

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Affordable Comfort Contracting, Inc.,  
Petitioner  
v.  
Unemployment Compensation Board of Review,  
Respondent  
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: :  
: No. 944 C.D. 2009  
: Submitted: November 13, 2009  
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BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: February 18, 2010

Affordable Comfort Contracting, Inc. (Employer) petitions for review from an order of the Unemployment Compensation Board of Review (Board), which affirmed the referee's order granting benefits to Matthew R. Newman (Claimant). We affirm.

Claimant last worked for Employer as a full-time helper from April 25, 2007 until his last day of work on December 12, 2008. Claimant filed an application for unemployment compensation benefits, which was denied by the Allentown UC Service Center on January 20, 2009 pursuant to Section 402(e) of the Unemployment Compensation Law<sup>1</sup> (Law) for willful misconduct. Claimant

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

appealed the notice of determination and the matter was heard before a referee. The referee reversed and granted unemployment compensation benefits to Claimant. From this decision, Employer filed an appeal with the Board.

The Board adopted the findings and conclusions of the referee, which are set forth as follows. On October 27, 2008, Employer denied Claimant additional time off advising him that he had been off 26 days to that date. Claimant was not absent again. On November 14, 2008, Employer warned Claimant in writing about his tardiness. Claimant was not tardy again. On April 24, 2008, Employer had all employees present to confirm that they received an addendum to the employee handbook regarding use of personal cell phones. Claimant used his personal cell phone to contact Employer and receive phone calls from Employer. Claimant restricted his personal use of his cell phone to break time. Claimant made phone calls to his stepfather and other coworkers regarding business-related questions. Claimant, who is 19 years old, made infrequent brief phone calls to his mother when he might be delayed due to bad weather.

On December 12, 2008, Claimant discovered duct material was damaged by the previous night's rainfall. Claimant discarded the duct material. Employer suspended Claimant and two coworkers for discarding the duct material. Employer suspended the two coworkers for two days each. Employer suspended Claimant for three days - December 15, 2008 through December 17, 2008 - because he had received a previous written warning on November 14, 2008 for tardiness. On December 18, 2008, Employer discharged Claimant for excessive tardiness, use of personal cell phones on company time, willful misconduct, carelessness and destruction of company property.

The Board accepted as credible that Claimant used his personal cell phone at work for work-related calls. The Board found that Claimant had already

been suspended regarding placing company property in the trash and therefore this was not proper grounds to support a termination. The Board further found that Employer failed to credibly establish that there were additional tardy arrivals to work or use of personal cell phone on company time for non-work-related calls to the extent that it rises to the level of willful misconduct. The Board resolved the conflicts in testimony in relevant part in favor of Claimant.

The Board ultimately concluded that Claimant is not ineligible for benefits under Section 402(e) of the Law. The Board reasoned that Claimant's actions did not rise to the level of willful misconduct as contemplated by Section 402(e). By decision dated April 17, 2009, the Board affirmed the referee's decision and awarded benefits to Claimant. Employer then filed the instant appeal.

Employer raises the following issues for our review:

1. Whether Employer proved willful misconduct where Claimant was stealing time from Employer by utilizing his cell phone for personal purposes during work hours.
2. Whether Employer proved willful misconduct relative to Claimant's destruction of company property, absenteeism and continued tardiness.
3. Alternatively, whether the referee and Board improperly precluded Employer from questioning Claimant relative to the pages of telephone bills that were admitted into evidence at the beginning of the hearing.

Employer contends that the Board capriciously disregarded Employer's evidence that Claimant was stealing time from Employer by using his cell phone for personal calls during work hours. We disagree.

Initially, we note that 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). An adjudication cannot be in accordance with the law if it is not decided on the basis of law and facts properly adduced; therefore, appellate review for the capricious disregard of material, competent evidence is an appropriate component of appellate consideration if such disregard is properly before the reviewing court. Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002); Porco. When determining whether the Board capriciously disregarded the evidence, the Court must decide if the Board deliberately disregarded competent evidence that a person of ordinary intelligence could not conceivably have avoided in reaching a particular result, or stated another way, if the Board willfully or deliberately ignored evidence that any reasonable person would have considered to be important. Id. at 487 n.12; Porco.

The Board is the ultimate fact finder and the arbiter of witness credibility. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985); Rapid Pallet v. Unemployment Compensation Board of Review, 707 A.2d 636 (Pa. Cmwlth. 1998). When the Board's findings of fact are supported by substantial evidence they are binding on this Court even though evidence was also introduced to the contrary. Unemployment Compensation Board of Review v. Jones, 352 A.2d 574 (Pa. Cmwlth. 1976). The fact that conflicting evidence is presented does not mean that there is no substantial evidence to support the eventual finding since it is the function of the Board, and not this Court, to resolve questions of credibility and conflicts in testimony. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343 (Pa. Cmwlth. 1978). Our duty as an

appellate court is to examine the testimony in a light most favorable to the party in whose favor the Board has found, giving that party the benefit of all inferences that can logically and reasonably be drawn from the testimony to see if substantial evidence for the Board's conclusions exists. Wheelock Hatchery, Inc. v. Unemployment Compensation of Review, 648 A.2d 103 (Pa. Cmwlth. 1994).

Section 402(e) of the Law provides in pertinent part:

An employee 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 the act.

43 P.S. §802(e). The term "willful misconduct" is not defined in the Law. Our Supreme Court has defined "willful misconduct" as an act of wanton or willful disregard of the employer's interests, a deliberate violation of the employer's rules, a disregard of the standards of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer's interests or of the employee's duties and obligations to the employer. Navickas v. Unemployment Compensation Board of Review, 567 Pa. 298, 304, 787 A.2d 284, 288 (2001).

Whether an employee's conduct rises to the level of willful misconduct is a matter of law subject to appellate review. Id.; Miller v. Unemployment Compensation Board of Review, 405 A.2d 1034 (Pa. Cmwlth. 1979). The burden of proving willful misconduct rests with the employer. Navickas; Brant v. Unemployment Compensation Board of Review, 477 A.2d 596 (Pa. Cmwlth. 1984). Once an employer has shown that the

employee violated a work rule, the employee may show that his conduct was justified. Kalenevitch v. Unemployment Compensation Board of Review, 531 A.2d 590 (Pa. Cmwlth. 1987), petition for allowance of appeal denied, 517 Pa. 625, 538 A.2d 878 (1988).

Here, Employer's work rule provided:

There shall be no use of personal cell phones while on company time. This means no personal phone calls or text messaging. All personal cell phones must remain in your personal vehicle once you get to work and up until the time your [sic] leave at the end of the day.

\* \* \*

All lead guys on the jobs have a cell phone provided to them by the company and the cell phones they have will be the ONLY ones allowed to be used during business hours and they are strictly for business use only.

Anyone with a personal cell phone on them or caught using a personal cell phone will be terminated immediately.

Employer's Employee Handbook Addendum, Exhibit #5C (emphasis in original). Employer presented five witnesses who testified that they observed Claimant making personal calls on his cell phone on company time despite having signed the addendum agreeing that he would not use his cell phone in this manner. Employer also asserts that telephone records admitted into evidence show that Claimant was making calls on company time to unknown individuals.

Claimant testified that the calls he made during business hours were business calls and that if he received a personal call he told the person he would call them back. Reproduced Record (R.R.) at 34-37. The telephone records show that any incoming calls received during business hours were brief in nature, lasting between one to three minutes. Supplemental Reproduced Record (S.R.R.) at 56-69. Claimant testified that he was told by Employer to take his cell phone to the

jobsite because there was no company phone provided. R.R. at 36. Claimant regularly received and made calls to the office and the owner's cell phone during business hours. R.R. at 25; S.R.R. at 56-69. Employer admitted that work calls were made to Claimant's personal cell phone during work hours, despite the existence of its policy. R.R. at 25-26, 33.

