

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Moore, :
 :
 Petitioner :
 :
 v. : No. 681 C.D. 2011
 :
 :
 Unemployment Compensation : Submitted: October 21, 2011
 Board of Review, :
 :
 Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: December 2, 2011

Joseph Moore (Claimant), *pro se*, petitions for review of an order of the Unemployment Compensation Board of Review (Board) affirming the Referee's decision finding Claimant ineligible for unemployment compensation benefits pursuant to 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) provides in pertinent part:

An employe shall be ineligible for compensation for any week--

(Continued....)

Claimant was last employed as a full-time maintenance person with Haddington Multi Services for Older Adults (Employer) from March 1, 2009, until April 20, 2010. Claimant filed a claim for unemployment compensation benefits with the Scranton UC Service Center (Service Center). By Notice of Determination mailed October 20, 2010, the Service Center deemed Claimant eligible for benefits pursuant to Section 402(e) of the Law because there was insufficient information provided to show that Claimant's separation from employment was due to willful misconduct.

Employer appealed the Service Center's determination alleging that Claimant was fired for repeatedly ignoring Employer's policies and procedures. A Notice of Hearing was mailed to Claimant and Employer on November 19, 2010, scheduling a hearing before the Referee for December 7, 2010. Certified Record (C.R.) at Item 6, Notice of Hearing. Employer and its two witnesses appeared at the December 7, 2010 hearing; however, Claimant did not appear in person or through counsel. C.R. at Item 7, Transcript of Testimony. The Referee noted on the record that the Notice of Hearing was mailed to Claimant at his last known address, that the postal authorities had not returned the Notice of Hearing as undeliverable, and that Claimant had not contacted the Referee's office to request a postponement or to explain his failure to attend the hearing. Id. The Referee stated that the hearing would be held despite Claimant's absence. Id. Employer's witnesses presented

(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 the act.

testimony regarding Claimant's separation from employment and the Referee admitted Employer's documentary evidence into the record Id.

Based on the evidence presented, the Referee found as follows. Employer's personnel policies require that an employee who uses sick leave is required to call in by 9:30 a.m. the day of the employee's absence. The employee must speak to the immediate supervisor or leave a message on Employer's voice mail system. The personnel policies also require the employees to contact the office each subsequent day thereafter unless they have informed the supervisor that they would be out on extended sick leave. Employer requires that the employees bring in a doctor's note for extended sick leave.

Claimant was aware, or should have been aware, of Employer's personnel policies as he had received the policies during orientation. Claimant had been warned repeatedly that he had to call out sick per Employer's policies. Employer also had issues regarding Claimant being a no-call/no-show and leaving his shift early. On April 8, 2010, Claimant was scheduled to work from 11:00 a.m. to 7:00 p.m.; however, Claimant left early that day at 4:45 p.m., without informing the supervisor. On April 10, 2010, Claimant was scheduled to work, but was a no-call/no-show. On April 12, 2010, Claimant spoke with Employer's fiscal officer regarding a doctor's appointment and left his place of employment without closing and without informing his immediate supervisor as required by Employer's personnel policies. On April 13, 2010, Claimant arrived at work at 2:00 p.m. but had not informed his supervisor that he would be coming in late for work. After arriving late, Claimant immediately left for lunch and did not provide an explanation as to why he was late. On April 14, 2010, Claimant reported for work at 1:00 p.m. instead of his regular shift time without reporting that he would be arriving late. Claimant was a

no-call/no-show on April 15, 2010, April 17, 2010, April 19, 2010 and April 20, 2010. On April 20, 2010, Employer discharged Claimant for being a no-call/no-show. Claimant submitted medical documents after he was terminated on April 20, 2010.

The Referee concluded that the competent and credible testimony, as well as the documentary evidence, established that Claimant deliberately violated Employer's personnel policies by his failure to report his absences and by arriving late without obtaining the supervisor's prior permission. The Referee concluded further that Claimant may have been sick but he failed to provide the medical documentation as required by Employer and only did so after he was terminated. Accordingly, the Referee determined that Claimant was ineligible for benefits pursuant to Section 402(e) of the Law.²

Claimant appealed the Referee's decision and order to the Board contending that he never received the Notice of Hearing and that the statements made before the Referee were untrue. Upon review, the Board pointed out that the record reflected that the Notice of Hearing was mailed to Claimant's last known address and was not returned as undeliverable by postal authorities. Thus, the Board stated that

² Willful misconduct has been judicially defined as that misconduct which must evidence the wanton and willful disregard of employer's interest, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from his employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional substantial disregard for the employer's interest, or the employee's duties and obligations. Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 351 A.2d 631 (1976). In order to prove willful misconduct by showing a violation of employer rules or policies, the employer must prove the existence of the rule or policy and that it was violated. Caterpillar, Inc. v. Unemployment Compensation Board of Review, 654 A.2d 199 (Pa. Cmwlth. 1995); Duquesne Light Company v. Unemployment Compensation Board of Review, 648 A.2d 1318 (Pa. Cmwlth. 1994).

receipt was presumed. Therefore, the Board determined that Claimant failed to demonstrate proper cause for his nonappearance at the December 7, 2010 hearing. The Board also denied Claimant's request for a remand hearing. The Board further determined that Claimant failed to present competent, credible evidence or testimony demonstrating good cause for his failure to report off work properly. The Board rejected Claimant's attempts to present additional evidence and testimony on appeal stating that it could not consider evidence or testimony that was not before the Referee at the time of the hearing. Accordingly, the Board adopted the Referee's findings of fact and conclusions of law and affirmed the Referee's decision.

Claimant timely filed a request with the Board for reconsideration of its order affirming the Referee's decision. The Board denied Claimant's request and this appeal followed.³

Herein, Claimant argues that he did not receive the Notice of Hearing and the Board violated his due process rights by failing to grant his timely request to

³ This Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003).

Pursuant to Section 504 of the Law, 43 P.S. § 824, the Board has discretion to decide whether to grant a request for remand. Skowronek v. Unemployment Compensation Board of Review, 921 A.2d 555, 558 (Pa. Cmwlth. 2007). Generally, a rehearing is granted to allow a party the opportunity to adduce evidence not offered at the original hearing because it was not then available. Flores v. Unemployment Compensation Board of Review, 686 A.2d 66, 75 (Pa. Cmwlth. 1996) (citing Brady v. Unemployment Compensation Board of Review, 539 A.2d 936 (Pa. Cmwlth. 1988)). The denial of an application for a remand or for reconsideration will be reversed only for a clear abuse of discretion. Department of Auditor General v. Unemployment Compensation Board of Review, 484 A.2d 829 (Pa. Cmwlth. 1984); Asplundh Tree Expert Co. v. Unemployment Compensation Board of Review, 470 A.2d 1097 (Pa. Cmwlth. 1984).

reopen the hearing filed pursuant to 34 Pa. Code §101.24(c)⁴ (reopening of hearing) and 34 Pa. Code §101.111⁵ (reconsideration by Board). Claimant contends that he was unable to present evidence to contradict Employer's allegations because he was not properly notified of the date, hour and place of the Referee's hearing. Claimant believes that this Court should recognize that there are instances where no notice is received through no fault of the parties involved and that the absence of the notice negates due process.

Section 101.24(a) of the Board's regulations provides that a hearing will be reopened if the Board determines that the requesting party's "failure to attend the hearing was for reasons which constitute 'proper cause.'" 34 Pa. Code § 101.24(a).⁶ Section 101.51 of the Board's regulations provides that "[i]f a party notified of the date, hour and place of a hearing fails to attend a hearing without proper cause, the hearing may be held in his absence." 34 Pa. Code §101.51. Section 101.53 provides that "[m]ailing of notices, orders or decisions of a referee, or of the Board to the

⁴ Section 101.24 of the Board's regulations governs requests for an additional hearing by a party who did not attend a scheduled hearing. 34 Pa. Code § 101.24. Verdecchia v. Unemployment Compensation Board of Review, 657 A.2d 1341, 1344 (Pa. Cmwlth. 1995). Section 101.24(c) provides that "[a] request for reopening the hearing which is not received before the decision was mailed, but is received or postmarked on or before the 15th day after the decision of the referee was mailed to the parties shall constitute a request for further appeal to the Board and a reopening of the hearing, and the Board will rule upon the request...." 34 Pa. Code § 101.24(c).

⁵ Section 111 of the Board's regulations provides that an aggrieved party may request reconsideration within 15 days after the issuance of the Board's decision.

⁶ See Sanders v. Unemployment Compensation Board of Review, 524 A.2d 1031, 1032 (Pa. Cmwlth. 1987) ("Where a party fails to appear at a scheduled hearing, the Board may remand the case for an additional hearing only where the Board has made an independent determination that the reasons set forth by the party for its failure to appear constitute proper cause.").

parties at their last known addresses as furnished by the parties to the referee, the Board or the Department, shall constitute notice of the matters contained therein.” 34 Pa. Code §101.53. It is well settled that if the evidence in the record supports that a notice from the Board was mailed to a party's last known address and not returned as undeliverable by the postal authorities, it is presumed that the notice was received. See Gaskins v. Unemployment Compensation Board of Review, 429 A.2d 138, 140 (Pa. Cmwlth. 1981) (affirming the Board's denial of an untimely appeal where notice of the referee's decision was mailed, was not returned by the postal authorities, and contained the information necessary to put the claimant on notice of the referee's decision). “[E]vidence of mailing vests the [unemployment compensation authorities] with the presumption of delivery which [the] claimant must attempt to rebut.” Id. at 141.

Herein, the record shows that Claimant’s last known mailing address has remained the same since the filing of his claim for unemployment compensation benefits upon his separation from employment to the mailing of the Board’s final order denying his request for reconsideration. Claimant does not contend the Notice of Hearing was not, in fact, mailed to him at his last known address or that he moved and properly notified the unemployment compensation authorities of a change of address. Claimant also does not allege that the Notice of Hearing was not returned as undeliverable. Thus, the record supports the presumption that Claimant received proper notice. Gaskins. This result may seem harsh but Claimant did not provide any factual support in his requests to the Board for his contention that he did not receive notice other than he believed the Notice of Hearing must have been mixed up with another person’s mail by the mail

carrier. C.R. at Item 11, Claimant's Request for Reconsideration. However, the Board did not find this theory credible.⁷

Accordingly, we conclude that the Board did not abuse its discretion and its order is affirmed.

JAMES R. KELLEY, Judge

⁷ The Board is the ultimate fact finder in unemployment cases and is empowered to make credibility determinations. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 272, 276-77, 501 A.2d 1383, 1386-88 (1985).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---------------------------|---|-------------------|
| Joseph Moore, | : | |
| | : | |
| Petitioner | : | |
| | : | |
| v. | : | No. 681 C.D. 2011 |
| | : | |
| Unemployment Compensation | : | |
| Board of Review, | : | |
| | : | |
| Respondent | : | |

ORDER

AND NOW, this 2nd day of December, 2011, the order of the Unemployment Compensation Board of Review entered in the above-captioned matter is affirmed.

JAMES R. KELLEY, Judge