

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Donyell Gholston,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 437 C.D. 2011
	:	Submitted: July 22, 2011
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: September 19, 2011

Donyell Gholston (Claimant), representing himself, petitions for review from an order of the Unemployment Compensation Board of Review (Board) that denied his claim for benefits under Section 402(e) of the Unemployment Compensation Law (Law) (relating to willful misconduct).¹ Claimant contends the Board’s findings were not supported by substantial evidence, and he did not engage in willful misconduct as a matter of law. Because Claimant failed to properly preserve either issue for appeal, we affirm.

I. Background

Claimant worked for The Fresh Grocer (Employer) as a full-time driver from March 19, 2009, until August 20, 2010. During that time, Employer

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

maintained a published vehicle policy that prohibited the use of company vehicles by off-the-clock employees. Claimant was aware of the vehicle policy, and, in an unrelated incident in January, 2010, was suspended for violating a provision of the policy.

On August 26, 2010, Employer instructed Claimant to drive a company truck from one of Employer's stores in Philadelphia to one of Employer's stores in Delaware to make a delivery. Following the delivery, Employer required Claimant return the company vehicle to the Philadelphia location. As directed, Claimant drove to the Delaware store and made the delivery. After the delivery, at approximately 10:00 p.m., Claimant clocked out at the Delaware store. While he was off the clock Claimant drove the company vehicle, eventually returning it to the Philadelphia store between 12:00 a.m. and 6:00 a.m.

The next day, Mary Touch (Employer's Witness), Employer's facilities assistant, asked Claimant why he clocked out in Delaware the previous night; Claimant did not give a direct answer. Notes of Testimony, 11/17/10 (N.T.), at 5. When further questioned about getting back late, Claimant admitted he had stopped to see a friend. Id. At that time, Employer discharged Claimant for violating the vehicle policy that prohibited employees from driving company vehicles when not on the clock.

Following his discharge, Claimant applied for unemployment benefits, which were initially granted. Employer appealed.

At a hearing before a referee, Employer presented one witness, the facilities assistant during the incident, and Claimant testified on his own behalf. Ultimately, the referee found Claimant ineligible for benefits under Section 402(e). The referee concluded: 1) Employer had a vehicle policy prohibiting the use of company vehicles by off-the-clock employees; 2) Claimant was aware of the policy; 3) Claimant drove a company vehicle after clocking out; and, 4) Claimant offered no plausible justification for his conduct. The referee determined Claimant's violation of Employer's vehicle policy constituted willful misconduct, and thus, Claimant was ineligible for benefits under Section 402(e). Claimant appealed.

On appeal, the Board affirmed and made substantially similar findings to those of the referee. Further, the Board explained:

In this case, [E]mployer testified credibly that it has a policy permitting the use of company vehicles only when employees are clocked in and working. [C]laimant was aware of the policy and admits that he drove [E]mployer's vehicle after clocking out for the night. The burden now shifts to [C]laimant to demonstrate that either he had good cause to disregard [E]mployer's policy or that the policy was unreasonable.

The Board finds [C]laimant's testimony that he clocked out at the Delaware location to save [E]mployer overtime incredible. [C]laimant provides no evidence that he has good cause to disregard [E]mployer's policy or that the policy was unreasonable. Therefore, benefits must be denied under Section 402(e), insofar as [C]laimant failed to meet his burden.

Bd. Op., at 2-3. Claimant petitions for review.

II. Issues

In his brief, Claimant raises two issues. First, he contends the record does not support the Board's finding that he violated a work rule. Second, Claimant argues the Board erred in determining he committed willful misconduct as a matter of law.

The Board responds that Claimant failed to preserve any challenges to the Board's findings and determinations in his petition for review, and further, Claimant's actions constituted willful misconduct as a matter of law.

III. Discussion

This Court first addresses whether Claimant preserved any challenges for review. A petition for review must conform to the requirements of Pa. R.A.P. 1513(d). See Maher v. Unemployment Comp. Bd. of Review, 983 A.2d 1264 (Pa. Cmwlth. 2009) (*en banc*). At a minimum, to preserve a claim for appeal, a petition for review must provide "a general statement of objections to the order or other determination." Pa. R.A.P. 1513(d). Where a claimant's petition fails to raise a challenge to any of the Board's specific findings or the issue of willful misconduct the result is waiver of those issues. Maher (citing Patla v. Unemployment Comp. Bd. of Review, 962 A.2d 724 (Pa. Cmwlth. 2008) and Deal v. Unemployment Comp. Bd. of Review, 878 A.2d 131 (Pa. Cmwlth. 2005)); Jimoh v. Unemployment Comp. Bd. of Review, 902 A.2d 608 (Pa. Cmwlth. 2006).

Here, in his petition for review, Claimant does not challenge any of the Board's factual findings. Rather, Claimant submits documents not contained in the certified record in an attempt to challenge the Board's ultimate conclusion. Specifically, Claimant's petition for review provides:

The Order of the Unemployment Compensation Board of Review should be reversed because:

I Donyell Gholston am sending in policy signed at date of hire that shows no direct violation of company policy, [sic] car registration of my vehicle that was parked at 40th St. store where [sic] I was from and worked, and proof of airport ticket for my daughter that supposed to have been ok, but I was still written up Jan. 2010 when given permission by night manager for the emergency pick up of my child.

[S]worn statement attached... We are ready to go to channel NBC 10 News with my story on this company...

Claimant's Pet. for Review, 2/19/11, at ¶ 3.

Based on the statements in his petition for review, we are unable to discern any issues raised by, or fairly comprised within Claimant's petition that relate to the August 2010 incident for which he was terminated. Moreover, the above-referenced company policy (a driver agreement), car registration, airport ticket, and sworn statement were not submitted to the referee and were not before the Board for its determination; therefore, we cannot consider these documents. See Grever v. Unemployment Comp. Bd. of Review, 989 A.2d 400 (Pa. Cmwlth. 2010). As such, Claimant's arguments that the Board's determinations were not

supported by substantial evidence, and that his actions did not constitute willful misconduct are waived. Maier.

Moreover, Claimant's assertions that substantial evidence does not support the Board's factual findings and that his actions did not amount to willful misconduct lack merit.

Substantial evidence is defined as evidence that a reasonable mind might accept as sufficient to support the conclusion reached. Bruce v. Unemployment Comp. Bd. of Review, 2 A.3d 667 (Pa. Cmwlth. 2010); Tapco, Inc. v. Unemployment Comp. Bd. of Review, 650 A.2d 1106 (Pa. Cmwlth. 2004). Moreover, the Board is the exclusive fact finder in unemployment cases; thus, all determinations of credibility and evidentiary weight fall within its province. Id.

Here, the record contains substantial evidence to support the Board's findings and determinations. Specifically, at the referee hearing, both Employer's Witness's testimony, and Claimant's testimony supported a finding that Employer maintained a vehicle policy, and Claimant violated the policy when he drove a company vehicle after he clocked out. N.T. at 4, 6, 11-12. Additionally, evidence that Employer previously suspended Claimant for violating the vehicle policy was uncontested, which provided further proof of the policy, and Claimant's knowledge of its requirements. N.T. at 6-8. Therefore, the burden shifted to Claimant to provide good cause for his violation. Claimant advanced an explanation to establish he had good cause; however, the Board rejected his testimony as not credible. Referee Dec., 11/29/10, at 2; Bd. Op., 2/9/11, at 2-3.

In short, viewing the evidence in the light most favorable to Employer, the prevailing party, the record supports the Board's findings that: 1) Employer maintained a work rule permitting the use of company vehicles only when employees were clocked in; 2) Claimant was aware of the policy; and, 3) Claimant drove a company vehicle while off the clock in violation of the vehicle policy. Bd. Op., 2/9/11., Findings of Fact Nos. 2-9.

Moreover, we conclude that Employer's policy is reasonable. In this regard, we accept the Board's contention that the policy implicitly requires a driver to clock out only after returning the assigned vehicle to the proper location. See Bd.'s Br. at 11. The policy protects the Employer from insurance coverage and liability questions which could arise if an accident occurs while its vehicle is operated by an off-the-clock employee.

Also, the Board did not err in determining Claimant failed to carry his burden to establish good cause for his conduct. Accordingly, Claimant's argument contesting the sufficiency of the evidence fails.

Finally, we discern no error in the Board's determination that Claimant's actions rose to the level of willful misconduct.² A claimant's violation

² Section 402(e) of the Law provides, "[a]n employee shall be ineligible for compensation for any week ... [i]n which his unemployment is due to his discharge...from work for willful misconduct connected with his work" 42 P.S. §802(e). Whether a claimant's conduct rises to the level of willful misconduct is a question of law fully reviewable on appeal. Caterpillar, Inc. v. Unemployment Comp. Bd. of Review, 550 Pa. 115, 703 A.2d 452, 456 (1997). "Our Supreme Court defines willful misconduct as behavior that evidences a willful disregard of the employer's **(Footnote continued on next page...)**

of a known, reasonable vehicle policy without good cause is willful misconduct. See Smith v. Unemployment Comp. Bd. of Review, 508 A.2d 1281 (Pa. Cmwlth. 1986) (holding willful misconduct existed when an employee admitted he knew a work rule and violated it by using a company vehicle at an unauthorized time without good cause). Based on the Board’s factual findings, which, as discussed above, are supported by substantial evidence, Claimant violated a known vehicle policy without good cause. Therefore, the Board’s determination of willful misconduct must be affirmed. Accordingly, we affirm.

ROBERT SIMPSON, Judge

(continued...)

interest, a deliberate violation of the employer’s work rules, or a disregard of standards of behavior that the employer can rightfully expect from its employees.” Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338, 341 (Pa. Cmwlth. 2008) (citing Caterpillar, Inc.).

When an employer asserts a violation of a work rule as grounds for finding willful misconduct, the employer must prove the existence of a known, reasonable rule and a violation of that rule. Ductmate Indus.; Williams v. Unemployment Comp. Bd. of Review, 926 A.2d 568 (Pa. Cmwlth. 2007); Bishop Carroll High School v. Unemployment Comp. Bd. of Review, 557 A.2d 1141 (Pa. Cmwlth. 1989) (en banc). If the employer proves the existence and violation of a known work rule, the burden shifts to the claimant to show either the rule was unreasonable, or there was good cause for violating it. Docherty v. Unemployment Comp. Bd. of Review, 898 A.2d 1205 (Pa. Cmwlth. 2006). This Court defines “good cause” as justifiable or reasonable actions taken under the circumstances confronting a claimant. Id.

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ORDER

AND NOW, this 19th day of September, 2011, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge