

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James M. Vivolo, :
 :
 : Petitioner :
 :
 : v. : No. 468 C.D. 2009
 : Submitted: December 11, 2009
 :
 : Unemployment Compensation :
 : Board of Review, :
 : Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: February 9, 2010

James M. Vivolo (Claimant), proceeding *pro se*, petitions for review of the February 10, 2009, order of the Unemployment Compensation Board of Review (UCBR), which affirmed a referee's decision and denied Claimant benefits under 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) of the Law provides that a claimant shall be ineligible for benefits for any week in which his unemployment is due to discharge from work for willful misconduct connected with work. 43 P.S. §802(e). Although, here, the referee's order contains a typographical error providing that Claimant's benefits were denied under section 402(b) of the Law, 43 P.S. §802(b) (relating to the voluntary termination of employment for necessitous and compelling reasons), the referee clearly analyzed and determined the matter of Claimant's entitlement to benefits pursuant to section 402(e). Neither party mentions this error, which, in any event, is harmless.

The UCBR found in relevant part as follows. Claimant last worked as a full-time regional account executive for Mandi Foods, Inc. (Employer) on July 3, 2008. Claimant's job duties included selling Employer's manufacturers' products through distribution channels. Claimant was based in Cleveland, Ohio, but his territory extended from Cincinnati to Cleveland to Pittsburgh to Altoona. Employer held mandatory, monthly sales meetings, which enabled the sales force to interact with one another and discuss potential opportunities in different territories. Claimant was required to attend sales meetings unless he had an excused absence. From April 2007 to July 2008, Claimant missed seven out of fourteen sales meetings, with one absence excused due to attendance at a food show.

In February 2008, Employer lost most of one manufacturer's business in Ohio, and, a short time later, the company's owner warned Claimant about his job performance, stating that Claimant needed to be more involved and present at sales meetings. On June 26, 2008, Claimant's supervisor informed him of a July 1, 2008, sales meeting at Employer's Pittsburgh office and demanded Claimant's presence. Indicating that he was otherwise scheduled, Claimant refused to attend this meeting in person, preferring to participate by conference call. However, Claimant's calendar, which could be viewed by others in the office, did not show that he had any appointments scheduled on July 1st. Claimant also requested that he be given one to two weeks' notice of sales meetings, although his supervisor believed Claimant should report to these meetings when they were scheduled.

Claimant took an approved vacation from July 3, 2008, through July 13, 2008. On the evening of July 13th, Claimant called his supervisor's office phone and

left a voice mail message stating that Claimant had injured his back while brushing his teeth. Claimant did not call his supervisor's cell phone, although Employer had provided the number to him, and Claimant previously had contacted his supervisor in this manner. Claimant also left two voice mail messages for the executive secretary,² further indicating that he injured his back while brushing his teeth.

Claimant was scheduled to attend a sales meeting at Employer's Pittsburgh office on July 14, 2008; initially, Claimant was supposed to pick up one of Employer's manufacturers' representatives from the Cleveland airport and drive him to the meeting. However, this representative called Claimant's supervisor at 8:00 a.m. on July 14th and indicated that he had changed his schedule to fly into Pittsburgh; he asked how he would be transported to Employer's office and questioned whether he should come at all given Claimant's injury.³ At the time, Claimant's supervisor was still unaware of this change of plans or that Claimant had suffered an injury on the previous day.

Claimant thereafter faxed Employer a doctor's note indicating that Claimant was to be excused from work indefinitely, beginning July 14, 2008. Employer accepted this note, despite the fact that it did not contain the physician's letterhead or his signature. Employer's secretary then sent Claimant information relating to Employer's short-term disability policy. The secretary explained that there

² Claimant apparently left these messages beginning July 14th. (Notes of Testimony (N.T.), Referee's hearing, October 15, 2008, at 34.)

