

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Duc Nguyen, :
Petitioner :
 :
v. : No. 606 C.D. 2010
 : Submitted: November 19, 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 JUDGE PELLEGRINI

FILED: January 4, 2011

Duc Nguyen (Claimant) appeals *pro se* from an order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Referee denying him unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law)¹ for willful misconduct

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937), 2897, *as amended*, 43 P.S. §802. That section provides, in relevant 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 he violated company policy by failing to report an incident that occurred while he was driving a forklift. For the reasons that follow, we affirm.

Claimant, who is Vietnamese, was employed by Exel, Incorporated (Employer) as a forklift operator for seven years. Employer has a policy which provides that failure to report an injury or incident immediately, whether or not damage occurs, is considered a violation of the work rules and is grounds for termination on the first occurrence. On April 23, 2009, Claimant was operating the forklift in Employer's work area and hit a pedestrian employee from behind. Because the employee was not injured, Claimant did not report the incident. The next day, Claimant was fired by Employer for not reporting the incident.

Claimant filed for unemployment compensation benefits with the Lancaster UC Service Center which granted him benefits because even though Claimant's conduct was serious enough to warrant a dismissal without a warning, Claimant showed good cause for his actions, i.e., he did not think it was an accident. Employer filed an appeal with the Referee and a hearing was held.

(continued...)

Willful misconduct has been defined as (1) the wanton and willful disregard of the employer's interest; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect from his 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. *Sheetz, Inc. v. Unemployment Compensation Board of Review*, 578 A.2d 621 (Pa. Cmwlth. 1990).

At the hearing, Gary Lowe (Lowe), a forklift operator, testified on behalf of Employer stating that he was the employee who was struck by the forklift driven by Claimant. Lowe stated that he and a lot of other men were coming out of a meeting at the end of a change in shift when Claimant was driving through an intersection at a high rate of speed that was marked for pedestrians. Lowe checked to make sure no one was coming and started crossing through the intersection and then heard someone yell for him to watch out. That's when the right front part of the forklift caught his left buttocks. He said he stopped and looked at Claimant who said a few words to him which he did not understand because of the language barrier and then Claimant proceeded on and started laughing and acting like it was funny, "but he didn't realize he actually hit me." (August 19, 2009 Notes of Testimony at 9.) Lowe said there were other witnesses and when he realized what happened, he notified John Lehman and Brady Johnson, both supervisors. Lowe admitted that he was carrying a clipboard when he was hit by Claimant.

Joseph Binner (Binner), also a forklift operator, testified that he witnessed the incident and noted that Claimant was driving the forklift a little too fast. As he was driving, Lowe was walking along the same path and he does not know how Claimant did not see Lowe. Binner stated that Claimant eventually hit Lowe, not very hard, just bumped into him, but Binner yelled because he saw what was happening. Lowe just looked at him and said "what are you doing?" Then Claimant drove away and Claimant looked at Binner, kind of smiled and laughed and went and parked the forklift. Binner added that "It just didn't look like he saw [Lowe]." (August 19, 2009 Notes of Testimony at 15.) Binner also stated that he was not aware of any bad blood between Claimant and Lowe and that he did not

believe that Claimant was attempting to run down Lowe. He also stated that Claimant was operating his forklift properly but for this incident.

Ray Hower (Hower), operations supervisor, did not witness the incident but took Claimant's statement via a Vietnamese interpreter and stated that Claimant was terminated for not reporting the incident. He stated that Claimant told him he did not report the incident because he thought everything was okay and Lowe was all right. He did mention to Hower that he was aware at the time that he had hit Lowe and that he was aware of Employer's work rule, but that Lowe had walked into him.

Finally, Claimant testified that at the time he was driving the forklift, he saw people walking on both sides, and he was not going fast. He was turning and watching and there was "this much space between us when I hit my brakes and [Lowe] was holding a paper and walked into me and jumped like this and that's what happened." (August 19, 2009 Notes of Testimony at 24.) Claimant stated that he stopped the forklift and then Lowe yelled "F--- You" at him. Claimant apologized to Lowe even though Lowe ran into him because Claimant felt it was his place to say he was sorry to be polite and make sure that there was nothing which followed after that which would create a problem for him. He believed that Lowe was not injured because after he put the forklift away, he saw Lowe operating his forklift. Claimant stated that he did not report the incident to anyone because he did not think it was an accident and "because I had stopped my vehicle and he had walked into it and he said it was an accident, but I didn't think it was one." (August 19, 2009 Notes of Testimony at 25.)

The Referee found that Claimant was operating his forklift at a high rate of speed while pedestrians were walking in the area; hit a pedestrian from behind; proceeded on the forklift laughing; and did not report the incident to anyone in violation of Employer's policy. Because Claimant violated Employer's work policy, Claimant's actions amounted to willful misconduct and the Referee denied Claimant unemployment compensation benefits.

Claimant filed an appeal with the Board alleging that his translator's ability was lacking and it was difficult for him to understand fully what was occurring during the hearing. Additionally, his translator did not fully translate his testimony accurately. He requested an additional hearing with a new translator. The Board granted a new hearing to allow Claimant an opportunity to testify regarding his belief that the prior hearing was not translated correctly and to allow for the development of additional information from both parties but not to repeat anything that was already testified to at the first hearing.

At the second hearing, Claimant testified that Lowe was carrying a clipboard and was looking down at the clipboard while he was walking. The forklift made contact with the clipboard and not with Lowe's body. Claimant also stated that he was given Employer's work rules but he would not have been able to understand them and they were never explained to him. Claimant also testified that it was his understanding to report to Employer when there was an accident but this did not involve an accident because no one was injured and his forklift was not damaged. He stated that if there had been an accident, he would have reported it to Employer as he had in the past. When Claimant was asked what would constitute an "incident," he

responded that it would involve two vehicles or something that was damaged, but not an individual. Claimant added that he knew Lowe was not hit because he could see his whole body.

The Board made the same findings as the Referee after the first hearing but also found that Employer's policy stated that failure to report any incident, whether or not injury or damage occurred, would result in discipline and could result in termination for a first time offense. The Board denied benefits and went on to state that Employer had met its burden of proving Claimant had violated its work rule and then concluded that Claimant did not establish good cause for his conduct. Specifically, the Board did not find Claimant credible when he testified that he did not hit his coworker and did not understand Employer's policy. The Board determined that Claimant was aware that he was required to report the incident to his shift supervisor regardless of whether or not damage or injury occurred and he did not. Also, Employer's witnesses credibly testified that Claimant hit Lowe. This appeal by Claimant followed.²

Claimant contends that there is not substantial evidence to support the Board's finding that he hit Lowe because Lowe testified that Claimant was unaware that he even hit him, and Claimant testified that he did not hit Lowe but only hit his clipboard. Claimant further argues that the Board's finding that Claimant deliberately violated Employer's reporting policy was not supported by substantial evidence

² Our scope of review of the Board's decision is limited to determining whether an error of law was committed, constitutional rights were violated or findings of fact were supported by substantial evidence. *Frazier v. Unemployment Compensation Board of Review*, 833 A.2d 1181 (Pa. Cmwlth. 2003).

because there was no injury, and Claimant had good reason to believe there was no “incident.”

In answer to both of those arguments, the Board is the ultimate fact finder and determiner of credibility in unemployment compensation cases. *McCarthy v. Unemployment Compensation Board of Review*, 820 A.2d 1266 (Pa. Cmwlth 2003). The Board did not find Claimant credible regarding his understanding of Employer’s reporting policy and, instead, found Employer’s witnesses credible, including the testimony of Lowe, who was hit, and Binner, who saw Lowe get hit. We will not disturb the Board’s credibility determinations on appeal.

Claimant also argues that even if we find that the Board’s findings were supported by substantial evidence, Employer’s reporting policy required progressive discipline, not immediate termination. However, Employer’s “Work, Performance and Productivity Rules” provide the following:

B. Class Two rule violations are extremely important for maintaining positive morale. Due to the serious nature of these rules, violation is considered gross misconduct and is grounds for termination of employment on the first occurrence.

General Behavior Rules

9. Failure to report an injury or incident immediately, whether or not damage occurs: Reports are necessary so that unsafe conditions can be corrected.

(Original Record at Exhibit 6.) Although Claimant argues that Employer also had an Accident Reporting Acknowledgement form which indicated that progressive

discipline would ensue for a failure to make a required report, and that Claimant rather than Employer should be held harmless for any inconsistency, the Accident Reporting Acknowledgement form was dated May 13, 2002, and the Employer's General Behavior Rules were revised March 1, 2005. Because Claimant signed an acknowledgement that he received the revised work, performance and productivity rules along with the revised safety rule on April 21, 2005, the updated rules would be in force by Employer and control.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Duc Nguyen,	:
Petitioner	:
	:
v.	: No. 606 C.D. 2010
	:
Unemployment Compensation	:
Board of Review,	:
Respondent	:

ORDER

AND NOW, this 4th day of January, 2011, the order of the Unemployment Compensation Board of Review, dated February 16, 2010, at No. B-495111, is affirmed.

DAN PELLEGRINI, JUDGE