IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Angela Oakley,	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation Board	:	
of Review,	:	No. 2820 C.D. 2010
Respondent	:	Submitted: May 20, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: June 13, 2011

Angela Oakley (Claimant) petitions *pro se* for review of the order of the Unemployment Compensation Board of Review (Board) reversing the decision of the Unemployment Compensation Referee (Referee) and finding her ineligible for benefits under Section 402(e) of the Unemployment Compensation Law[1] (Law)

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). That section provides, in pertinent part:

> An employe shall be ineligible for compensation for any week –
>
> (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in this act.

(Footnote continued on next page…)

because her actions amounted to willful misconduct. Finding no error in the Board's decision, we affirm.

Claimant was employed full-time as a licensed practical nurse (LPN) with Ashton Health Care (Employer) from September 23, 2009, until May 14, 2010, with a final rate of pay of $15.67 per hour. Employer terminated her employment for not following proper protocol and for unsafe nursing practices stemming from Claimant's treatment of a diabetic patient on May 13, 2010. Claimant filed an unemployment compensation claim, which the Department of Labor and Industry's Office of UC Benefits denied, finding Claimant ineligible for benefits under Section 402(e) of the Law because her actions showed a disregard of the standards of behavior that the Employer had the right to expect of its

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While the term "willful misconduct" is not specifically defined in the Law, the Supreme Court of Pennsylvania has provided the following definition:

> (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.

Grieb v. Unemployment Compensation Board of Review, 573 Pa. 594, 827 A.2d 422 (2003) (citing *Navickas v. Unemployment Compensation Review Board*, 567 Pa. 298, 787 A.2d 284 (2001)). To show willful misconduct, an employer must present evidence that the employee's conduct was intentional and deliberate, not just that the employee committed a negligent act. *Grieb*, 573 Pa. at 600, 827 A.2d at 426. The court must consider all the facts and circumstances when making this determination, including the employee's proffered reasons for non-compliance.

employees, and Claimant failed to demonstrate good cause for her actions. Claimant appealed this decision to the Referee.

Before the Referee, Robert Nichols (Mr. Nichols), Employer's interim director of nursing, testified that Claimant was discharged for not following Employer's established protocol and for unsafe nursing practices which put residents at risk. Specifically, on May 13, 2010, Claimant was treating a resident who was a known diabetic and whose blood sugar test had a reading of 87 milligrams per deciliter. Mr. Nichols stated that while this test result was within the normal range, Claimant gave the resident oral glucose causing the resident's blood sugar level to reach 328 milligrams per deciliter. He stated that this was a very high, dangerous level which could have resulted in coma or death, and the resident had to be given insulin to bring her blood sugar back down to within the normal range. Mr. Nichols testified that Employer's protocol for diabetic residents is posted on the unit and is contained in Employer's medication books. According to this protocol, a normal blood sugar level is usually between 70 and 99 milligrams per deciliter, and diabetic residents are not to be given oral glucose unless their blood sugar drops to below 55 and they are symptomatic. Claimant's notes regarding the resident did not say anything about the resident exhibiting symptoms of low blood sugar or provide any reason why Claimant disregarded Employer's protocol.

Mr. Nichols also testified that Claimant was previously written up for refusing to check the blood sugar level of a known diabetic patient. Employer's diabetic protocols were discussed with Claimant at that time. Claimant received a

separate write-up on May 6, 2010, for falsification of records and not following protocol with another diabetic resident. Because of Claimant's actions, the resident's blood sugar level dropped to a level requiring treatment.

Claimant testified that she had been treating this particular resident for eight months and that the resident was a "brittle" diabetic, meaning her blood sugar routinely fluctuated and could drop quickly – one minute it was high and the next it was low. When she initially tested the resident's blood sugar at 4:40 p.m., it was 87, which Claimant admitted was within the normal level. However, the resident was leaning over in her bed, moaning, and Claimant could not arouse her or get her to appropriately answer questions. Given these symptoms, Claimant administered oral glucose gel to the resident. Claimant testified that she tested the resident's blood sugar again at 5:00 p.m. and it was 148. At that time, the resident was sitting up in her bed and was able to answer Claimant. At some point after this, the resident ate dinner. When Claimant re-tested the resident's blood sugar at 8:00 p.m., it had spiked to 328 and the resident had to be administered insulin. Claimant stated that when a brittle diabetic ate, her blood sugar went up; therefore, Claimant argued that it was not necessarily the glucose gel that she administered that made this resident's blood sugar spike; it could just have been the fact that the resident ate dinner. Claimant testified that when she reported for work the next day, she was pulled into a meeting with three other employees. Claimant was shown a guideline or protocol on diabetic treatment at this meeting, and she denied ever having seen the protocol before. After that, Claimant was told that she was being fired based upon her unsafe practices.

On cross-examination, Claimant admitted that she did not look at the prior nurse's notes in the resident's chart which indicated that the resident had been treated for both pain and anxiety during the prior shift. The resident had been given pain medication that afternoon, which Claimant admitted could cause the resident to become tired and confused, symptoms which Claimant attributed to her blood sugar level. Claimant admitted that if she had known about the resident's prior treatment, she would have sought the input of the nursing supervisor before treating her with glucose gel. She also admitted that it would have been better to offer the resident orange juice or a snack rather than giving her the glucose gel which could quickly boost the resident's blood sugar level.