Contrary to Employer's assertions that the Board capriciously disregarded its evidence, the Board weighed the evidence presented and chose to credit the testimony and evidence presented by Claimant. As our Supreme Court has opined:

The facts that [Employer] produced a greater number of witnesses, and that they assert that their witnesses were more credible, are not paramount. Evidence offered by the claimants was not rendered insubstantial by the mere fact that it was contradicted by evidence introduced by [Employer]. Hence, the court below properly determined that the expert medical testimony adduced by the claimants provided the requisite basis for the referees' findings.

Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 393, 612 A.2d 434, 437 (1992). Employer's argument that its witnesses should have been believed over Claimant is a challenge to the Board's credibility determinations, which is beyond our scope of review. Based upon our review, we conclude that the Board's finding that Claimant used his personal cell phone at work for work-related calls is supported by substantial evidence and that Claimant's limited use of his phone for non-work-related calls did not rise to the level of willful misconduct.

Next, Employer contends that it proved willful misconduct based upon Claimant's destruction of company property, absenteeism and continued tardiness. We disagree.

Prior incidents of willful misconduct, which are temporally remote from the ultimate discharge, cannot support denial of benefits. See Raimondi v. Unemployment Compensation Board of Review, 863 A.2d 1242 (Pa. Cmwlth. 2004) (Where there is an unexplained substantial delay between the claimant's misconduct and the employer's act to terminate the claimant, the remoteness doctrine will preclude an employer from seeking a denial of benefits based on allegations of willful misconduct); Panaro v. Unemployment Compensation Board of Review, 413 A.2d 772 (Pa. Cmwlth. 1980) (burden is on employer to show conduct not too remote); Tundel v. Unemployment Compensation Board of Review, 404 A.2d 434 (Pa. Cmwlth. 1979) (25 days between incident and termination too remote to support denial of benefits).

Evidence was presented that Claimant had previously violated Employer's rules relative to tardiness, was denied additional time off, and had destroyed company property. Evidence was also presented that Claimant had been warned and/or disciplined for this conduct. R.R. at 14-15, 43-44. Claimant heeded the warnings and did not repeat the infractions. R.R. at 17. While an employer certainly has the right to discharge an employee for any reason whatsoever, to deny unemployment compensation benefits to a claimant, an employer must demonstrate that the employee was discharged for willful misconduct. Employer has not met this burden here. We, therefore, conclude that the Board did not err in determining that Employer failed to establish that Claimant was terminated for willful misconduct.

Lastly, Employer contends that the referee and Board improperly precluded Employer from questioning Claimant about the pages of telephone bills that were admitted into evidence at the beginning of the hearing. We disagree.



At the hearing, Employer cross examined Claimant regarding the phone records and asked multiple questions regarding calls made on a particular day. Claimant testified that personal calls were made on his lunch break or after the work day had ended that day. R.R. at 37-38. Claimant testified that the calls to Allentown were calls made to his stepfather who would assist him with electrical problems on the jobsite. Id. When Employer sought to review the records for the next days, the referee limited the questioning, stating “I don’t have the time to allow you to go through this. The Employer has already said that the cell – there was cell usage.” R.R. at 38. Employer agreed and moved onto the next issue. Review of the telephone records reveals that continued questioning in this regard would have been redundant. Based upon our review, Employer was not denied the right to cross examine Claimant regarding the telephone records.

Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Affordable Comfort        | : |                   |
| Contracting, Inc.,        | : |                   |
|                           | : |                   |
| Petitioner                | : |                   |
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| v.                        | : | No. 944 C.D. 2009 |
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| Unemployment Compensation | : |                   |
| Board of Review,          | : |                   |
|                           | : |                   |
| Respondent                | : |                   |

**ORDER**

AND NOW, this 18th day of February, 2010, the order of the Unemployment Compensation Board of Review, at Decision No. B-483095, dated April 17, 2009 is AFFIRMED.

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JAMES R. KELLEY, Senior Judge