³ The record reflects that Claimant contacted the manufacturer's representative about his injury. (N.T. at 47.)

is a twenty-nine-day elimination period during which employees do not receive pay; however, employees subsequently become eligible to receive sixty percent of their salary for the remainder of the time that they are on leave. The secretary proposed that Claimant use some of his vacation days toward the elimination period, but Claimant was not satisfied and suggested that he should be paid sick time.

On July 17, 2008, Claimant called Employer and informed the secretary and his supervisor that he actually hurt his back while pushing a company car after the car's battery had died. On July 21, 2008, Employer discharged Claimant for poor work performance, for missing sales meetings and for dishonesty. (UCBR's Findings of Fact Nos. 1-31.)

The local job center granted Claimant's application for unemployment compensation benefits; however, on appeal by Employer, the referee reversed.⁴ Following Claimant's appeal, the UCBR resolved the relevant conflicts in the testimony in Employer's favor, specifically noting that: (1) Employer's witnesses "credibly testified that the claimant's failure to physically attend sales meetings contributed to an overall poor sales performance in the Ohio region," (UCBR's op. at 4); (2) Claimant's supervisor credibly testified that Claimant was warned to appear at sales meetings but, even so, Claimant refused to appear at the July 1, 2008, meeting without good cause; and (3) Employer discharged Claimant "because he changed his

⁴ The local job center determined Claimant to be eligible for benefits under section 402(b). At the hearing before the referee, the parties agreed that Claimant had been discharged, and the referee proceeded to consider the matter under section 402(e), without objection by either side. (N.T. at 8-9.)

story about the manner in which he sustained a back injury, and the employer concluded that the claimant had been dishonest.” (UCBR’s op. at 5.) With respect to the missed sales meeting on July 1st, the UCBR specifically discredited Claimant’s testimony that he had a previously scheduled appointment on that day. The UCBR also specifically discredited Claimant’s assertion that he injured his back while pushing Employer’s car, but this injury only became fully manifest while Claimant was brushing his teeth. Consequently, the UCBR affirmed the denial of benefits.⁵ Claimant now petitions this court for review.⁶

In his statement of the questions involved, Claimant asks whether the UCBR erred by “capriciously” disregarding competent evidence favorable to him⁷ and by determining that sufficient evidence did not exist to support Claimant’s assertion that all of his absences from sales meetings were excused.⁸ Claimant also

⁵ The Board denied reconsideration by order mailed March 18, 2009.

⁶ Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

⁷ When considering whether the UCBR has capriciously disregarded competent evidence, the court decides if the agency deliberately disregarded competent evidence that a person of ordinary intelligence could not conceivably have avoided in arriving at a result, or, in other words, if the UCBR willfully or deliberately ignored evidence that any reasonable person would have deemed important. *Jackson v. Unemployment Compensation Board of Review*, 933 A.2d 155 (Pa. Cmwlth. 2007).

⁸ Given the somewhat nebulous mix of allegations raised by Claimant in both his petition for review and his statement of the questions involved, we admit to giving Claimant wide latitude with respect to his proper preservation of evidentiary issues. *See* Pa. R.A.P. 1513 (concerning petitions for review) and Pa. R.A.P. 2116 (relating to statements of questions involved).

asks whether the referee failed to provide him with the assistance required by due process and Pennsylvania law.

Initially, we note that an employer bears the burden of proving willful misconduct.⁹ *Perez v. Unemployment Compensation Board of Review*, 736 A.2d 737 (Pa. Cmwlth. 1999). Once that burden is met, the burden shifts to an employee to show good cause for his or her actions. *Id.* Moreover, a claimant who has been discharged for more than one reason is disqualified from receipt of benefits even if only one of those reasons rises to the level of willful misconduct. *Glenn v. Unemployment Compensation Board of Review*, 928 A.2d 1169 (Pa. Cmwlth. 2007).