The Referee found that Claimant administered oral glucose to the resident despite the fact that the resident's blood sugar level was 87 and despite the fact that Claimant knew the resident was a "brittle" diabetic and her blood sugar levels would spike continuously throughout the day. The Referee also found that Claimant had been given previous warnings regarding her treatment of patients with blood sugar problems. However, the Referee reversed the decision of the Office of UC Benefits and found Claimant eligible for benefits because she had a reasonable explanation for her actions. Specifically, the Referee noted that the resident's blood sugar was known to spike after she ate and stated, "the fact that the [resident] ate raised her blood sugar to an extremely high level and would have occurred regardless of the [C]laimant's action." (Referee's September 21, 2010 Decision at 2.)

Employer appealed to the Board, which reversed the Referee's decision and denied benefits. The Board held that Employer had established protocols for the treatment of diabetic residents, and Claimant was previously counseled by Employer for failing to adhere to these protocols. The Board also held that Claimant administered oral glucose to the resident despite the fact that the resident's blood glucose level was within the normal range and this caused a dangerous spike in her blood sugar, requiring treatment with insulin. While Claimant asserted that she administered the glucose gel because of the resident's symptoms, Claimant admitted that she did not read the previous entries in the resident's chart stating that she had received medication which could have accounted for her symptoms. The Board also noted that Claimant admitted that she should have provided the resident with orange juice or a snack before proceeding directly to oral glucose. Given these facts, the Board found that Claimant was ineligible for benefits because Employer met its burden of proving willful misconduct, and Claimant had not justified her failure to follow Employer's established diabetic protocols. Claimant submitted a request for reconsideration, which the Board denied, and this appeal followed.[2]

On appeal, Claimant basically argues that the Board's finding that she engaged in willful misconduct is not supported by substantial evidence. Substantial evidence has been defined as "such relevant evidence as a reasonable

[2] Our review of the Board's decision is limited to determining whether there was a constitutional violation or error of law, whether any practice or procedure of the Board was not followed, and whether the necessary findings of fact are supported by substantial evidence. *Glenn v. Unemployment Compensation Board of Review*, 928 A.2d 1169, 1171 n.1 (Pa. Cmwlth. 2007).

mind might accept as adequate to support a finding of fact." *Seton Co. v. Unemployment Compensation Board of Review*, 663 A.2d 296, 299 n.3 (Pa. Cmwlth. 1995).

The Board denied benefits because under Employer's posted diabetic protocol, no medical treatment is required unless a patient's blood sugar level drops below 55. Claimant admitted that the resident's blood sugar level was 87 – within the normal range and not indicated for treatment under Employer's protocol. Despite this fact, Claimant administered fast acting oral glucose gel to the resident causing her blood sugar to spike to a dangerous level which could have resulted in coma or death. Claimant admitted that she did not read the prior nurse's notes on this resident's chart, and that if she would have known that the resident had received medication and treatment for anxiety and pain, she would not have administered the glucose gel. Claimant also admitted during her testimony that she should have attempted to give the resident orange juice or a snack before administering the glucose gel. Finally, the Board found that Claimant had been warned for failing to follow Employer's diabetic protocols on previous occasions and that she was counseled on the proper procedures. "A conclusion that the [claimant] has engaged in disqualifying willful misconduct is especially warranted in such cases where, as here, the employee has been warned and/or reprimanded for prior similar conduct." *Department of Transportation v. Unemployment Compensation Board of Review*, 479 A.2d 57, 58 (Pa. Cmwlth. 1984).[3]

[3] In her brief, Claimant also argues that Employer did not have a specific policy in place for the treatment of "brittle" or unstable diabetics, only guidelines for healthy, stable diabetics. According to Claimant, treatment of unstable and stable diabetics differs, and she followed the proper procedures for treating an unstable diabetic resident. In making this argument, Claimant
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Accordingly, because there was more than substantial evidence to support the Board's conclusion that Claimant disregarded Employer's diabetic protocols, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

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relies upon facts which are not in the record, and the Board did not find Claimant to be credible but instead credited the testimony of Employer's witness. The Board is the ultimate fact-finder, empowered to determine the credibility of witnesses and resolve conflicts in evidence. *Metropolitan Edison Co. v. Unemployment Compensation Board of Review*, 606 A.2d 955, 957 (Pa. Cmwlth. 1992). Finally, with regard to this particular issue, Claimant failed to raise this issue before the Board or in her petition for review, and we have repeatedly held that failure to do so, even by a *pro se* claimant, constitutes waiver of that issue. *See McDonough v. Unemployment Compensation Board of Review*, 670 A.2d 749, 750 (Pa. Cmwlth. 1996); *Reading Nursing Center v. Unemployment Compensation Board of Review*, 663 A.2d 270, 275 (Pa. Cmwlth. 1995). Therefore, this issue will not be considered by the Court.

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O R D E R

AND NOW, this 13th day of June, 2011, the order of the Unemployment Compensation Board of Review, dated December 13, 2010, is affirmed.

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DAN PELLEGRINI, JUDGE