IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard J. Ventura,	:	
Petitioner	:	
v.	:	No. 206 C.D. 2010
	:	Submitted: August 27, 2010
Unemployment Compensation Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** November 15, 2010

Petitioner Richard J. Ventura (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed the Referee's decision and denied Claimant unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)[1] based on willful misconduct. For the following reasons, we now affirm.

Claimant applied for unemployment compensation benefits after being discharged from his employment as a sterile processing technician with St.

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

Clair Memorial Hospital (Employer).[2] The Duquesne Unemployment Compensation Service Center (Service Center) issued a determination, finding Claimant ineligible for unemployment benefits under Section 402(e) of the Law. Claimant appealed this determination, and a Referee conducted evidentiary hearings.

During the hearings, Employer presented the testimony of Kathy Shimer (Shimer) and Janet Davin (Davin) in support of its position. Davin, manager of employee services for Employer, testified that on March 25, 2009, she went to the break room between 3:00 and 3:30 a.m. to observe the finished product of the room's newly waxed floor. (Certified Record (C.R.), Item 17 at 3.) When she walked into the room the lights were off. (*Id.*) As she went to turn on the lights, Davin noticed Claimant sitting in the chair. (*Id.*) Davin testified that they startled each other as she turned on the lights. (*Id.*) After Davin apologized for the commotion, Claimant stated that he was taking a break and resting his eyes. (*Id.*) Davin testified nothing else was said, and she left the break room. (*Id.*) Regarding a second incident on March 27, 2009, Davin testified that she again came to the break room between 3:00 and 3:30 a.m., to address some problems about the waxed floor with another employee. (*Id.*) Again, she walked into a dark room. (*Id.*) This time, Davin stood in the room for approximately a minute and observed

[2] Employer is an Intervenor in this matter.

Claimant snoring. (*Id.*) She turned on the lights, and Claimant stated he was "just resting [his] eyes." (*Id.*) Davin testified that she informed Claimant's supervisor, Shimer, of the incidents at a later date. (*Id.*)

Shimer, a supervisor in the sterile processing department for Employer, testified that Claimant began working for Employer in September 2008. (*Id.* at 4.) Shimer testified that Employer's designated lunchtime for employees is between 1:00 and 1:30 a.m., and break time is 5:00 a.m. (*Id.*) She testified that rumors were brought to her attention that Claimant was sleeping on the job. (*Id.* at 5.) On December 8, 2009, in response to the rumors, Shimer held a meeting with all three night-term staff, including Claimant, to reiterate Employer's rules against sleeping while at work. (*Id.*)

Claimant testified to the circumstances surrounding his separation from employment. Claimant testified that he was not in the break room during the two separate incidents with Davin. (C.R., Item 27 at 6.) He testified that on March 25, 2009 and March 27, 2009, between 3:00 and 4:00 a.m., he was on the third floor in the Operating Room (OR) running autoclaves and performing diagnostic tests. (*Id.* at 7.) Claimant explained that the diagnostic tests have tickertape on the machine, with a date and time that show when the work started and ended. (*Id.* at 8.) The employee has to be at the machine the entire time testing is taking place.

(*Id.*) Claimant testified that on the dates in question, he was one of the employees running the diagnostic tests between 3:00 and 4:00 a.m., and, therefore, it was impossible for him to be in the break room when Davin alleged the incidents occurred. (*Id.*) Further, Claimant testified that the employees never had specific, written break times and would only take a break after finishing their work in the OR. (*Id.* at 10.)

Following the hearings, the Referee issued a decision, affirming the Service Center's determination denying Claimant unemployment compensation benefits. The Referee resolved any conflicts in the testimony, in relevant part, in favor of Employer's position that Claimant was sleeping on the job. The Referee concluded that Claimant's actions were contrary to Employer's best interests, and, therefore, Claimant was disqualified for benefits under Section 402(e) of the Law.

Claimant appealed the Referee's order to the Board, which affirmed the Referee's decision. The Board specifically found, in relevant part, as follows:

> 1. The claimant was last employed as a full-time sterile processing technician by Saint Clair Memorial Hospital from September 2, 2008, at a final rate of $13.03 per hour and his last day of work was April 6, 2009.
>
> 2. The employer's policy provides that sleeping while on duty will result in disciplinary action up to and including discharge.

3. The claimant was or should have been aware of the employer's policy.

4. The claimant worked the 11 p.m. to 7 a.m. shift.

5. The claimant had a scheduled lunch between 1 and 1:30 a.m. The claimant also had a scheduled break at 5 a.m.

6. On March 25, 2009, the manager of employee services was supervising a floor refinishing project.

7. The manager went to the break room area between 3 and 3:30 a.m. to observe the finished refinishing project.

8. When the manager turned on the light switch to the break room area, she observed the claimant popping up out of a chair and yelling in a startled manner.

9. The manager was also startled and yelled.

10. The claimant admitted to the manager that he was just resting his eyes and taking a break.

11. On March 27, 2009, between 3 and 3:30 a.m., the manager once again entered the break room area and observed the claimant.

12. The lights were off, and the manager heard the claimant snoring.

13. The manager turned on the light switch, and the claimant woke up.

14. The manager told the claimant, "I hope you weren't sleeping."

15. The claimant said he was not sleeping but was just resting his eyes.

16. The manager reported the March 25 and March 27 incidents to the claimant's supervisor.

> 17. The employer conducted an investigation.
>
> 18. At the conclusion of its investigation on April 6, 2009, the employer discharged the claimant for sleeping on the job.
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> 19. The claimant asserts that he was not in the break room on March 25 and March 27, 2009, between 3 a.m. and 3:30 a.m. as he was in the operating room performing diagnostic testing.
>
> 20. The claimant also asserts that he never had a designed break period.

(C.R., Item No. 30.) Based on these facts, the Board concluded that Claimant did not establish good cause for violating Employer's policy prohibiting sleeping while on the job. (*Id.*) Further, the Board found that Claimant's conduct was a clear disregard of Employer's interests and fell below the reasonable standards of behavior that Employer had a right to expect of him. (*Id.*) The Board affirmed the decision of the Referee and denied benefits to Claimant. (*Id.*) Claimant now petitions this Court for review of the Board's order.

On appeal,[3] Claimant presents two arguments. First, Claimant argues that substantial evidence does not exist in the record to support the Board's finding that Claimant fell asleep on the job in violation of Employer's policy, because the

[3] This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704. Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules, Inc. v. Unemployment Comp. Bd. of Review*, 604 A.2d 1159 (Pa. Cmwlth. 1992).

Board erred in resolving conflicting testimony in favor of Employer. Second, Claimant argues that the Board erred in finding that his actions rose to the level of willful misconduct under Section 402(e) of the Law, thereby making him ineligible for unemployment compensation benefits.

First, we will address whether the Board's findings of fact are supported by substantial evidence. Substantial evidence is defined as relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp. Bd. of Review*, 502 A.2d 738, 740 (Pa. Cmwlth. 1986). In determining whether there is substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn from the evidence. *Id.* A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record as a whole. *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 378 A.2d 829, 831 (1977). The Board's findings of fact are conclusive on appeal only so long as the record, taken as a whole, contains substantial evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 286, 485 A.2d 359, 365 (1984).

Despite Claimant's testimony to the contrary, the Board found credible the testimony of Employer's witnesses, Davin and Shimer. Specifically, the Board found credible the testimony of Davin regarding the incidents on March 25, 2009 and March 27, 2009. In an unemployment case, the Board is the ultimate finder of fact and is, therefore, entitled to make its own determinations as to witness credibility. *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985). The Board is also empowered to resolve conflicts in the evidence. *DeRiggi v. Unemployment Comp. Bd. of Review*, 856 A.2d 253, 255 (Pa. Cmwlth. 2004). Here, the Board resolved any conflict in testimony in favor of Employer and rejected the testimony of Claimant as not credible. The testimony of Employer's witnesses, as summarized above, supports the Board's findings that Claimant violated Employer's policy by sleeping on the job. When viewed in light most favorable to Employer, our review of the record demonstrates that there is substantial evidence to support the Board's findings.

We address, next, Claimant's second contention that the Board erred in concluding that his conduct rose to the level of willful misconduct under Section 402(e) of the Law. Section 402(e) of the Law provides, in part, that an employee shall be ineligible for compensation for any week "[i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." Section 402(e) of the Law. The term "willful

misconduct" is not defined by statute. The courts have defined "willful misconduct" as follows:

> (a) wanton or willful disregard for an employer's interests; (b) deliberate violation of an employer's rules; (c) disregard for standards of behavior which an employer can rightfully expect of an employee; or (d) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003). An employer, seeking to prove willful misconduct by showing that the claimant violated the employer's rules or policies, must prove the existence of a rule or policy and that the claimant violated it. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 369 (Pa. Cmwlth. 2008). Whether an employee's conduct constituted willful misconduct is a matter of law subject to this Court's review. *Id.*

Claimant argues that his actions did not rise to the level of willful misconduct because his testimony is credible regarding the two incidents in question, and, therefore, he was not sleeping on the job in violation of an employer policy or rule.[4] However, the Board found that on March 25, 2009, the manager went into the break room area between 3:00 and 3:30 a.m., and when she turned on the light, Claimant popped up out of his chair, stating he was just resting his eyes.

[4] Claimant does not dispute the existence of a work rule prohibiting sleeping.

(C.R., Item 30.) The Board found that on March 27, 2009, between 3:00 and 3:30 a.m., the manager entered the break room and observed Claimant snoring for approximately a minute. *Id.* The Board found that Claimant, again, stated he was resting his eyes. *Id.* The Board found credible the testimony of Employer's witness Davin and concluded that Claimant was caught sleeping on the job between 3:00 and 3:30 a.m., which was not Claimant's designed 5:00 a.m. break period. (*Id.*) Based on the credible testimony of Employer's witness Shimer, the Board found that Employer established there was a policy prohibiting employees from sleeping on the job, and Claimant was or should have been aware of Employer's policy. *Id.* Based on these findings and well-settled case law, the Board properly concluded that Claimant violated Employer's policy when found sleeping on the job by a manager. *Id.* Moreover, it is well-settled that sleeping on the job is "*prima facie* an act of willful misconduct." *Biggs v. Unemployment Comp. Bd. of Review*, 443 A.2d 1204, 1205 (Pa. Cmwlth. 1982); *see also Unemployment Comp. Bd. of Review*, 355 A.2d 614 (Pa. Cmwlth. 1976) (holding that where employer proves claimant slept on job, *prima facie* case is proven).

Based on our review of the record, we are convinced that the Board correctly concluded that Employer met its burden to establish that Claimant's

actions amounted to willful misconduct. Claimant is, therefore, ineligible for unemployment compensation benefits under Section 402(e) of the Law.[5]

Accordingly, we affirm the decision of the Board.

P. KEVIN BROBSON, Judge

[5] Claimant also contends that it was an error for the Referee to disallow testimony from Claimant's co-worker, Patty Trevino, who regularly worked the night shift. A review of the record reveals that the Referee provided Ms. Trevino with an opportunity to testify to events relating to Claimant's separation, but she had no personal knowledge of the circumstances because she was not at work on March 25 or 27. We can find no error in the Referee's decision to limit testimony to that relevant to the incidents resulting in termination. (C.R., Item 26, p. 31.) Claimant also contends that denial of unemployment compensation benefits was improper because he was not terminated until ten (10) days after the alleged incident and because an exhibit relied upon by Employer was not created until *after* his employment was terminated. Again, we find no error on the part of the Referee.

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O R D E R

AND NOW, this 15th day of November, 2010, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

P. KEVIN BROBSON, Judge