IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Devine, Petitioner	:	
v.	:	No. 865 C.D. 2011
	:	Submitted: October 21, 2011
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: December 1, 2011**

Michael Devine (Claimant), representing himself, petitions for review of 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) (willful misconduct).[1] Claimant contends the evidence presented against him, particularly an incident report, was not competent, and therefore, not sufficient to support the referee's findings. Additionally, Claimant argues he did not engage in willful misconduct. Upon review, we affirm.

Claimant worked for CableNet Services Unlimited (Employer) as a technician for approximately one year. During that time, Employer maintained a safety code of conduct. Claimant was aware of Employer's safety code and its

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

requirements. The safety code included rules requiring employees: wear safety equipment, including hardhats and safety vests; lock ladders to the truck when not in use; and, layout traffic cones after parking a vehicle.

Despite Claimant's knowledge of Employer's policies, Employer determined Claimant violated the safety code on three separate occasions. First, Employer issued Claimant a written warning for failing to wear a lanyard and a hardhat while working. Subsequently, one of Employer's supervisors spoke to Claimant about his failure to secure his ladder to his truck. Lastly, Employer discovered, on at least one additional occasion, Claimant did not wear his safety vest or layout traffic cones after parking his truck. Following Claimant's third safety code violation, Employer terminated Claimant. Thereafter, Claimant applied for unemployment benefits, which were initially granted. Employer appealed.

At a hearing before a referee, Employer presented the testimony of two witnesses, and Claimant testified on his own behalf. Employer also submitted several exhibits, including the incident report from Claimant's second safety code violation (Incident Report No. 2). Claimant objected to the admission of this document claiming he never saw it before, and that it was a forgery. Despite Claimant's objection, the referee determined Employer issued Claimant Incident Report No. 2. See Referee's Decision, 12/14/10, Finding of Fact No. 3. Following the hearing, the referee determined Claimant was ineligible for benefits. Claimant appealed.

On appeal, the Board made its own findings. Specifically, the Board found Employer maintained various safety policies, which were known to Claimant. Additionally, Claimant violated these policies several times, even after Employer reprimanded him for his prior violations.

Contrary to the referee's findings, the Board determined Employer did not prove Claimant received Incident Report No. 2, and furthermore, the offered document lacked reliability. However, the Board noted, according to Claimant's admissions, the parties discussed Claimant's alleged second violation, thereby establishing its occurrence. Ultimately, the Board determined Claimant's behavior constituted willful misconduct, and he was ineligible for benefits. Claimant petitions for review.[2]

In his brief, Claimant argues Incident Report No. 2 is a forgery, and the referee impermissibly considered it in makings her findings. Therefore, Claimant contends the Board erred as it did not have sufficient evidence before it to establish he engaged in willful misconduct.

Section 402(e) of the Law provides, "[a]n employe 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

[2] Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Oliver v. Unemployment Comp. Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010) (en banc). 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 (1997).

P.S. §802(e). "Our Supreme Court defines willful misconduct as behavior that evidences a willful disregard of the employer's 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. v. Unemployment Comp. Bd. of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997)).

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 he had good cause to violate it. Ductmate Indus.; Docherty v. Unemployment Comp. Bd. of Review, 898 A.2d 1205 (Pa. Cmwlth. 2006). This Court defines "good cause" as justifiable or reasonable action taken under the circumstances confronting an employee. Id.

Here, Claimant's primary contention is that Incident Report No. 2 is a forgery, and therefore, the Board's decision, affirming the referee, is based on insufficient evidence.[3] Contrary to Claimant's assertion, the Board did not consider Incident Report No. 2. Bd. Op., 2/22/11, at 3. Specifically, the Board determined Employer failed to demonstrate Claimant received the report, and the report alone was not reliable evidence of the underlying incident. Id.

[3] In support, Claimant submits a copy of the second incident report and his military service honorable discharge notification so this Court may compare the signatures of the two documents for authenticity. Because these documents are outside the record considered by the Board, we may not consider them in our review. See Grever v. Unemployment Comp. Bd. of Review, 989 A.2d 400 (Pa. Cmwlth. 2010).

Nevertheless, the Board found the second safety code infraction occurred based on Claimant's admission that his supervisor verbally reprimanded him for failing to secure his ladders to his truck. Id.; Notes of Testimony (N.T.), 12/10/10, at 8.

In sum, the Board did not rely on Incident Report No. 2 to support its findings. Because we review the Board's findings rather than those of the referee, and the Board did not consider Incident Report No. 2, Claimant's argument lacks merit. See First Fed. Savs. Bank v. Unemployment Comp. Bd. of Review, 957 A.2d 811 (Pa. Cmwlth. 2008) (where the Board makes its own findings, this Court reviews those findings, not the findings of the referee). Additionally, because Claimant has not challenged any specific Board finding, we are unable to consider a challenge to the sufficiency of the evidence as that issue is waived. See Maher v. Unemployment Comp. Bd. of Review, 983 A.2d 1264 (Pa. Cmwlth. 2009). Therefore, Claimant's argument is meritless.

Nevertheless, upon review, Claimant's contention that the Board's findings are not supported by substantial evidence lacks merit. The record contains substantial evidence supporting the Board's findings. Specifically, Claimant was aware of Employer's safety policies (N.T. at 5); Employer warned Claimant either in writing or verbally about his first two infractions (N.T. at 6-8); and, Claimant violated Employer's safety policies on three known occasions (N.T. at 3). Moreover, Claimant did not assert just cause for his actions, and none exists on the record. See id. Thus, even if we were to consider Claimant's argument contesting the sufficiency of the evidence, the argument lacks merit.

Finally, we discern no error in the Board's conclusion that Claimant's actions constituted willful misconduct as a matter of law. More specifically, an employee's violation of a known safety code without good cause constitutes willful misconduct. Moran v. Unemployment Comp. Bd. of Review, 973 A.2d 1024 (Pa. Cmwlth. 2009) (violating safety policies including proper vehicle parking is willful misconduct); Brenaman v. Unemployment Comp. Bd. of Review, 392 A.2d 924 (Pa. Cmwlth. 1978) (employment rule violations including failure to wear safety glasses constitutes willful misconduct). Furthermore, when an employee repeatedly fails to observe safety policies whether purposefully or negligently, after the employer reprimands the employee accordingly, the employee engages in willful misconduct. Baglivo v. Unemployment Comp. Bd. of Review, 734 A.2d 452 (Pa. Cmwlth. 1999).

Based on the Board's findings, which are supported by the record, Claimant violated known safety policies without good cause on three separate occasions after being reprimanded about his prior violations. See id. Therefore, the Board's determination that Claimant engaged in willful misconduct is proper. Claimant's argument to the contrary is meritless.

Accordingly, we affirm.

ROBERT SIMPSON, Judge

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Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

O R D E R

AND NOW, this 1st day of December, 2011, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge