

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nathan B. Morris,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2383 C.D. 2010
	:	SUBMITTED: April 15, 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
PRESIDENT JUDGE LEADBETTER**

FILED: June 14, 2011

Claimant, Nathan B. Morris, petitions for review of the October 7, 2010 order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of the referee to deny him unemployment compensation benefits pursuant to the willful misconduct provision found in Section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e). Section 402(e) provides, in pertinent 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” The term “willful misconduct” has been defined as: (1) the wanton and willful disregard of the employer’s interests; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an
(Footnote continued on next page...)

The referee made the following findings, which the Board adopted in their entirety.² In 2007, Claimant started working full-time as a crew chief for Employer Tait Engineering. Employer gave him a BP gas card “to keep his company truck fueled and expected [him] to use the card for that purpose only.” Referee’s Finding of Fact No. 3. When Employer suspected in August 2008 that Claimant was using the card for other purchases, Employer warned him to use it for fuel only. Once again suspecting that Claimant was misusing his card, Employer obtained records from BP in January 2010 covering Claimant’s purchases from April 2008 to date. After reviewing the records, Employer discovered that Claimant had used his card for non-fuel purchases from April 2008 to August 2008 and then again in April 2009. Between April 2008 and January 2010, the purchases totaled almost \$1000.³

On January 23, 2010, Employer’s vice president and owner Lee Tait met with Claimant and compared Claimant’s BP card number with the relevant card number on the records obtained from BP. Upon confirming that the numbers

(continued...)

employer can rightfully expect of its employee; or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer’s interests or the employee’s duties and obligations. *Glatfelter Barber Shop v. Unemployment Comp. Bd. of Review*, 957 A.2d 786 (Pa. Cmwlth. 2008).

² Credibility and evidentiary weight are determined by the Board and its findings of fact are conclusive on appeal when the record, in its entirety, contains substantial evidence to support those findings. *Guthrie v. Unemployment Comp. Bd. of Review*, 738 A.2d 518 (Pa. Cmwlth. 1999).

³ Claimant has attached what appear to be several credit card slips as an appendix to his reply brief and alleges that the non-fuel charges reflected thereon approach only \$42.59. The certified record, however, contains the exhibit presented at the hearing, which includes BP customer detail statements. Certified Record (C.R.), Item No. 3. To the extent that at least some of the slips included in the appendix are *de hors* the record, we may not consider them. *Hempfling v. Unemployment Comp. Bd. of Review*, 850 A.2d 773 (Pa. Cmwlth. 2004).

matched, Mr. Tait asked Claimant if he had used his card for any non-fuel purchases. After an initial denial, Claimant admitted that he had used the card for non-fuel purchases. Employer terminated Claimant's employment and Claimant applied for unemployment compensation benefits the following day. In his Internet Initial Claims form, Claimant "described the reasons for his actions which caused him to be discharged as 'habit' and ... admitted to being involved in the incident which caused his separation." Referee's Finding of Fact No. 12.

After an August 9, 2010 hearing where only Employer presented evidence, the referee denied Claimant's claim for unemployment compensation benefits. In so doing, the referee found that "[t]he employer's witness testified credibly that the claimant was warned in August 2008 not to use his fuel card for non-fuel purposes and then admitted in January 2010 that he had in fact used his card for non-fuel purposes." Referee's August 10, 2010 Decision at 2. The referee concluded that "the claimant's actions were contrary to the employer's best interest and disqualifying under Section 402(e) of the Law." *Id.*

The Board affirmed the referee's decision, additionally stating as follows:

The Board finds sufficient evidence in the record to establish that the claimant made nonfuel purchases after being warned not to do so in August 2008. Moreover, the claimant did not offer evidence to contradict the employer's testimony. The claimant's request that the record be remanded for additional testimony is denied because claimant's counsel made an untimely request to have a telephone hearing on the day of the hearing.

Board's October 7, 2010 Decision at 1. Claimant's petition for review to this Court followed.

