IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin Baylor,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1887 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	Submitted: January 21, 2011
	:	
	:	
Respondent	:	

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: June 22, 2011**

Kevin Baylor (Claimant), pro se, petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the Unemployment Compensation Referee's (Referee) determination finding Claimant ineligible for Unemployment Compensation (UC) benefits because he committed willful misconduct under Section 402(e) of the Unemployment Compensation Law (Law).[1] Because this case turns on the Board's credibility determination made in

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

favor of Employer that is supported by substantial evidence, we affirm the order of the Board.

Claimant applied for UC benefits after becoming separated from his employment with Main Line Protection Services (Employer). The Philadelphia UC Service Center (Service Center) granted benefits and Employer appealed. An evidentiary hearing was held before a Referee at which Claimant, Claimant's witness, and Employer's two witnesses appeared and testified. Following the hearing, the Referee issued a decision reversing the Service Center's determination and finding Claimant ineligible for UC benefits. Claimant appealed to the Board, which affirmed the Referee's decision finding Claimant ineligible for benefits under Section 402(e) of the Law. The Board made the following findings of fact:

> 1. The claimant was last employed as a full-time security officer by [Employer] from January 2, 2006, at a final rate of $10.00 per hour and his last day of work was August 30, 2009.
>
> 2. On August 27, 20[09], the claimant was assigned to a 6 p.m. to 2 a.m. shift at Langhorne Shopping Center [(Center)] on Lincoln Drive.
>
> 3. On August 27, 20[09], at 12:45 a.m., the security manager arrived at the Center but could not locate the claimant.
>
> 4. The claimant was not located within the employer's vehicle that was parked alongside the edge of the shopping center.
>
> 5. The claimant was permitted to use his own vehicle to do patrols.
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> 6. The security manager drove around looking for the claimant in his own vehicle.
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> 7. The security manager saw only a few vehicles within the parking lot, as the only businesses that were open within the Center were a supermarket and a gym.

8. The security manager checked every vehicle in the lot but could not find the claimant.

9. There were no individuals located within any of the parked vehicles within the lot.

10. The security manager placed a call to the claimant's cell phone, which went into voicemail, and the security manager left a message for the claimant.

11. The security manager stayed at the Center for approximately 45 minutes driving to the back and front of the Center looking for the claimant to no avail, then left at 1:30 a.m.

12. At approximately 1:50 a.m., the claimant telephoned the security manager advising that he just got the security manager's message, and was at the Center in his own car.

13. The security manager reported his findings to the director.

14. The claimant was suspended, then eventually terminated for not being on his assigned post.

15. The claimant asserts that he was at an adjacent convenience station using the restroom for approximately 25 minutes of the time that the security manager was at the Center.

16. The adjacent convenience station was not client property, and the claimant was required to be on site during his scheduled shift.

17. The claimant asserts that he was dealing with the police for the remainder of the time regarding a suspicious vehicle that was parked behind the Center.

18. The claimant never advised the security manager that he was dealing with the police regarding a suspicious vehicle.

(Board Decision, Findings of Fact (FOF) ¶¶ 1-18.) The Board found Employer credibly established "that the claimant was not at his assigned location on August 27, 2009." (Board Decision at 3.) The Board found Claimant's testimony not credible

and did not accept either of Claimant's two explanations for his absence when Employer's Night Manager (Manager) could not locate him. (Board Decision at 3.) The Board further indicated that even if it had accepted that Claimant was in the off-site, convenience store restroom, which it did not, that restroom was not client property, as credibly established by Manager, whereas "there was a supermarket and gym that were open during [C]laimant's shift" in the Center which had restrooms Claimant could have used since Claimant was required to be on-site during his shift. (Board Decision at 3) Thus, the Board concluded that Employer met its burden of establishing that Claimant's discharge was attributable to willful misconduct because Claimant, a security guard, was not present on the job site when he was supposed to be on duty. The Board further concluded that Claimant did not meet his burden of establishing good cause for his absence from his post. Accordingly, the Board determined that Claimant was ineligible for benefits under Section 402(e) of the Law.

Claimant filed a Request for Reconsideration (Request) with the Board on August 26, 2010, wherein he alleged his use of the off-site restroom was a result of the effect of coffee on his digestive system, further alleging that a previous supervisor permitted him to use the off-site restroom located at the convenience store, and also attached a copy of a police report relating to a suspicious vehicle he allegedly reported to police, which he alleged was not available at the time of the hearing. (Request at 2-3.) The Board considered his Request and denied it. Claimant now petitions this Court for review.[2]

[2] "The Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record." *(Continued…)*

Section 402(e) of the Law provides that a claimant will not be eligible for unemployment compensation when "his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." 43 P.S. § 802(e). Although Section 402(e) does not define the term "willful misconduct," the Supreme Court has defined it as:

> an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer's interest or of the employe's duties and obligations to the employer.

Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 83-84, 351 A.2d 631, 632 (1976) (quoting Moyer v. Unemployment Compensation Board of Review, 110 A.2d 753, 754 (Pa. Super. 1955)). The employer has the burden of proving that an employee was discharged for willful misconduct. Graham v. Unemployment Compensation Board of Review, 840 A.2d 1054, 1056 (Pa. Cmwlth. 2004). Once the employer has established a showing of willful misconduct, "the burden then shifts to the claimant to establish good cause for [his] actions." Bruce v. Unemployment Compensation Board of Review, 2 A.3d 667, 671 (Pa. Cmwlth. 2010). "A claimant has good cause if his . . . actions are justifiable and reasonable under the circumstances." Docherty v. Unemployment Compensation Board of Review, 898 A.2d 1205, 1208-1209 (Pa. Cmwlth. 2006). Whether a claimant's conduct constitutes willful misconduct is a question of law reviewable by this Court. Orend v. Unemployment Compensation Board of Review, 821 A.2d 659, 661 (Pa. Cmwlth. 2003).

Western & Southern Life Ins. Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

Claimant does not dispute that he was away from his post for a period of time on August 27, 2009, but argues that he had good cause for his absence because he was using a convenience store restroom, necessitated by a reaction to coffee, and he then went to the back of the Center where he was involved with reporting a suspicious vehicle to police. Claimant's argument about coffee is seemingly presented as a means of explaining why he asserted he was using the off-site restroom when Manager was searching for him. Our review of the record, however, establishes that Claimant did not mention his reaction to coffee as an explanation during the evidentiary hearing before the Referee. Rule 1551 of the Pennsylvania Rules of Appellate Procedure provides, "No question shall be heard or considered by the court which was not raised before the governmental unit." Pa. R.A.P. 1551. Because Claimant did not include this assertion in his argument before the Referee, this issue is not properly before this Court. More importantly, Claimant's argument that coffee was the reason for his alleged use of the off-site restroom fails because the Board did not credit Claimant's testimony that he was ever in the off-site restroom. (Board Decision at 3.) In fact, the Board further stated that, even had it found Claimant credible, the off-site restroom was not client property or an area of his job site where he was permitted to be. (Board Decision at 3). The Board found credible Employer's testimony that Claimant was required to be on the job site until two in the morning on full patrol. (Hr'g Tr. at 5-6.) In addition, the Board did not find Claimant's testimony credible that he was in the back of the Center dealing with the police about a suspicious vehicle.[3]

[3] Claimant maintains that he called the police regarding a suspicious vehicle located behind the Center during the time Employer was searching for him. Claimant admitted that he never prepared an incident report about this for Employer. (Hr'g Tr. at 17.) Claimant asserts that the police report for this incident was not available for the hearing below, but he attempted to submit *(Continued…)*

The law is clear that the Board is the ultimate finder of fact, and "questions of credibility and evidentiary weight to be given [to] conflicting testimony are matters for" the Board as fact finder and not for a reviewing court. Freedom Valley Federal S & L Association v. Unemployment Compensation Board of Review, 436 A.2d 1054, 1055 (Pa. Cmwlth. 1981). The Board, acting in its role of fact finder, did not credit Claimant's testimony regarding his whereabouts during his work shift or his explanations for why he was not at his post. Because the Board did not credit Claimant's testimony and evidence, Claimant did not meet his burden of proving that he had good cause for his absence from his post.

Next, Claimant argues that there does not exist substantial evidence to support finding of fact 14, that he was terminated for not being at his assigned post, and finding of fact 16, that the off-site, convenience store restroom was not client property or his job site where he was required to be during his shift. Although framed primarily as a substantial evidence challenge, this claim also appears to be an implicit challenge to the Board's credibility determinations. However, as this Court has expressed in Freedom Valley, credibility is a matter for the Board and not for this Court to reweigh, and the Board did not credit Claimant's testimony. Id.

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this police report as part of his Request for Reconsideration, (Request at 5-8, August 26, 2010), which was denied. (Board Order, September 22, 2010.) This report is, therefore, not properly part of the record herein and has no impact upon our decision in this case. However, we note that had this report been properly authenticated and introduced into evidence below, it merely documents that a call about a suspicious vehicle was made at 2:03 a.m., more than thirty minutes after Employer gave up searching for Claimant. (FOF ¶ 11.) The report does not provide any information about who initiated the call resulting in the report and redacts the name of the owner of the vehicle reported.

With respect to Claimant's substantial evidence challenges to findings of fact 14 and 16, our review of the record reveals that there is substantial evidence in the record to support those factual findings. If the Board's findings are supported by substantial evidence, those findings are conclusive on appeal. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343, 1344 (Pa. Cmwlth. 1978). Substantial evidence is defined as "such relevant evidence which a reasonable mind would accept as adequate to support a conclusion." Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518, 521 (Pa. Cmwlth. 1999). Additionally, we "must view the record in a light most favorable to the party which prevailed before the Board, giving that party the benefit of all logical and reasonable inferences deducible from the evidence." Stringent v. Unemployment Compensation Board of Review, 703 A.2d 1084, 1087 (Pa. Cmwlth. 1997). That Claimant may have given "a different version of the events, or . . . might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's findings." Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994).

Manager's testimony establishes that he could not locate Claimant when he searched for Claimant at the job site. He testified that he went out to the Center at approximately 12:45 a.m. on the night in question. Manager stated that when he arrived, the vehicle Employer provided for Claimant's use was "parked up along the edge of the [Center] on . . . Lincoln Highway, and no one was in it." (Hr'g Tr. at 5.) He further stated that Claimant was supposed to be there on full patrol until 2:00 a.m. (Hr'g Tr. at 6.) Manager testified:

> I arrived at around quarter to 1:00. And the vehicle was there, unoccupied, and the guard [(Claimant)] was nowhere to be found. I

> continued -- I stayed there. I drove around, looking for him. Sometimes, Mr. Baylor would use his own car to make patrols. I checked the entire lot at that time, and I saw only a few cars in the lot. There's only two things open at that time, a supermarket and a gym. So, the amount of cars there was minimal. I checked every car. I looked for cars right and around. Mr. Baylor was nowhere to be found. I placed a phone call to our telephone -- cell phone which we keep in the car for use for them to check with us, and to check with the, the different stores and location[s]. And I got no answer. Just go into voicemail. I stayed on the site for a while to make sure things [were] good, to make sure that all was locked up properly. I continued on to the area to check. At around 10 of 2:00, I got a phone call from Mr. Baylor saying he just got the voicemail, and that he was on the site at that time in his own car, which I know he was not there at all.

(Hr'g Tr. at 6.) Manager further testified that he also drove around the back of the Center, as well as the front, and that he drove around more than once. (Hr'g Tr. at 11.) Manager added that he would not expect Claimant to have been at the off-site convenience store for forty-five minutes when it was not client property. (Hr'g Tr. at 12.) Manager testified that he searched for Claimant at the Center for at least forty-five minutes, from 12:45 a.m. to 1:30 a.m. (Hr'g Tr. at 11.) In viewing this testimony in the light most favorable to Employer as the prevailing party, we conclude that Manager's testimony constitutes substantial evidence that supports the Board's findings that Claimant was discharged for not being at his post and that the convenience store was not a part of the client's property.

To support his version of the events, Claimant relied only upon his own testimony and the testimony of his witness, a co-worker from a daytime job with a different employer. However, the Board did not credit Claimant's testimony or that of his co-worker, which together created discrepancies and added uncertainty to

Claimant's version of what occurred that night.[4] These discrepancies further support the Board's credibility determinations in favor of Employer. Because we conclude that there is substantial evidence to support the facts as found by the Board, the fact that one party may view testimony differently than the Board is not grounds for reversal. Tapco, Inc., 650 A.2d at 1108-1109.

Claimant's final argument is that Section 402(e) requires Employer to provide a prior warning for absenteeism before terminating him under these circumstances and no warning had been provided. The language of Section 402(e) does not impose such a requirement, and Claimant does not cite any case for this proposition. Claimant may be referring to case law involving an employee's *reported*, but excessive absences, where there is absenteeism plus another factor, such as warnings, that can constitute willful misconduct, although he does not cite any authority. See Harmon v. Unemployment Compensation Board of Review, 439 A.2d 900, 901 (Pa. Cmwlth. 1982) (holding "that continued excessive absenteeism, especially in the face of the warnings by the employer, constitutes willful misconduct within the meaning of Section 402(e) of the Law"). However, Claimant was not discharged for that reason, but because of his failure, as a security officer, to be present on the job site while claiming to be there.

In sum, Claimant was terminated for willful misconduct when, as a night security guard assigned to patrol the Center, he was not on the job when and where he

[4] For example, Claimant asserted that he came straight to work from Brooklyn, New York, (Letter from Claimant to Employer (September 8, 2009), Claimant's Ex. C-1 at 2), but his witness testified that he went to the job site with Claimant that night from Camden, New Jersey. (Hr'g Tr. at 27-28.)

was supposed to be. The Board correctly stated "an employer has a right to expect that a security officer will perform his job duties at an assigned location." (Board Decision at 3.)

Accordingly, the order of the Board is affirmed.

RENÉE COHN JUBELIRER, Judge

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	:	
Respondent	:	

O R D E R

NOW, June 22, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED.**

RENÉE COHN JUBELIRER, Judge