IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dwayne L. Finkey, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 2168 C.D. 2010
	:	Submitted: April 1, 2011

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: June 23, 2011

Dwayne Finkey (Claimant), petitions this Court for review of the September 13, 2010, order of the Unemployment Compensation Board of Review (Board) affirming the Unemployment Compensation (UC) Referee's (Referee) determination denying him unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law),[1] and which reversed the determination of the Lancaster UC Service Center (UCSC). There are three issues before this Court: 1) whether Lightstyles LTD (Employer) timely-filed a valid appeal of the UCSC's determination (Determination) awarding Claimant benefits; 2) whether Claimant's due process rights were violated by the Board's reliance on a document allegedly created by a clerical error; and 3) whether substantial evidence

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

supported the finding that Claimant engaged in willful misconduct. For the reasons that follow, we affirm the Board's order.

Claimant was employed by Employer as a delivery driver until March 5, 2010, at which time he was terminated by Employer. Claimant had been repeatedly warned that Employer required him to call in and report his absence from work prior to 5:00 a.m. on any scheduled work day if Claimant would not be reporting for work that day. Employer terminated Claimant for failing to timely report that he would be absent from work on March 3, 2010. Claimant applied for unemployment compensation benefits.

On March 31, 2010, the UCSC issued a Notice of Determination finding Claimant eligible for benefits. By letter dated April 7, 2010, addressed to the Office of UC Benefits, Employer wrote "responding to the enclosed copy of 'Notice of Determination' report for Dwayne Finkey" (Letter). Original Record (O.R.) Item No. 7 at 2. Therein, Employer objected to the Determination, stating:

> [t]he determination states that [Claimant] is eligible for benefits because 'he did not feel he could safely make his delivery run that day due to ongoing stress and physical problems.' I am requesting that Lightstyles Ltd not be charged for his unemployment claims [because] his stress and physical problems were not job related. There was plenty of work available and he failed to show for his scheduled shift. [And,] Claimant never notified his supervisor of stress or physical problems.

Id. The Office of UC Benefits received the Letter and processed it as a timely-filed appeal by Employer. Given that Employer did not file an appeal form, the Office of UC Benefits completed a form, attaching the same to Employer's Letter.[2] While the

[2] There is nothing in the record explicitly stating that the form was completed by an Office of UC Benefits employee; however, there is no dispute that neither party filled out the appeal form. Hence, the parties do not dispute the fact that the form was completed by an employee of the Office of UC Benefits upon receipt of the Letter.

completed appeal form is incorrectly labeled on its face as setting forth an appeal by Claimant, the filing was marked in the claim record and treated by the Office of UC Benefits as a timely-filed appeal by Employer, and a hearing date was set before the Referee.

On May 24, 2010, the Referee heard testimony from Claimant and two representatives for Employer. The Referee entered the following documents on record: 1) the certification of documents; 2) the appeal form; 3) the Determination; 4) the initial internet claim; 5) records from oral interviews; 6) the Letter and its corresponding envelope; 7) a fax cover sheet; 8) Employer's notice of application of benefits; 9) the claim record printout; 10) the hearing notice; and 11) the list of issues and its corresponding translation form.

On June 8, 2010, the Referee issued a decision (Referee's Decision) denying Claimant benefits and reversing the Determination. In support of his decision, the Referee issued the following findings of fact:

> 1. The claimant was last employed by Lightstyles LTD as a delivery driver at a final hourly rate of $12.90 and his last day of work was March 5, 2010.
>
> 2. The claimant was asked many times to call in when he was going to be absent.
>
> 3. On March 3, 2010, the claimant was absent without reporting off work.
>
> 4. Many times, if the claimant called at all, it would be three hours after the start of his shift.
>
> 5. The claimant was verbally warned that his job could be in jeopardy for not reporting his absences.
>
> 6. The claimant did not report to work on March 3, 2010 and believed his girlfriend called him off sometime that morning between 5AM and 7AM.

> 7. The claimant spoke to the employer between 8:30AM and 9:00AM and was asked to bring in his easy pass.
>
> 8. The claimant was discharged by the employer.

O.R. Item No. 11. The Referee concluded that under Section 402(e) of the Law, Claimant was ineligible to collect benefits because Claimant's actions constituted willful misconduct.

On June 15, 2010, Claimant appealed to the Board from the Referee's Decision, stating that he disagreed with the Referee's finding that Claimant had engaged in willful misconduct. Subsequently, on July 30, 2010, Claimant sent further correspondence to the Board, which set forth additional reasons why Claimant felt that the Referee's Decision should be reversed. O.R. Item No. 13. In his July 30, 2010 correspondence, Claimant stated, in sum, that the Referee's Decision should be reversed because no party filed an appeal from the Determination awarding Claimant benefits. *Id*. Claimant asserted that he did not file for an appeal and that Employer's request had been misinterpreted. O.R. Item No. 13. Claimant argued that Employer never filed an appeal, but rather, that a representative for Employer stated that he had filed for "tax charge relief." O.R. Item No. 13. Claimant argued that because no party to the action filed a valid, timely appeal, the Referee never had jurisdiction to hear the appeal and, therefore, the appeal should be quashed and his benefits reinstated. O.R. Item No. 13.

On September 13, 2010, the Board issued an order affirming the Referee's Decision. The Board's order expressly adopted the Referee's Findings of Fact and Conclusions of Law, and noted that the record reflects that Employer did file a timely appeal from the Determination. The Board's order added the finding that Claimant's testimony was not credible in so far as he testified about his girlfriend

calling Employer on his behalf. Claimant now petitions this Court for review of the Board's order.[3]

As stated, Claimant's first issue on appeal is whether Employer timely-filed a valid appeal of the Determination. Specifically, Claimant contends no party timely-filed a valid appeal. We disagree. The Board's conclusion that Employer's Letter constituted a valid, timely appeal did not constitute an error of law.