Claimant first argues that the UCBR ignored competent evidence in his favor. According to Claimant, the physician's note excusing Claimant from work beginning on July 14, 2008, was excluded from evidence; the UCBR did not permit him to testify regarding his conversation with Employer's manufacturer's representative; the UCBR improperly disregarded evidence of Claimant's excellent work performance; the UCBR failed to consider that the company manual did not include an absenteeism policy; and the UCBR ignored evidence that the company calendar, along with Claimant's testimony, refuted Employer's allegations of missed

⁹ While not statutorily defined, the courts have defined "willful misconduct" under section 402(e) as behavior evidencing wanton and willful disregard of an employer's interest, deliberate violation of an employer's rules, disregard of standards of behavior which an employer can rightfully expect from its employees, negligence that manifests culpability, wrongful intent, evil design or intentional disregard for an employer's interests or an employer's duties and obligations. *Perez*.

sales meetings. After review of the record, we are satisfied that Claimant's contentions are unavailing.

First, contrary to Claimant's assertion, the physician's note was entered into the record. (*See* N.T. at 4-8.) Moreover, although this note may provide Claimant with an excuse for his absence from the July 14, 2008, sales meeting and beyond, it obviously does not aid Claimant in proving that he had good reason for missing the July 1, 2008, sales meeting. The note also does nothing to prove that Claimant was truthful regarding the cause of his back injury. In fact, Claimant had ample opportunity to explain how he eventually arrived at the conclusion, through discussions with his doctor, that the act of pushing Employer's car, rather than the act of brushing his teeth, caused that injury, (N.T. at 59-72), but the UCBR did not credit that testimony.

Further, Claimant's desire to present testimony regarding his conversations with Employer's manufacturer's representative was properly denied on hearsay grounds.¹⁰ Moreover, even if admitted, such evidence related only to Claimant's work performance. It would not have been relevant to either Claimant's

¹⁰ Claimant apparently sought to clarify that the representative never indicated Employer was in danger of losing this line of business and, therefore, tried to refute the allegations that Claimant had somehow underperformed. Upon objection by Employer's counsel, Claimant stated that he wanted to explain "what Peter Dulche explained to me." (N.T. at 55.) Despite Claimant's assertions otherwise, such hearsay, which was properly objected to, would not have been competent to support a factual finding by the Board. *See Myers v. Unemployment Compensation Board of Review*, 533 Pa. 373, 625 A.2d 622 (1993); *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976).

refusal to appear at the July 1st meeting or to the specific reasons why Claimant could not attend the meeting on July 14th, both also reasons for Claimant's discharge.

As for Claimant's assertions that the UCBR improperly disregarded evidence of Claimant's excellent work performance and wrongly determined that he missed sales meetings in contravention of Employer's wishes, we note that Claimant himself testified that he refused to appear at the July 1, 2008, meeting because he felt he was needed elsewhere. (N.T. at 54, 74-75.) Claimant's belief that Employer was better served by Claimant's decision to miss this meeting than by Employer's wish for him to attend was not ample justification for his failure to obey Employer's directive.

Finally, Claimant argues that the referee did not afford him the assistance required under 34 Pa. Code § 101.21(a), relating to conduct of hearings. This Code section requires a tribunal to assist an unrepresented party by advising him as to his rights, aiding him in examining and cross-examining witnesses and giving him every assistance compatible with the discharge of the tribunal's official duties. Claimant has waived this issue by failing to preserve it in his petition for review, Pa. R.A.P. 1513; however, Claimant would not have prevailed in any event. Even a cursory record review reveals that the referee properly assisted Claimant by reminding him of his right to counsel, explaining procedure, attempting to keep Claimant on point, giving Claimant ample opportunity to present testimony and conduct cross-examination and admonishing opposing counsel when he spoke to Claimant in a less than respectful tone. "A referee is not required to advise a claimant on specific evidentiary questions or points of law." *Rohrbach v.*

Unemployment Compensation Board of Review, 450 A.2d 323, 324 (Pa. Cmwlth. 1982) (citation omitted).

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 9th day of February, 2010, the order of the Unemployment Compensation Board of Review, dated February 10, 2009, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge