IN THE COMMONWEALTH COURT OF PENNSYLVANIA

N. Lee Ligo & Associates, Petitioner	:	
v.	:	No. 96 C.D. 2010
	:	SUBMITTED: July 9, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** October 28, 2010

N. Lee Ligo & Associates (Employer) petitions this court for review of the order of the Unemployment Compensation Board of Review (Board), which reversed the decision of the referee and granted benefits to Melvin E. Booher (Claimant), concluding that his actions did not constitute willful misconduct under Section 402(e) of the Unemployment Compensation Law (Law).[1] After review, 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) renders an employee ineligible for unemployment compensation benefits where his "unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with" that work.

Employer owns several properties in or near Slippery Rock, Pennsylvania and rents apartment units to students of Slippery Rock University. Claimant was in charge of the maintenance for the rental properties and was issued a cell phone for work. Employer expected Claimant to be available by cell phone 24 hours a day, seven days a week. Jolan Smith was the Rental Manager for the apartment buildings and Claimant's supervisor. On May 23, 2009, an issue arose between Ms. Smith and Claimant concerning Claimant's work duties the next day. The issue was resolved when Employer, who was on vacation in Greece, called Claimant and gave him specific instructions to work on the apartments, which work was completed by noon the next day. On May 25, 2009, at approximately 1:37 p.m., an alarm went off indicating that a sump pump had failed at one of the apartment buildings. The alarm company contacted Ms. Smith, who called Claimant on his work cell phone and his home phone, but because Claimant was returning from a trip to Ohio, she was unable to reach him. Ms. Smith left messages on Claimant's cell phone and his home phone. Claimant learned about the sump pump when his son got in touch with Claimant's wife on her cell phone, who in turn, related the problems to Claimant as he was driving. Claimant understood that the problem with the sump pump would be handled by Ms. Smith. Claimant eventually got in contact with Ms. Smith directly at approximately 4:49 p.m. Upon Employer's return from his own vacation, Claimant was terminated for insubordination and not being available to Employer by his work cell phone on the day the sump pump failed.

Claimant's initial application for unemployment compensation benefits was granted. Employer appealed and hearings were held before the referee at which Claimant, Employer, and Employer's witness, Ms. Smith,

appeared and testified. The referee reversed the grant of benefits and made the following findings of fact:

> . . . .
>
> 3. The employer sometimes had problems with the claimant not following instructions provided by his supervisor, [Jolan Smith] the office/rental manager.
>
> 4. On May 23, 2009, during a weekend which involved a high turnover of residents due to the end of the school year, the claimant was instructed by his supervisor to inspect, repair, and prepare several apartments for incoming tenants.
>
> 5. The claimant refused, indicating he was performing another job task for the owner, and did not comply until the owner had to call the claimant from his vacation in Greece demanding the claimant perform his work as instructed by his supervisor.
>
> 6. The claimant was aware the work he was instructed to perform by his supervisor took priority over the job task requested by the owner.
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> 7. On May 25, 2009, at approximately 1:37 p.m., while the claimant was visiting family in Ohio, one of the apartment buildings had a major maintenance emergency involving the plumbing which caused an overflow of sewage.
>
> 8. The claimant's supervisor immediately attempted to contact the claimant, leaving messages on his cell and home phones for assistance and guidance regarding the situation.
>
> 9. A large part of the claimant's job includes responding to these types of emergencies.
>
> 10. The claimant became aware of the plumbing emergency soon after it occurred, but did not contact his

> supervisor directly to address the emergency until 4:49 p.m.
>
> 11. The claimant was not restricted in any way from immediately contacting his supervisor.
>
> 12. Upon returning from his vacation in Greece and the claimant's return to work from a short leave due to health issues, on June 5, 2009, the claimant was discharged for insubordination, specifically regarding not following instruction from his supervisor.

