

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brandon Sapp,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 442 C.D. 2010
	:	Submitted: November 12, 2010
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: January 19, 2011

Brandon Sapp (Claimant) petitions for review, *pro se*, of the January 25, 2010, order of the Unemployment Compensation Board of Review (UCBR) affirming the decision of the referee to deny his request for unemployment compensation benefits. The UCBR determined that Claimant was not entitled to benefits because his discharge was the result of willful misconduct under section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.

Claimant worked as a full-time operations supervisor of support services at CNH America, LLC (Employer) from January 28, 2008, until his discharge on

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). Section 402(e) of the Law provides that an 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.” 43 P.S. §802(e).

August 3, 2009. (UCBR's Findings of Fact, No. 1.) Employer's code of conduct provides that employees shall use company assets or resources within their care or control efficiently and in a manner that protects their value. The code also prohibits employees from using assets or resources in a manner contrary to Employer's interest. (UCBR's Findings of Fact, No. 2.) Claimant was aware of Employer's policy. (UCBR's Findings of Fact, No. 3.)

On July 30, 2009, Employer learned that a customer had ordered a part and that Claimant later called the customer and said that if the customer wanted to cancel the order, Claimant could sell the customer the same part at a reduced price. (UCBR's Findings of Fact, No. 4.) The part was shipped from Employer's facility, and the customer reported the transaction to Employer. (UCBR's Findings of Fact, Nos. 5-6.) Upon further investigation, Employer verified that: (1) the original order had been cancelled; (2) the part was missing from its current inventory; (3) the part had been shipped from its facility to the customer; and (4) Employer neither billed the customer nor received payment for the part. (UCBR's Findings of Fact, Nos. 7-10.) On August 3, 2009, Employer terminated Claimant for using company assets contrary to Employer's interest in violation of the code of conduct. (UCBR's Findings of Fact, No. 11.)

Claimant filed a claim for unemployment compensation benefits, which was denied by the local service center. Claimant appealed to the referee, who held an evidentiary hearing on October 15, 2009. Paul DeAngelis, Employer's facility manager and Claimant's direct supervisor, testified that Employer's code of conduct provides that employees shall use company assets and resources within their care or

control efficiently and in a way that protects their value. (N.T., 10/15/09, at 13-14, Ex. E-1 at 10.) The code of conduct also prohibits employees from using company assets in a manner that might be contrary to Employer's interest. (*Id.*) DeAngelis testified that he first learned about Claimant's furtive dealings with customers when a Virginia customer had called Employer to report that it had ordered a part, after which Claimant called the customer and said that he could sell the customer the same part at a reduced price. (*Id.* at 8, 10.) Upon further investigation, DeAngelis discovered that Claimant had engaged in similar dealings with other customers. (*Id.* at 12, 15-17.) After reviewing Employer's sales and shipment records, DeAngelis learned that: (1) another customer's order for a part had been cancelled; (2) the part was missing from Employer's inventory; (3) the part was shipped from Employer's facility to the customer; and (4) Employer neither billed the customer nor received payment for the part. (*Id.* at 15-17, Exs. E-4a to E-4d.) DeAngelis also admitted into evidence a check that Employer had received from the same customer in the amount of \$1,000.00, which was made payable to Claimant. (*Id.* at 15, 17, Ex. E-4.)²

Claimant testified that a Selinsgrove customer had received a part from Employer that it could not use, but Employer would not accept its return. Claimant knew that a customer in Virginia needed the same part, so Claimant offered to sell the part to the Virginia customer at a reduced price. (*Id.* at 21.) Claimant testified that he

² As the UCBR points out, much of DeAngelis's testimony was based on hearsay. Claimant, however, did not raise any objections during his testimony at the time of the hearing. "[H]earsay evidence, admitted without objection, will be given its natural and probative effect and may support a finding, if corroborated, by any competent evidence of the record." *Estate of Fells by Boulding v. Unemployment Compensation Board of Review*, 635 A.2d 666, 669 (Pa. Cmwlth. 1993). As the UCBR found, DeAngelis's testimony was sufficiently corroborated by other evidence of record, including Claimant's own testimony. (*See* UCBR's Decision & Order at 3.)

received the part from the Selinsgrove customer, inspected it by comparing it to a part in Employer's inventory, and then shipped the part to the Virginia customer. (*Id.* at 22.) According to Claimant, the Virginia customer sent Claimant a check made payable to the Selinsgrove customer, which Claimant then forwarded to the Selinsgrove customer. (*Id.*) Claimant further testified that the part missing from Employer's inventory was the one he had used for comparison and that he had returned it to quality control. (*Id.* at 26.) Claimant admitted that he participated in similar transactions on two other occasions. (*Id.* at 25.) Claimant testified that he never personally benefited from these transactions and that he participated in them because he believed they would benefit Employer. (*Id.* at 24-25, 27.) He also testified that he never told DeAngelis about the transactions. (*Id.* at 25.) The referee ultimately concluded that Claimant engaged in willful misconduct and affirmed the denial of benefits.

Claimant timely appealed to the UCBR, which affirmed the referee's decision. The UCBR found sufficient evidence that Claimant had used Employer's assets, including the part and the facility to ship the part, in a manner contrary to Employer's interest. The UCBR specifically rejected Claimant's testimony that he intended to benefit the company as not credible. Therefore, the UCBR concluded that Claimant was discharged for willful misconduct under section 402(e) of the Law. Claimant now petitions for review of that decision.³

³ Our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Claimant asserts that the UCBR's finding of willful misconduct was unsupported by substantial evidence.⁴ We disagree.

“Willful misconduct” is defined as: (1) wanton and willful disregard of the employer's interests; (2) deliberate violation of the rules; (3) disregard of standards of behavior that an employer rightfully can expect from its employees; or (4) negligence that manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or the employee's duties and obligations. *Andrews v. Unemployment Compensation Board of Review*, 633 A.2d 1261, 1262 (Pa. Cmwlth. 1993). When an employee is discharged for violating a work rule, the employer has the burden of proving that the employee knew of the existence of the work rule and that he or she violated the rule. *Roberts v. Unemployment Compensation Board of Review*, 977 A.2d 12, 16 (Pa. Cmwlth. 2009). The burden then shifts to the employee to establish that he or she had good cause for the violation or that the rule itself was unreasonable. *Id.*

⁴ Although this claim is not stated as such in his petition for review, we believe that it is fairly comprised therein. See Pa. R.A.P. 1513(d) (stating that statement of objections in a petition for review is “deemed to include every subsidiary question fairly comprised therein”). Claimant raises the following issue in his petition:

The facts given by the employer (CNH) were inaccurate. Inventory from the company was neither taken nor missing; and I never intended to nor expected to profit from any transaction. I was simply assisting one of our customers but unknowingly went against some kind of undefined company policy in doing so.

(Petition for Review at 1 (emphasis in original).) Claimant also challenges the UCBR's willful misconduct finding in his brief. (Claimant's Brief at 7.) Thus, we will address this claim.

Here, the UCBR found that Employer's code of conduct prohibits employees from using company assets or resources in a manner contrary to Employer's interest and that Claimant was aware of this policy. Claimant admitted that he participated in the transactions at issue on several occasions and that he did not inform Employer about them. He merely claimed that he was brokering deals between customers for Employer's benefit, yet he never explained *how* such deals benefited Employer. Critically, the UCBR disbelieved Claimant's testimony, and we are bound by that credibility determination. Therefore, we conclude that the testimony credited by the UCBR provides substantial evidence to support the finding that Claimant deliberately violated Employer's code of conduct.

Claimant also challenges the referee's findings of fact and credibility determinations. However, when the UCBR makes its own factual findings, it is the UCBR's findings, not the referee's, that are subject to this court's review. *Allen v. Unemployment Compensation Board of Review*, 638 A.2d 448, 450 (Pa. Cmwlth. 1994). The UCBR is the ultimate fact-finder in unemployment compensation matters and is empowered to resolve conflicts in the evidence and determine witness credibility. *Id.* Therefore, we will not address these claims.

Finally, Claimant challenges certain evidentiary rulings made by the referee. We agree with the UCBR that these claims are waived. First, Claimant failed to object at the time of the hearing. Second, Claimant did not raise any evidentiary issues in his petition for review. Therefore, they are waived. *See Tyler v. Unemployment Compensation Board of Review*, 591 A.2d 1164, 1168 (Pa. Cmwlth.

1991) (finding issue waived where claimant failed to include the issue in his petition for review but addressed it in his brief); Pa. R.A.P. 1513(d).

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brandon Sapp,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 442 C.D. 2010
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 19th day of January, 2011, we hereby affirm the January 25, 2010, order of the Unemployment Compensation Board of Review.

ROCHELLE S. FRIEDMAN, Senior Judge