Under Section 501(e) of the Law, an appeal from a UCSC determination of eligibility for unemployment compensation benefits must be filed within fifteen days from the mailing date stated on the determination. 43 P.S. § 821(e). Pennsylvania's Administrative Code sets forth the process by which a party may file an appeal from a UCSC determination. See 34 Pa. Code § 101.81. As an alternative to the filing of an appeal form provided by the Department of Labor and Industry (Department), 34 Pa. Code § 101.81(e) provides for consideration of: "a written objection to the Department's determination as an appeal [to be] process[ed] under subsection (c) if the appellant does not complete the Department-provided appeal form." Moreover, the process by which a party must file a timely appeal is set forth in detail in the Notice of Determination that was sent to the parties after the UCSC Determination that Claimant was eligible for benefits. The Notice of Determination provides:

> You may use a Petition for Appeal form, *a letter or e-mail* to appeal. Regardless of the format you choose, your appeal must include, the name and address of the claimant, the social security number of the claimant, if known, the date of the determination being appealed, the reason for the

[3] This Court's scope of review is limited to determining whether the findings of fact are supported substantial evidence, whether an error of law was committed or whether constitutional rights were violated. *Johnson v. Unemployment Comp. Bd. of Review*, 869 A.2d 1095 (Pa. Cmwlth. 2005).

> appeal and the name and address of the individual filing the appeal.

O.R. Item No. 13 (emphasis added).

Here, on April 7, 2010, seven days after the UCSC Determination, Employer sent its Letter to the Office of UC Benefits, at the address listed in the Notice of Determination, "responding to the enclosed copy of 'Notice of Determination' report for Dwayne Finkey." O.R. Item No. 7 at 2. While the Employer did not use an official appeal form, the Letter complied with all of the requirements set forth in the Notice of Determination. Thus, the Board did not err in concluding that Employer's Letter effected a timely appeal of the UCSC Determination.

Claimant's second issue on appeal is whether his due process rights were violated by the Board's reliance on the appeal form allegedly created by a clerical error. Because we hold that Employer's timely-filed Letter effected a valid appeal, the issue of whether the appeal form in question was completed by a clerical error is of no moment, as the form is not the basis of the Board's conclusion that Employer timely-filed a valid appeal. We discern no violation of Claimant's right to due process.

Claimant's final issue on appeal is whether substantial evidence supports the conclusion that Claimant engaged in willful misconduct. We hold that it does.

As noted by the Board, under Section 402(e) of the Law, an employee is not eligible for benefits if his unemployment is due to his being discharged for willful misconduct in connection with his work. *Grieb v. Unemployment Comp. Bd. of Review*, 573 Pa. 594, 827 A.2d 422 (2003). Willful misconduct has been defined as:

> (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.

Id, 573 Pa. at 600, 827 A.2d at 425. An employer has the burden of proving that a claimant's discharge was the result of willful misconduct. *McKeesport Hosp. v. Unemployment Comp. Bd. of Review*, 625 A.2d 112 (Pa. Cmwlth. 1993). While absenteeism itself may not rise to the level of willful misconduct, it is well settled that absenteeism along with other factors such as: 1) excessive absences, 2) failure to notify the employer in advance of an absence, 3) lack of good or adequate cause for the absence, and 4) disregarding previous warnings for absenteeism, may indeed constitute willful misconduct. *Pettey v. Unemployment Comp. Bd. of Review*, 325 A.2d 642 (Pa. Cmwlth. 1974).

Here, there is no dispute that Claimant was absent from work on March 3, 2010. Moreover, there is no dispute that nobody called Employer on Claimant's behalf *prior to* 5:00 a.m. on March 3, 2010. It is further undisputed that Claimant had previously, on multiple occasions, been absent from work without calling to inform Employer of his absence before 5:00 a.m., if at all, and that Claimant's Employer had warned him that he was required to call before 5:00 a.m. if he was going to be absent from work that day. Given Claimant's excessive absences, his failure to timely report his absences, and Employer's repeated warnings to Claimant about his misconduct, we hold that the testimony of Employer's representatives serves as substantial evidence establishing Claimant's willful misconduct.

Once an employer has met its burden of demonstrating willful misconduct the burden shifts to the claimant to show good cause as a justification for his willful misconduct. *McKeesport.* While illness can be considered good cause such that a claimant's willful misconduct is deemed justified, the claimant must establish as an affirmative fact that illness was actually the cause of his absence. *Id.* Beyond that, however, even if a claimant's absence was indeed the result of illness,

failure to report the absence to an employer in the manner required by the employer constitutes willful misconduct under Section 402(e) of the Law. *Logan v. Unemployment Comp. Bd. of Review*, 434 A.2d 877 (Pa. Cmwlth. 1981). Here, it is clear that Claimant failed to report absences to Employer as required, and failed to do so for the last time on March 3, 2010. We hold that substantial evidence does, in fact, support the Board's conclusion that Claimant's conduct constituted willful misconduct.

For the foregoing reasons, we affirm the Board's order.

JOHNNY J. BUTLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dwayne L. Finkey, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 2168 C.D. 2010

O R D E R

AND NOW, this 23rd day of June, 2011, the September 13, 2010 order of the Unemployment Compensation Board of Review is affirmed.

_____

JOHNNY J. BUTLER, Judge