Referee's Decision/Order, dated August 31, 2009, at 1-2. The referee therefore concluded that:

> [T]he claimant was discharged after failing to comply or respond to his supervisor on two separate occasions while the owner was out of town on vacation in Greece. The Referee credits the employer's testimony that the claimant was aware of the priority of work and the importance of responding to an emergency situation, even when out of town. *Although the claimant maintains he was unable to immediately contact his supervisor on the day of the plumbing issue, the Referee does not find this information credible as he contacted his son several times during that period of time. Although his presence was not required, it was important the claimant contact his supervisor to provide much needed guidance and information. Further, it appears as though he did not contact his supervisor merely because he didn't want to speak to his supervisor.* Therefore, the claimant did not have good cause for the insubordination.

Id. (Emphasis added.)

Claimant appealed the referee's decision to the Board, which, without taking new evidence, made its own findings and conclusions, reversing the referee. The Board adopted verbatim the referee's first four findings of fact and then made further findings as follows:

5. The claimant had gone to his brother's residence in Ohio for a family "get together."

6. The claimant had gone this weekend for such a visit on each of the six years of his employment.

7. The employer considers that the claimant should be available for emergencies by telephone.

8. The claimant's supervisor asked the claimant if he was helping to determine that the apartments were ready for the incoming tenants.

9. The claimant indicated that he was going to work on a warehouse which he had been directed to clean by the owner who was currently on vacation in Greece.

10. The claimant was unaware that there was a problem with these apartments as a contract employee was working with the supervisor to perform the work.

11. The supervisor contacted the owner who called the claimant from Greece and indicated that the claimant should work on the apartments.

12. The claimant worked on the apartments and finished the work by 12:30 p.m. the next day, which was a day and a half before the new leases were to start.

13. On May 25, 2009, at approximately 1:37 p.m., while the claimant was visiting family in Ohio, one of the apartment buildings has [sic] a major maintenance emergency involving the plumbing which caused an overflow of sewage.

14. The claimant's supervisor immediately attempted to contact the claimant, leaving messages on his cell and home phones for assistance and guidance regarding the situation.

> 15. The employer provides the claimant a work cell phone.
>
> 16. The claimant had his work cell phone in his suitcase and was driving his car returning from his trip.
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> 17. The claimant's cell phone number is listed as the third number to call in an emergency.
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> 18. The claimant agreed that he was to be available by phone 24/7.
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> 19. The claimant became aware of the problem with the sump pump on the afternoon of May 25, 2009, after a phone call from his son. The son called the claimant's wife's cell phone and the information was relayed to the claimant as he was driving. The claimant understood that his supervisor was going to take care of the problem.
>
> 20. The claimant became aware of additional problems and called the supervisor on his cell phone at 4:49 p.m. to address the problems with the sump pumps.
>
> 21. The employer discharged the claimant for insubordination, and failure to be available by the work cell phone.

Board's Decision and Order, dated December 23, 2009, at 1-3.

The Board found that while it was clear that Claimant and his supervisor had disagreements, Claimant did not intentionally fail to be available to employer on the date in question and that placing his cell phone in his suitcase while driving did not rise to the level of willful misconduct. The Board noted that Employer was able to contact Claimant through his wife on her cell phone and that Claimant ultimately called his supervisor directly. Therefore, the Board concluded that because Claimant's conduct did not constitute willful misconduct, he was not

ineligible for benefits under the Law. Employer now appeals the Board's order to this court.

On appeal, Employer first argues that the Board erred in relying on statements made by Claimant in his appeal to the Board to find that: (1) Claimant's work cell phone was in his suitcase on the afternoon in question; (2) Claimant was made aware of the sump pump problem after he received a phone call from his son; and (3) Claimant understood the problem was being handled by his supervisor. Findings of Fact nos. 16 and 19. Employer argues that these findings are not based on evidence of record but solely stem from a document attached to Claimant's appeal to the Board and that it did not have the opportunity to respond to these statements or offer evidence in rebuttal.[2]

Pursuant to 34 Pa. Code § 101.106, the Board's scope of review of an appeal from the decision of a referee is that it "may review both the facts and the law pertinent to the issues involved on the basis of the evidence previously submitted . . . ." Therefore, Employer is correct in its assertion that the Board is not permitted to consider post-hearing factual communications in its determination and must consider only the evidence previously submitted at the hearing. *Croft v. Unemployment Comp. Bd. of Review,* 662 A.2d 24 (Pa. Cmwlth. 1995); *Tener v. Unemployment Comp. Bd. of Review,* 568 A.2d 733 (Pa. Cmwlth. 1990).

However, a review of the record reveals that, in response to a question by the referee, Claimant testified that the reason he did not call Ms. Smith back

[2] Employer is specifically referring to a two-page typewritten document, entitled "Reasons for appeal," attached to Claimant's Petition for Appeal to the Board. *See* Original Record, Item 13. A review of this document shows that although Claimant does recite his version of the events of May 25, 2009, there is no mention of the physical location of Claimant's work cell phone on that day. As we discuss *infra,* there is evidence of record to support both findings, and therefore, Employer's argument is meritless.

directly on his work cell phone was because it was "either in my suitcase" or that it was not on his person as he was driving, explaining that his back was bothering him so he tried to keep everything away from his back while he drove. Notes of Testimony (N.T.), Hearing of August 20, 2009, at 13. In addition, Claimant also testified that he first heard of the sump pump problem in a telephone call made from his son to his wife as the Claimant and his wife were driving back from Ohio. Claimant explained the phone call with his son and his understanding of the conversation:

> [i]t was sometime around 2:00 Bret [Ligo, Employer's son] called my home and talked to my son, Mark . . . [a]nd told him that the alarm was going of [sic]. Mark informed him [Bret] that we were out of town in Ohio and he [Bret] would have Jo [Smith, Employer's Rental Manager] take care of it and that's the first time I heard of it.

Id. at 7. Claimant reiterated that, "from what I under[stood] from my son, Bret said he would have Jo take care of it . . . normally, Jo is quite capable." *Id.* at 33. The Board accepted as credible Claimant's testimony that he placed his work phone in his suitcase while driving and that his son called his wife's cell phone to relay the message from Ms. Smith and that he believed the problem would be handled by Ms. Smith. Accordingly, because there is substantial evidence of record to support these findings, there is no merit to Employer's argument.

Employer next argues that the Board erred when it found that Claimant's cell phone was in his suitcase and that Ms. Smith was going to handle the sump pump issue, because in basing these findings on evidence *de hors* the record, the Board impermissibly disregarded the findings of the referee which were based upon consistent and uncontradicted evidence, without stating its reasons for

doing so, thereby raising an issue under *Treon v. Unemployment Compensation Board of Review*, 499 Pa. 455, 453 A.2d 960 (1982).

We reject Employer's argument for several reasons. First, as we have previously discussed, there is evidence of record to support the Board's findings. Second, we disagree that *Treon* is applicable in this instance. That case involved the Board's rejection of a finding by the referee that was based on consistent and uncontradicted testimony. The claimant, a bricklayer for employer in Shamokin, Pennsylvania, testified that while he was offered a job by employer in the Philadelphia area, he did not accept the offer because it would have involved more that 336 miles of travel and too great of an expense. The referee made a finding that the claimant alleged that it was too far to travel and too expensive, and that he was concerned that the work would not be steady due to weather conditions. The Board did not adopt this finding nor did it set forth any explanation that the finding was either incredible or unsupported by the evidence. In its discussion, the Supreme Court noted that the Board had heard no additional testimony, and that the record contained "the consistent and uncontradicted testimony of one witness, [claimant]." *Treon*, 499 Pa. at 460, 453 A.2d at 962. The Court went on to explain that while the Board "certainly had the right to disbelieve [claimant's] testimony, even though that testimony was uncontradicted . . . the Board did not have the right to arbitrarily and capriciously disregard the findings of the referee after the referee had listened to the testimony of the only witness and observed his demeanor, and had made findings of fact based upon that uncontradicted testimony." *Id.* at 460-61, 453 A.2d at 962 (citations omitted). The Court held that, "[i]f particular findings are inconsistent, incredible or unsupported by the evidence, then the Board must so indicate. The Board may not, however, simply disregard findings

made by the referee which are based upon consistent and uncontradicted testimony without stating its reasons for doing so." *Id.*

Similarly, in *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 501 A.2d 1383 (1985), the claimant argued that because the Board rejected the referee's credibility determinations made in his favor and failed to explain why it was not adopting the referee's findings, *Treon* applied. Our Supreme Court disagreed, finding that "evidence of [claimant's] misconduct was conflicting" and later, that, "*Treon* is readily distinguishable from this case with its conflicting evidence." *Id.* at 270, 273, 501 A.2d at 1385, 1386. The real issue in the matter *sub judice* is whether Claimant's conduct on the afternoon of May 25, 2009, was deliberate and intentional, as the referee determined, or unintentional and reasonable under the circumstances, as the Board found. Conflicting evidence exists as to this issue, that is, the testimony of Ms. Smith and Mr. Ligo regarding Claimant's past difficulties and working relationship with Ms. Smith, as well as the events on the day in question; and, Claimant's testimony regarding the same. Thus, the Board was free to make its own findings of fact based on the evidence of record and reach a different conclusion based on those findings. Where the Board adequately explains its reasons for reversing the referee and there is evidence in the record to support the Board's findings, we are not free to substitute our evaluation on judicial review. *Peak.* Therefore, we also find this contention to be without merit.

Employer's final argument is that the Board erred in concluding that Claimant's conduct did not rise to the level of willful misconduct. Specifically noting that Claimant agreed that he was to be available by phone "24/7," Employer argues that Claimant's failure to call his supervisor in a timely manner constituted

willful misconduct. Essentially, Employer is arguing that Claimant violated a known work rule without good cause.

When the misconduct involves a work rule violation, the employer bears the burden of proving the existence of the work rule and its violation. *Walsh v. Unemployment Comp. Bd. of Review,* 943 A.2d 363 (Pa. Cmwlth. 2008). Moreover, in order for Employer to demonstrate willful misconduct, it must present evidence that Claimant's conduct was intentional and deliberate. *See Grieb v. Unemployment Comp. Bd. of Review,* 573 Pa. 594, 827 A.2d 422 (2003). A determination of whether an action constitutes willful misconduct requires a consideration of all of the circumstances, "including the reasons for the employee's noncompliance with the employer's directive." *Rebel v. Unemployment Comp. Bd. of Review,* 555 Pa. 114, 117, 723 A.2d 156, 158 (1998).

With respect to the incident with the sump pump on May 25, 2009, Claimant testified that he often does not get reception on the drive back from Ohio and that he probably had his work cell phone in his suitcase while he was driving. Claimant testified that when he got the phone call about the sump pump, he understood from his son that Bret Ligo was going to have Ms. Smith handle the problem. Claimant testified that he had "roundabout communications with Jo before that in that Jo called my son and told him that she needed some information." *Id.* at 10. Claimant stated that Ms. Smith asked where the keys to the sump pump were, how to shut the water to the apartments off, and who to call for repairs and that his son called Ms. Smith with the information. When Claimant became aware of additional problems, he got Ms. Smith's cell phone number from his son and he called her directly. Claimant explained that he did not know Ms. Smith's number offhand, because it was automatically entered in his work cell

phone and he just pressed a number on his cell phone when he needed to call her. Claimant testified that after he called Ms. Smith at 4:49 p.m. from his wife's cell phone, he spoke with her five more times that day and that he did not ignore the situation.

The Board concluded that while it was "clear that the claimant and his supervisor had some disagreements . . . the claimant did not intentionally fail to be available to the employer and placing his cell phone in his suitcase while driving does not rise to the level of willful misconduct in this proceeding." Board's Decision and Order, at 3. The Board noted that Claimant "ultimately called his supervisor directly at a later time and that the employer was able to contact the claimant through his wife's cell phone." *Id.* The Board concluded that Claimant's conduct was not intentional nor deliberate and that his delay in calling Ms. Smith directly was reasonable given the Board's finding that he thought the problem was being handled by Ms. Smith and that he called as soon as became aware the problem remained. While we might have found the facts differently, that is not our province. Although the issue is close, based on its findings, we cannot say that the Board erred as a matter of law in concluding that there was no intentional work rule violation.

Accordingly, we affirm the order of the Board.

BONNIE BRIGANCE LEADBETTER,
President Judge

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v.	:	No. 96 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 28th day of October, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge