

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose Ortega, Jr.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2142 C.D. 2010
	:	Submitted: April 29, 2011
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON

FILED: August 5, 2011

Petitioner Jose Ortega, Jr. (Claimant) petitions *pro se* for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed a decision of an Unemployment Compensation Referee (Referee), denying Claimant unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)¹ based on willful misconduct. For the reasons set forth below, we affirm.

Claimant applied for unemployment compensation benefits after being discharged from his employment as a truck driver at Summit Apparel Incorporated (Employer). The Allentown UC Service Center (Service Center) issued a determination, finding Claimant ineligible for benefits pursuant to Section

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

402(b) of the Law, 43 P.S. § 802(b), relating to voluntary termination of employment without cause of a necessitous and compelling nature. Claimant appealed the Service Center's determination, and a Referee conducted a hearing at which neither party appeared. The Referee issued a decision based upon written statements submitted by Claimant and Employer to the Service Center.² The Referee modified the Service Center's determination and denied unemployment compensation benefits pursuant to Section 402(e) of the Law, relating to willful misconduct. The Referee made the following relevant findings:

1. Claimant was last employed by Summit Apparel Incorporated from October 19, 2009 at a final rate of pay of \$11.50 an hour and his last day worked was January 5, 2010.³
2. Claimant and two supervisors were in an argument. Claimant raised his voice at the supervisors and left the site.
3. Employer discharged Claimant for leaving the site.

(C.R., Item 10.)

The Referee concluded that Claimant's separation from employment was involuntary, and, therefore, Section 402(e) of the Law applied. (*Id.*) The Referee resolved conflicting evidence in favor of Employer by concluding that Employer discharged Claimant because he left the site after arguing with his

² Pursuant to 34 Pa. Code § 101.51, "[i]n the absence of all parties, the decision [of a Referee] may be based upon the pertinent available records." Claimant alleged in his statement to the Service Center that he did not walk off the job, and that he was told to "punch out" by his supervisor. (Certified Record (C.R.), Item 2, Exhibit Nos. 5 and 5a.) Employer alleged in its statement to the Service Center that Claimant engaged in an argument with two supervisors, after which Claimant left work without authorization. (C.R., Item 3, Exhibit Nos. 6 and 6a.)

³ The parties agree that documents of record establish that Claimant's last day worked was actually January 25, 2010.

supervisors. (*Id.*) The Referee determined that Claimant’s conduct was in disregard of Employer’s interests and standards of behavior which an employer has a right to expect of an employee and constituted willful misconduct. (*Id.*) The Referee concluded that Claimant was ineligible for benefits under Section 402(e) of the Law. (*Id.*)

Claimant appealed the Referee’s order to the Board, which affirmed the Referee’s decision. (*Id.* at 13.) In its order, the Board adopted and incorporated the Referee’s findings of fact and conclusions of law. (*Id.*) The Board also denied Claimant’s request that the record be remanded for additional testimony due to lack of notice of the hearing. The Board reasoned that the hearing notice, which was mailed to Claimant’s last known address and not returned as undeliverable by postal authorities, was presumed received.⁴ (*Id.*) Claimant now petitions this Court for review of the Board’s order.

On appeal,⁵ Claimant only argues that the Board erred in concluding that his conduct rose to the level of willful misconduct under Section 402(e) of the

⁴ *John Kenneth, Ltd. v. Unemployment Comp. Bd. of Review*, 444 A.2d 824, 826 (Pa. Cmwlth. 1982) (“Where notice, mailed to a party’s last known address, is not returned by the postal authorities as undeliverable, the party is presumed to have received notice.”). Claimant waived this issue on appeal because he failed to raise it in his statement of the questions involved. *See* Pa.R.A.P. 2116(a) (“No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.”).

Claimant’s *pro se* appeal does not excuse him from complying with the Pennsylvania Rules of Appellate Procedure. A *pro se* litigant is granted the same rights, privileges and consideration as those afforded a party represented by counsel; however, *pro se* status does not confer any advantage. *First Union Mortg. Corp. v. Frempong*, 744 A.2d 327, 333 (Pa. Super. 1999). Any layperson who chooses to represent himself in a legal proceeding must assume the risk that his lack of legal training may prove to be his undoing. *Groch v. Unemployment Comp. Bd. of Review*, 472 A.2d 286, 288 (Pa. Cmwlth. 1984).

⁵ 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. Section 704 of the Administrative Agency Law, 2 Pa. C.S.

Law.⁶ Section 402(e) provides, in part, that an employee shall be ineligible for compensation for any week in which “his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work.” The employer bears the burden of proving that the claimant’s unemployment is due to the claimant’s willful misconduct.⁷ *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 369 (Pa. Cmwlth. 2008). The term “willful misconduct” is not defined by statute. The courts, however, have defined “willful misconduct” as:

- (a) wanton or willful disregard of employer’s interests,
- (b) deliberate violation of the employer’s rules,
- (c) disregard of 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 and obligations.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003).

This Court has consistently held that leaving work early without an employer’s permission constitutes willful misconduct, unless motivated by good cause. *Grispino v. Unemployment Comp. Bd. of Review*, 472 A.2d 288, 289 (Pa.

§ 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, 1161 (Pa. Cmwlth. 1992).

⁶ Although not properly preserved, Claimant appears to argue in his brief that there was not substantial evidence to support a finding that Claimant was fired. Rather, he was actually laid off. Claimant waived a substantial evidence challenge by failing to include it in the statement of questions involved. *See* Pa.R.A.P. 2116(a); *Metrick v. Civil Serv. Comm’n*, 687 A.2d 26, 28 (Pa. Cmwlth. 1996) (failing to preserve substantial evidence challenge in statement of questions involved required that challenge be deemed waived even if addressed in argument). Therefore, the Board’s findings of fact are conclusive and binding on this Court upon review. *Campbell v. Unemployment Comp. Bd. of Review*, 694 A.2d 1167, 1169 (Pa. Cmwlth. 1997).

⁷ Whether or not an employee’s actions amount to willful misconduct is a question of law subject to review by this Court. *Nolan v. Unemployment Comp. Bd. of Review*, 425 A.2d 1203, 1205 (Pa. Cmwlth. 1981).

Cmwlth. 1984); *Simmons v. Unemployment Comp. Bd. of Review*, 429 A.2d 121, 122 (Pa. Cmwlth. 1981); *Dolan v. Unemployment Comp. Bd. of Review*, 381 A.2d 1323, 1324 (Pa. Cmwlth. 1978). Even a single incident of misconduct may support a denial of benefits. *Jones v. Unemployment Comp. Bd. of Review*, 373 A.2d 791, 792 (Pa. Cmwlth. 1977).

Claimant argues that the Board erred when it concluded that his conduct rose to the level of willful misconduct because he was asked to “punch out” and did not walk off the job site. Our review of the record supports the Board’s conclusion that Employer sustained its burden to establish a *prima facie* case of willful misconduct. In an unemployment case, 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 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 conflicts in evidence in favor of Employer when it determined that Employer discharged Claimant because he left the site. (C.R., Item 13.) Consequently, the Board rejected Claimant’s argument that he was asked to “punch out.” Claimant’s actions, which included raising his voice at supervisors and leaving the work site without authorization, fell below the standards of behavior that an employer has the right to expect from its employees. Therefore, the Board did not err in concluding that Employer met its burden of proving Claimant’s actions rose to the level of willful misconduct.

Because Employer established a *prima facie* case for willful misconduct, the burden shifted to Claimant to establish good cause for his actions of leaving the job site without authorization. While the employer bears the burden

of proving that a claimant's behavior constitutes willful misconduct, it is the claimant who bears the burden of proving good cause for his actions. *Kelly v. Unemployment Comp. Bd. of Review*, 747 A.2d 436, 438-39 (Pa. Cmwlth. 2000). To prove "good cause," the claimant must demonstrate that his actions were justifiable and reasonable under the circumstances. *Id.* at 439. Claimant essentially argues that he had good cause for leaving the work site because he was asked to "punch out" by a supervisor. The Board, however, rejected this assertion in favor of Employer's statement that Claimant was discharged for leaving the site. Based on the facts here and in light of the Board's credibility determinations, we conclude that Claimant failed to establish good cause for leaving the job site. The Board, therefore, properly concluded that Claimant's conduct was a disregard of Employer's interests and standards of behavior which an employer has a right to expect of an employee, and Claimant's actions constituted willful misconduct.

Accordingly, the order of the Board is affirmed.

P. KEVIN BROBSON, Judge

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ORDER

AND NOW, this 5th day of August, 2011, the order of the Unemployment Compensation Board of Review is AFFIRMED.

P. KEVIN BROBSON, Judge