An employer has the initial burden of proving willful misconduct. *Graham v. Unemployment Comp. Bd. of Review*, 840 A.2d 1054 (Pa. Cmwlth.

2004). Where an employee has been discharged due to a violation of a known work rule, an employer must establish the existence of the rule, its reasonableness, and its violation. *Owens v. Unemployment Comp. Bd. of Review*, 748 A.2d 794 (Pa. Cmwlth. 2000). Once the employer meets its burden, the employee must then show good cause for his or her action. *Id.*

Claimant first argues that the Board erred in failing to exclude as inadmissible hearsay the BP credit card statements and the testimony Employer's witness Mr. Tait about those statements. Specifically, Claimant maintains that Mr. Tait had no first-hand knowledge about those statements and notes that Tait testified that another employee, who did not testify, annotated them. Claimant additionally argues that Employer failed to corroborate the credit card evidence and its claim that it had a rule in place prohibiting non-fuel purchases such that there is a "Walker Rule" violation.⁴ Further, he notes that Employer admittedly did not have a written rule in effect regarding the proper use of the company credit cards.

In response, the Board points out that Mr. Tait credibly testified that he confirmed with Claimant at their January 2010 meeting that Claimant's BP credit card number matched the relevant number on the records that Employer obtained from BP. In addition, Mr. Tait testified that, despite having warned Claimant in August 2008 not to use the company credit card for non-fuel purchases, Claimant did so as he admitted at that January 2010 meeting. With regard to that admission, the Board maintains that it constitutes a party admission

⁴ As per *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976), if hearsay evidence is properly objected to, it is not competent to support a finding of fact. Where it is admitted without objection, it will be given its natural probative effect and may support a finding of fact if corroborated by any competent evidence of record.

admissible as an exception to the hearsay rule under Pennsylvania Rule of Evidence 803(25) and may be used as competent evidence. *Wright v. Unemployment Comp. Bd. of Review*, 465 A.2d 1075 (Pa. Cmwlth. 1983). Employer argues, therefore, that the Board's findings that Employer had a rule in place prohibiting use of the card for non-fuel purchases and that Claimant admittedly violated that rule by using the card for such purchases are supported by substantial evidence and conclusive on appeal.

We agree with Employer that Claimant's admission to Mr. Tait that he used the card for non-fuel purposes is admissible as a party admission. *Borough of Grove City v. Unemployment Comp. Bd. of Review*, 928 A.2d 371 (Pa. Cmwlth. 2007). We disagree with Claimant that Employer's evidence was not corroborated. Mr. Tait's credible testimony,⁵ coupled with the credit card statements and Claimant's admissions on his claims form,⁶ are sufficient to satisfy Employer's

⁵ We examine the testimony in the light most favorable to Employer, in whose favor the Board found, giving it the benefit of all inferences that logically and reasonably can be drawn from the testimony. *Spencer v. Unemployment Comp. Bd. of Review*, 602 A.2d 484 (Pa. Cmwlth. 1992).

⁶ That form, which was accepted into evidence without objection and was completed and accepted pursuant to the agency's standard policy, reads as follows:

13. Please list the reason(s) for your actions which caused you to be discharged or suspended? HABIT

14. Do you admit to being involved in the incident, which caused your separation? Y

....

20. Please provide the reason(s) you were given for being discharged or suspended? LOSS OF TRUST.

C.R., Item No. 2 at 3.

burden that it had a rule in place and that Claimant violated that rule. Further, even though the employee who made notes on the records that Employer received from BP did not testify, Mr. Tait was competent to testify about those records. During Mr. Tait's January 2010 meeting with Claimant, Tait had Claimant confirm that his specific credit card number matched the relevant number on the statements with the non-fuel charges. Any alleged failure on Employer's part to further corroborate its evidence goes to the weight of the evidence, which is within the purview of the fact-finder. *Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review*, 949 A.2d 338 (Pa. Cmwlth. 2008).

Claimant next argues that the Board erred in concluding that his conduct constituted willful misconduct. Whether a claimant's conduct constitutes willful misconduct is a question of law over which we exercise plenary review. *Frazier v. Unemployment Comp. Bd. of Review*, 833 A.2d 1181 (Pa. Cmwlth. 2003). Further, "[i]t is not necessary that an employer's reasonable order or directive be written in order for the Court to determine that an employee's violation thereof constitutes willful misconduct: an employer may deal with its employees on a non-written basis and expect its directives to be followed." *Graham*, 840 A.2d at 1057.

In the present case, Claimant's deliberate violation of Employer's rule not to use the company credit card for non-fuel purposes demonstrated his willful disregard of Employer's stated interest in having its cards used only for fuel. Employer warned Claimant once before about his "habit," Claimant refrained from making non-fuel purchases for a while and then proceeded to do so once again. Where an employer has previously warned an employee regarding a work rule, its prior tolerance of any violations does not justify a claimant's subsequent violations

and those subsequent violations can constitute willful misconduct. *Love v. Unemployment Comp. Bd. of Review*, 434 A.2d 1336 (Pa. Cmwlth. 1981). Here, the evidence accepted by the Board as credible amply supports its conclusion that Claimant was discharged for willful misconduct.

Next, Claimant argues that the referee erred in refusing to permit him to submit his testimony by telephone or otherwise to rebut Employer's evidence. Specifically, he asserts that he was entitled to confront the persons who asserted that his actions constituted willful misconduct and to refute Employer's hearsay evidence.

In response, the Board points out that in requesting on the day of the hearing that Claimant be able to testify by telephone, his counsel for the first time indicated that Claimant would be unable to appear because his new employer would not permit him to leave work. It further points out that Claimant in his brief to this Court, also for the first time, asserted that his new employer initially advised him that he could attend the hearing, but broke its promise on the morning of the hearing. Because Claimant's counsel never specifically articulated this more specific reason to the referee on the morning of the hearing or in his appeal to the Board, the Board maintains that Claimant failed to preserve this challenge to the Board's refusal to allow him to testify by telephone or otherwise. Pa. R.A.P. 1551(a); *Schneider v. Unemployment Comp. Bd. of Review*, 12 A.3d 754 (Pa. Cmwlth.), *appeal denied*, ___ Pa. ___, 14 A.3d 830 (2010). Finally, the Board submits that because Claimant's counsel nonetheless agreed to proceed without him, there is no basis for this Court to grant Claimant's request for a remand hearing.

We conclude that the referee did not err in refusing the request of Claimant's counsel that Claimant be permitted to submit testimony via telephone. None of the regulations generally applicable to telephone hearings were followed. *See* 34 Pa. Code §§ 101.127-101.133. In addition, it is within the discretion of the referee to determine whether a proffered reason is "compelling" when considering a request to schedule testimony by telephone.⁷ As the Board noted, there were numerous requests for continuances granted in this case and Claimant initiated two of them. C.R., Item Nos. 9 and 15. In any event, a referee is permitted to hold a hearing in the absence of a party who has been duly notified of the date, hour and place of the hearing but has failed to appear without proper cause. 34 Pa. Code § 101.51.

Finally, we agree that the Board did not abuse its discretion in denying Claimant's request for a remand hearing. A request to offer additional evidence at another hearing is properly denied unless it can be shown that the additional evidence was unavailable at the time of the referee's hearing. *Flores v. Unemployment Comp. Bd. of Review*, 686 A.2d 66 (Pa. Cmwlth. 1996).

⁷ In pertinent part, the applicable regulation provides as follows:

(b) The tribunal *may* schedule testimony by telephone of a party or witness, at the request of one or more parties, when one of the following applies:

....

(2) The party or witness is *reasonably* unable to testify in person due to a compelling employment, transportation, or health reason, or other compelling problem.

34 Pa. Code § 101.128(b)(2) (emphasis added).

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

BONNIE BRIGANCE LEADBETTER,
President Judge

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	:	
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ORDER

AND NOW, this 14th day of June, 2011, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge