

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vernita E. Brundage, :
Petitioner :
 :
v. :
 :
Unemployment Compensation :
Board of Review, : No. 2146 C.D. 2009
Respondent : Submitted: June 18, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: July 29, 2010

Vernita E. Brundage (Claimant) petitions for review from the order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's denial of benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹

The facts, as found by the Board, are as follows:

1. The claimant was last employed by Brokers Worldwide as a Mail Processor from January 10, 2006, and her last day of work was April 27, 2009. Her final rate of pay was \$13.25 per hour.
2. The employer maintains standards of conduct that provide that insubordination could result in disciplinary action up to and including termination.

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

3. On April 27, 2009, the claimant was instructed by the Operations Manager to work the machine at the end of the belt.
4. The request made was within the claimant's job description.
5. The claimant was or should have been aware of her job duties as she acknowledges signing a copy of the Job Description on September 21, 2001, with a handwritten notation that she felt she would need some assistance with the lifting.
6. The claimant refused to perform the duties stating she was too top heavy, her equilibrium was off and she could not do that work because she had a bad back.
7. The Operations Manager advised the claimant he had no knowledge of any medical problems.
8. The claimant was then brought into the Human Resource Manager's office where she was again requested to perform duties that were within her job description.
9. The claimant again refused to perform the duties advising she could not do the work because she had a bad back.
10. Claimant was given the opportunity to leave work to obtain medical certification as to her alleged medical condition that would prevent performance of the requested tasks.
11. Claimant refused to obtain medical certification, if it was at her own expense.
12. The claimant was advised that the Employer would only pay for a doctor's visit if it was a work-related injury.

13. The claimant was then sent back to her department where the Director, of the shop where the claimant worked, showed the claimant her job description.

14. The claimant was again given the instructions to perform her duties to which she again refused.

15. The Human Resources Manager was again called to meet with the claimant, the Letter Shop Director and Operations Manager, and the claimant was again given a directive to perform her duties. The claimant again refused to perform her duties.

16. The claimant was given the opportunity to leave work for the rest of the day and return the next day, which she refused to do.

17. The claimant was advised to clock out and go home or she would be terminated.

18. The claimant refused to clock out and go home and advised the Employer to call the police.

19. The claimant was then terminated for insubordination and she again refused to leave.

20. The claimant eventually left the worksite.

Board Opinion, June 2, 2010, (Opinion), Findings of Fact (F.F.) Nos. 1-20 at 1-2.

The Board determined:

The employer credibly testified to the facts of the claimant's refusal to perform a particular job task within claimant's job description. Claimant was given ample opportunity to, short of termination, to leave the premises without further consequences. The Claimant refused to obtain medical certification, regarding her alleged medical inability to perform certain tasks. She also refused to leave and return the next day when directed to do so. The employer has met their burden of proof to show the Claimant was insubordinate.

Opinion at 3.

Claimant contends that the Board erred when it concluded that her actions constituted willful misconduct.² Essentially³, Claimant avers that even if her actions constitute willful misconduct, she was justified in refusing to lift heavy objects because: (1) she reasonably feared that she would hurt herself, due to her

² 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 findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

³ Claimant's Statement of Questions Involved:

1. Did the Board err by finding that Appellant committed willful misconduct?
2. Did the Board err by crediting the Employer's witnesses' testimony, when the testimony was contradictory and should not have been so credited?
3. Did the appellant provide justifiable reasons for refusing to lift heavy objects based on her legitimate fear that she would hurt herself and/or present a safety hazard, due to her belief that the objects were too heavy?
4. Did the appellant provide a justifiable reason for refusing to lift heavy objects and work on a machine that was unfamiliar to her, based on her belief that she would hurt herself an/or that she would present a safety hazard?
5. Did the Board err by not finding that the employee's remarks to the employer's managers/supervisors were not willful misconduct, where she was legitimately challenging the efficacy of the procedure to dismiss her from work, when she was willing and able to perform other work, and she had also requested that the CEO be notified of what was occurring?
6. Did the Board err by not finding that the Employer had written notice from 2001, that the appellant would have difficulty with heavy lifting, which she documented on her alleged job description?
7. Did the Board err by not finding that numerous of the Referee's finding of fact were not supported by substantial evidence, including facts numbered 2 and 4-19?
8. Did the Board err by not finding that the appellant had a legitimate reason to refuse to do the task, based on the fact that she had not been trained on the machine?
9. Did the Board err by not finding that the appellant had not violated a work rule regarding a task that was essential to her duties and that appellant had not been previously warned and/or disciplined for refusing to perform such work?

Petitioner's Brief at 2.

physical inability to lift such objects; (2) she reasonably feared that she would present a safety hazard because she believed she would/could fall into the machine due to the weight of the objects to be lifted; and (3) she had not been properly trained in working on the machine. Furthermore, Claimant argues that the Board erred by not finding that many of the Referee's findings of fact were not supported by substantial evidence, including facts numbered 2 and 4-19.

I. Willful Misconduct

Whether a Claimant's conduct rises to the level of willful misconduct is a question of law subject to this Court's review. Lee Hospital v. Unemployment Compensation Board of Review, 589 A.2d 297 (Pa. Cmwlth. 1991). Willful misconduct is defined as conduct that represents a wanton and willful disregard of an Employer's interest, deliberate violation of rules, disregard of standards of behavior which an Employer can rightfully expect from the employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the Employer's interest or employee's duties and obligations. Frick v. Unemployment Compensation Board of Review, 375 A.2d 879 (Pa. Cmwlth. 1977). The Employer bears the burden of proving that it discharged an employee for willful misconduct. City of Beaver Falls v. Unemployment Compensation Board of Review, 441 A.2d 510 (Pa. Cmwlth. 1982). The Employer bears the burden of proving the existence of the work rule and its violation. Once the Employer establishes that, the burden then shifts to the Claimant to prove that the violation was for good cause. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

Here, Brokers Worldwide (Employer) established that Claimant refused to perform duties that fell within her job description multiple times on April 27, 2009, even after being shown a copy of her job description. Gregory Webb, Employer's Operations Manager, (Webb) testified during the hearing, "She [Claimant] refused to work on the end of the belt... She had worked on the end of the belt before... All of it is incorporated in her job description that she had signed". Notes of Testimony, July 28, 2009, (N.T.) at 5-6. Employer demonstrated that Claimant was or should have been aware that such tasks fall within her job description. Ann Searl, Employer's Human Resources Manager, (Searl) testified that Claimant signed a copy of the job description when she was hired and that the duties she was asked to perform were essential to Claimant's job: "...I advised her that she signed her job description that she knew and understood her job duties including the physical parts of the job... it's an essential duty of this position that you be able to do some lifting, some bending, etcetera [sic] and if you can't perform those duties, you need to have a doctor say so." N.T. at 11. Searl produced a copy of Claimant's job description; it was entered into the record at the hearing and marked as exhibit E1.

Furthermore, Employer established that it has a Standards of Conduct Policy in the Employee handbook that addresses insubordination; Searl testified, "I also reminded her that refusing to follow instructions of her supervisor was insubordination." N.T. at 11. As a result, Claimant's repeated refusals to perform tasks that fall within her job description constitute willful misconduct. The burden then shifts to Claimant to establish that she had good cause for her refusals to perform duties and her violation the Standards of Conduct Policy.

II. Just Cause for Willful Misconduct

Claimant argues that even assuming *arguendo* that she did commit willful misconduct, she had just cause for doing so: she claims that she was merely trying to protect her safety and the safety of those around her. The Claimant refused to perform the duties because she was too top heavy, her equilibrium was off, and she had a bad back (F.F. No. 6). Claimant testified, “I told him [Webb] I was too top heavy to be bending over in that Gaylord^[4] which is dangerous.” N.T. at 15. However, Employer was unaware that she had a bad back. During the hearing, Webb testified, “She [Claimant] said she couldn’t do it because of her back. I told her that I had no knowledge of that.” Moreover, she did not have medical certification documenting her alleged medical condition, and she refused to see a doctor to obtain medical certification at her own expense (F.F. Nos. 6-11). Searl testified to that effect stating the following:

I asked Vernita [Claimant] if she had a documented medical condition or if she had a note from her doctor indicating that she could not perform one or more of the essential duties of her position. She indicated that she did not have a doctor’s note. I asked her if it was a work related injury. She indicated it was not... I said well, you’ll need to go get a doctor’s note. If you’re saying you can’t perform those duties, you have to have a doctor say that you can’t perform the job because you signed the job, you know – it’s an essential duty of this position that you be able to do some lifting, some bending, etcetera [sic] and if you can’t perform those duties, you need to have a doctor say so. She refused to do so and she said she would only go to the doctor if the company paid for it. I said the company would not pay for her to get a doctor’s note for a non-work related condition and I

⁴ During the hearing, Webb testified that a Gaylord is essentially “A skid. It’s basically a big box that rolled on top of the skid that you can put mail into.” N.T. at 7.

advised her that she signed her job description that she knew and understood her job duties including the physical parts of the job. I also reminded her that refusing to follow instructions of her supervisor was insubordination.

N.T. at 11.

Because Claimant was unwilling or unable to demonstrate that she had a medical condition that prohibited her from fulfilling her work duties, she failed to show that she had just cause for refusing to perform tasks that fell within her job description. As a result, Claimant's repeated refusals constitute willful misconduct.

III. The Board's Findings of Fact

Claimant contends that the Board's findings of fact, specifically nos. 2 and 4-19, were not supported by substantial evidence. However, the Board was free to find Claimant's testimony credible but did not. In unemployment compensation proceedings, the Board is the ultimate fact-finding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence. Unemployment Compensation Board of Review v. Wright, 347 A.2d 328 (Pa. Cmwlth. 1975). Findings of fact are conclusive upon review provided that the record, taken as a whole, provides substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). Furthermore, although Claimant asserts that findings of fact were not supported by substantial evidence, Claimant provides no evidence to support her claim. The Board

appropriately determined that Claimant was ineligible for benefits on the basis of her willful misconduct.⁵

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

⁵ Claimant's argument that Employer violated its progressive discipline policy is waived because Claimant failed to raise this issue before either the referee or Board. This Court has consistently held that the failure of a party to raise an issue in an agency proceeding constitutes a waiver of that issue and it cannot be raised for the first time in a judicial appeal. K.J. v. Department of Public Welfare, 767 A.2d 609 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 567 Pa. 750, 788 A.2d 381 (2001). Claimant planned to object to the admission of her job description, exhibit E1, but claims she was unduly pressured by the referee during the hearing. She asserts that as a result of the referee's pressuring she did not object to the admission of the document. Claimant did not include this issue in her Statement of Questions Involved. Pa.R.A.P. 2116(a) provides in pertinent part:

The statement of questions involved must state concisely the issues to be resolved, expressed in the terms and circumstances of the case but without unnecessary detail. The statement shall be no more than two pages will be deemed to include every subsidiary question fairly comprised therein. *No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.*

Thus, the issue is waived. See St. Joseph Hospital v. Berks County Board of Assessment Appeals, 709 A.2d 928 (Pa. Cmwlth. 1998).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vernita E. Brundage,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 2146 C.D. 2009
	:	
Respondent	:	

ORDER

AND NOW, this 29th day of July, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge