

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John A. Stewart, :
 :
 Petitioner :
 :
 v. :
 :
 Unemployment Compensation :
 Board of Review, : No. 2216 C.D. 2010
 Respondent : Submitted: March 11, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: April 4, 2011

John Stewart (Claimant), *pro se*, challenges 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 initially found by the referee and confirmed by the Board, are as follows:

1. The claimant was last employed with Tony De[P]aul Construction as a fulltime construction foreman at a pay rate of \$29.40 per hour. The claimant was employed from 1998 and his last day of work was February 22, 2009.

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

2. The employer became aware of suspect fuel usage issues and had an employee stake out the gas pump.
3. The employer became aware that the claimant got gas using a code '1234' and a hot key.
4. The employer discharged the claimant for theft and turned the case over to the police.
5. The claimant was convicted for taking gas.

Referee's Decision (Decision), June 24, 2010, Findings of Fact Nos. 1-5 at 1.

The referee determined:

A single proven incident of theft from the employer will support a disqualification. Further, conviction of a crime is conclusive proof of the wrongdoing charged.

Here, the employer became aware of a suspect fuel usage issues [sic], staked out the gas pump, and became aware that the claimant took gas using a code '1234' and a hot key. The employer discharged the claimant, turned the matter over to the police, and the claimant was convicted of the underlining [sic] charges. The employer has established that the claimant's actions clearly rose to the level of disqualifying willful misconduct in connection with his work.

Decision at 2. The Board affirmed.

Claimant contends that the Board erred when it did not allow him to testify or introduce evidence at the hearing before the referee and that the Board erred when it determined that he committed willful misconduct.²

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 **(Footnote continued on next page...)**

Initially, Claimant contends that the referee told him he would have the opportunity to present his evidence after Jonathan Russell (Russell) presented the case for Tony DePaul (Employer). Claimant asserts that when Russell was finished he was not given an opportunity to present his evidence.

First, a review of the record reveals that there was no one named Russell at the hearing. Second, Claimant did testify at the hearing. Third, at the hearing, Claimant stated that he had witness testimony to present. The referee corrected him and said, “You don’t have any witnesses here.” Claimant replied, “Okay.” Notes of Testimony, May 28, 2010, (N.T.) at 9. Fourth, at the end of the hearing, the referee asked Claimant, “Mr. Stewart, is there anything further before we close the record?” Claimant replied, “Yes, I don’t understand how I can be convicted of gas that was returned. I was fired, the gas was still on the truck, and I’m entitled to take gas for company projects. And the cans were full.” N.T. at 10-11. Claimant had ample opportunity to present any additional evidence of his choosing and did not. There was no error.³

Claimant next contends that he did not commit willful misconduct because he was authorized to use the key to pump gas with Code #1234 and he was permitted to use the gas pumps to fill gas cans that were on his company truck.

(continued...)

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 attached to his brief interviews of fellow employees for this Court’s review. Because these interviews were not part of the record, this Court may not consider them. Tener v. Unemployment Compensation Board of Review, 568 A.2d 733 (Pa. Cmwlth. 1990).

Claimant admits that he was found guilty but asserts that he was falsely accused and fired.

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).

In Department of the Navy v. Unemployment Compensation Board of Review, 632 A.2d 622, 631 (Pa. Cmwlth. 1993), this Court addressed the issue of theft in the context of willful misconduct and determined that proof of a conviction for theft of an employer's property constitutes willful misconduct as a matter of law and was not subject to the rationale of "good cause."

Also, in Department of Navy, this Court noted:

It is now firmly established by our Supreme Court that where a person is convicted of a crime after a trial, either by a jury or a judge, or pleads guilty thereto . . . that the introduction of the record of the criminal conviction in a civil action involving substantially the same facts and issues as determined in the criminal proceeding, the guilty person in the civil action is conclusively bound by the fact of guilt. A person determined to be guilty of a crime following a trial or a plea of guilty cannot be heard to deny in a civil action that which was established in his prior determination of guilt without proof that his guilt was procured by fraud, perjury or some manner of error sufficient to set aside his determinations of guilt.

Department of Navy, 632 A.2d at 631 n.4.

Here, David Roman (Roman), operations manager for Employer, testified that Claimant was fired for employee theft. Roman further explained “I noticed some suspect fuel issues. We had the fuel pumps at our facility staked out. We found that Mr. Stewart was stealing gas. We reported that to the authorities and we prosecuted him and he was found guilty.” N.T. at 5. Roman introduced into evidence the criminal docket entries which established the conviction for theft by unlawful taking and receiving stolen property. N.T. at 8. Claimant admitted that he was convicted. N.T. at 10. Although he protested his innocence, he did not establish that the conviction was obtained through fraud, perjury, or any other error necessary to set aside the determination of guilt. The Board did not err when it determined that Claimant committed willful misconduct.

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

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ORDER

AND NOW, this 4th day of April, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge