days earlier, and that Claimant failed to answer the question. Claimant's admission by silence is capable of supporting Employer's burden. The Board properly found Claimant was terminated for willful misconduct and, therefore, ineligible for benefits under Section 402(e) of the Law.[7]

JIM FLAHERTY, Senior Judge

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before the referee in that case was the owner who questioned the claimant based on information he gained from other workers who were not at the hearing. Moreover, the McIntyre case, also cited by Claimant, was disposed of based solely on the admission by silence principle.

[7] Claimant's arguments on appeal go to whether Employer satisfied its burden of proof of establishing a violation of a work rule. He does not challenge, assuming that Employer established a violation of the work rule, that he had good cause for the violation consistent with ATM Corp. of America.

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	:	
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	
	:	

ORDER

AND NOW, this 7th day of December, 2010, the order of the Unemployment Compensation Board of Review is AFFIRMED.

JIM FLAHERTY, Senior Judge