

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephen Moylan, :
Petitioner :
v. : No. 1896 C.D. 2009
Unemployment Compensation : Submitted: March 26, 2010
Board of Review, :
Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY

FILED: July 30, 2010

Stephen Moylan (Claimant) petitions, *pro se*, for review from the order of the Unemployment Compensation Board of Review (Board) that affirmed the referee's denial of benefits, as modified, 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 employee 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, irrespective of whether or not such work is "employment" as defined in this act....

Claimant was employed as a part-time laborer with Ridley Park Borough (Employer) from November 18, 2005 until October 23, 2008. Claimant earned \$9.80 an hour when working as a crossing guard and \$11.27 an hour when working as a janitor or highway worker.

Claimant filed for unemployment benefits, which the Unemployment Compensation Service Center denied pursuant to Section 402(b) of the Law and also ordered a fault overpayment.² Claimant appealed and the referee, following a hearing at which Claimant and Employer testified, issued a decision affirming as modified, the denial benefits, but concluding that it was a non-fault overpayment. Claimant appealed to the Board which affirmed the referee.

Claimant thereafter requested reconsideration, maintaining that he was deprived of the opportunity to testify to certain facts and to present certain evidence when the referee refused to allow him to read from a prepared statement. The Board granted reconsideration, vacated its order and remanded “to allow the claimant the opportunity to testify and submit evidence for the record.”

Prior to the remand hearing, Claimant requested five subpoenas for witnesses. The referee issued the subpoenas, but subsequently communicated to the parties that they were rescinded because the referee had exceeded the scope of the remand order. Thereafter, Claimant’s counsel again asked for subpoenas and a different referee again issued the subpoenas. The subpoenaed parties did not appear at the hearing due to the understanding that the subpoenas had been rescinded. The hearing was held

² Section 402(b) of the Law, 43 P.S. §802(b), relates to a voluntary quit.

before the referee on June 19, 2009, and the Board issued its decision and order on August 4, 2009. The Board made the following relevant findings of fact:

2. The claimant had an incident of drinking alcohol while working for the employer in 2007.
3. The employer on February 26, 2007, informed the claimant that employer had a zero tolerance policy regarding consumption of alcohol while working for the employer.
4. The employer also informed the claimant that being under the influence of alcohol while working is also prohibited.
5. The employer and the claimant entered into an agreement that the claimant would be subject to random drug and alcohol testing.
6. The claimant thereafter did submit to various requests for tests from the employer and did not test positive on any of those tests.
7. On October 23, 2008, the employer had concerns over a strong odor of alcohol from the claimant.
8. The employer determined that it would require all workers to undergo a blood drug and alcohol test from the hospital.
9. The claimant initially agreed to take the test.
10. The claimant believed he was singled out and subsequently refused to take the test.
11. The other employees did take the test.
12. The claimant was informed when he refused the test that his job was in danger.

13. The claimant continued to refuse to take the test and left the premises.

14. The employer discharged the claimant for his refusal to take a drug and alcohol test.

Board's decision, August 4, 2009, Findings of Fact Nos. 2-14, at 1-2.

The Board concluded that the subpoenas were improperly issued, as the purpose of the remand was to allow Claimant to testify and present evidence which he claimed that he was not permitted to present at the first hearing, not to allow Claimant to secure additional new testimony from other witnesses. The Board found in pertinent part as follows:

The employer credibly established that it had a policy against consumption of alcohol and working under the influence of alcohol or drugs and that the claimant was aware of this policy. The employer credibly established that it had requested random drug and alcohol tests from the claimant in the past. The employer credibly established that it suspected that the claimant may have been drinking and directed all of the employees at work that day to have a random drug and alcohol blood test done. The claimant initially agreed and then refused to take the test. The claimant did not credibly establish good cause for his failure to follow the employer's directive. Claimant was not treated differently from all of the other employees as the employer required all working employees that day to take the test. Furthermore, the claimant was informed that his job was in danger from his refusal to take the test. The claimant continued to refuse to take the test and the employer discharged the claimant. Claimant's actions rise to the level of willful misconduct....

Board's decision, August 4, 2009, at 2-4. The Board concluded that Claimant was ineligible for benefits under Section 402(e) of the Law and

that Claimant had a non-fault overpayment subject to recoupment under Section 804(b) of the Law.³ Claimant now petitions this court for review.⁴

Claimant essentially contends that the Board erred in determining that he quit his job and also claims that he was denied a fair hearing before the referee and the Board.

The Board found that Claimant committed willful misconduct, not that he quit his employment. Thus, Claimant's first issue is moot. The Board made its findings under Section 402(e) of the Law, not Section 402(b), as was previously found by the referee and Board prior to the remand. There was substantial evidence of record to support the Board's finding of willful misconduct under Section 402(e) of the Law.

Next, Claimant contends that he was denied a fair hearing before the referee and the Board. Claimant states that the referee denied him his right to give prepared testimony and to ask questions of witnesses that he subpoenaed that failed to appear at the hearing.

The Board remand was to allow Claimant to present additional testimony and evidence that he may have been prevented from presenting by the referee's refusal to allow the Claimant to read from a prepared document. Claimant requested subpoenas at the remand hearing, which were not requested at the first hearing before the referee. The referee was correct in determining that permitting the subpoenaed persons to testify at

³ Claimant does not question the non-fault overpayment, thus, we will not address that issue in this opinion.

⁴ 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).

the remand hearing would have been beyond the scope of the remand. See Emery Worldwide v. Unemployment Compensation Board of Review, 540 A.2d 988 (Pa. Cmwlth. 1988)(refusing to remand where subpoena was not requested originally, as it would allow the party the proverbial second bite at the apple); Young v. Worker’s Compensation Appeal Board (Britt & Pirie, Inc. et al.), 456 A.2d 1150 (Pa. Cmwlth. 1982)(a rehearing should not be allowed for the purpose of strengthening weak proofs which have already been presented.) The Board did not err in ruling that the subpoenaed persons would not have been permitted to testify, as their testimony would have been beyond the scope of the remand.

We observe that Claimant was permitted on remand to testify on his own behalf regarding the incident. Claimant was not permitted to read from a prepared statement, however, he was permitted to testify and refer to the document as needed. This action was proper and within the confines of the Board’s remand.

Accordingly, we must affirm the decision of the Board.

JIM FLAHERTY, Senior Judge

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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 30th day of July, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge