IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Segraves, Petitioner	:	
v.	:	No. 971 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	Submitted: January 28, 2011

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: March 7, 2011

Michael Segraves (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review denying his claim for unemployment compensation benefits pursuant to Section 402(e) of the 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---
>
> (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.

Claimant was last employed by Koppers, Inc. (Employer) as a utility operator and his last day of work was August 12, 2009. Shortly thereafter, Claimant applied for unemployment compensation benefits. On the "Claimant's Questionnaire", Claimant stated that he was discharged for failing a drug/alcohol test. Reproduced Record (R.R.) at 1A. Claimant further stated that "I passed the drug test, but I failed the breathalyzer test because I was drinking the night before. I did not get up early and start drinking it was because I was out the night before. I tried to tell them I would seek consuling (sic), but they didn't care and they discharged me. I am in consuling (sic) right now with Dr. William Hauch. I am doing it out of my own pocket." Id.

By determination mailed September 28, 2009, the Scranton UC Service Center (Service Center) found that Claimant was eligible for benefits pursuant to Section 402(e.1) of the Law.[2] R.R. at 8A. The Service Center determined that Employer did not establish that it had a substance abuse policy. Id.

Employer appealed the Service Center's determination and a hearing before the Referee ensued on January 25, 2010. In support of its appeal, Employer presented the testimony of Gerald Horning, a co-generation supervisor. Claimant testified on his own behalf. With the exception of Exhibits 2L, Breath Alcohol

[2] 43 P.S. §802(e.1). Section 402(e.1) of the Law provides in pertinent part:

> An employe shall be ineligible for compensation for any week--
>
> (e.1) In which his unemployment is due to discharge or temporary suspension from work due to failure to submit and/or pass a drug test conducted pursuant to an employer's established substance abuse policy, provided that the drug test is not requested or implemented in violation of the law or of a collective bargaining agreement.

Testing Form (Non-DOT), and parts of Exhibit 2B, Employer's Appeal from Service Center Determination, all offered documents and exhibits were admitted into the record by the Referee.

Based on the evidence presented, the Referee affirmed the Service Center's determination and granted Claimant benefits pursuant to Section 402(e.1) of the Law. R.R. at 62A. Employer appealed the Referee's decision to the Board.

Upon review, the Board determined that Section 402(e.1) of the Law applies only to drug testing; therefore that section was inapplicable in this case. The Board found that this matter was more appropriately adjudicated under Section 402(e) of the Law and that the parties were advised via the hearing notice that Section 402(e) was also under consideration. Based on the evidence presented, the Board made the following findings of fact.

Employer's facility utilizes high pressure steam, heavy equipment and high-speed rotating equipment. Because it is concerned with safety in its facility, Employer has a policy prohibiting employees from reporting to work under the influence of alcohol. Claimant was aware of this policy, as acknowledged by his signature on the work rules form dated July 7, 2008.

Claimant reported for work on August 12, 2009, two hours late at 9:00 a.m., looking disheveled and with blood shot-eyes. Employer requested that Claimant submit to an alcohol test, based on his tardiness and appearance. Claimant agreed and failed the breathalyzer test. Claimant was discharged for violating Employer's alcohol policy. In supplying information to the Department of Labor and Industry, Bureau of UC Benefits and Allowances, regarding his claim for unemployment compensation benefits, Claimant admitted that he failed the breathalyzer test because he was drinking the night before.

Accordingly, the Board concluded as follows:

> The employer established that it had a policy prohibiting employees from reporting for work while under the influence of alcohol. Contrary to the claimant's testimony that he was not aware of the policy, the record contains a document bearing his signature in acknowledgement of receiving the policy. (Exhibit 2g) The claimant further acknowledged at the hearing that it was his signature on the document. While the claimant's attorney objected to admission of the actual test results, the claimant testified that he "blew hot" on the test. He further admitted to the Department that he failed the breathalyzer test because he was drinking the night before. (Exhibit 4) The Board discredits the claimant's testimony that the cold medicine he allegedly consumed may have contributed to the positive result. The employer met its burden of proving willful misconduct in connection with Claimant's discharge.

Board Opinion at 3. Therefore, the Board reversed the Referee's decision and denied Claimant benefits pursuant to Section 402(e) of the Law. This appeal by Claimant followed.[3]

Herein, Claimant raises the following issues for our review: (1) whether the Board erred in finding that Claimant is ineligible for benefits pursuant to Section 402(e.1) of the Law; and (2) whether the Board's findings of fact and conclusions of law are based on substantial evidence.

[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). It is irrelevant whether the record contains evidence to support findings other than those made by the fact-finder; the critical inquiry is whether there is evidence to support the findings actually made. Ductmate Industries, Inc., v. Unemployment Compensation Board of Review, 949 A.2d 338 (Pa. Cmwlth. 2008) (citing Minicozzi v. Workers' Compensation Appeal Board (Industrial Metal Plating, Inc.)., 873 A.2d 25 (Pa. Cmwlth. 2005)).

Initially, we note that the Board contends that Claimant has waived his first issue based on Section 402(e.1) because the Board denied Claimant benefits based on Section 402(e) of the Law. While the foregoing is correct, a review of Claimant's brief reveals that while he cites Section 402(e.1) in the Statement of Questions of Presented, he actually argues that the Board erred in finding him ineligible because he committed willful misconduct. Accordingly, we decline to hold that Claimant has waived the first issue raised in his Statement of Questions Involved.

Whether an employee's conduct constituted willful misconduct is a matter of law subject to this Court's review. Miller v. Unemployment Compensation Board of Review, 405 A.2d 1034 (Pa. Cmwlth. 1979). The burden of proving willful misconduct rests with the employer. Brant v. Unemployment Compensation Board of Review, 477 A.2d 596 (Pa. Cmwlth. 1984).

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. Caterpiller, 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).

Claimant argues that Employer failed to prove that he violated the existing alcohol and drug policy. Claimant contends that the only evidence Employer relied upon to prove that he violated the alcohol and drug policy was that Claimant had "blood shot eyes" and "he looked like he just crawled out of bed." Claimant argues that his testimony alone that he "blew hot" on the breathalyzer test is not enough to satisfy Employer's burden of proving he violated the policy. Claimant contends that his attorney objected to this testimony, which he gave in response to the Referee's question inquiring as to how much alcohol Claimant had to drink the night before. Claimant contends further that the Referee sustained the objection; therefore, there is no evidence to support the Board's findings that Claimant failed the breathalyzer or that he admitted that he failed the breathalyzer test because he was drinking the night before.

In this matter, Employer established the existence of its policy that an employee will be discharged if he or she reports for work under the influence of alcohol. See Exhibit 2g; R.R. at 28A. Employer also established that Claimant was aware of this policy. Id. Accordingly, the issue before this Court is whether Employer established that Claimant violated the policy. Upon review of the entire record in this matter, we conclude that the Board correctly found, based on Claimant's own statements, that Claimant violated Employer's policy.

As pointed out by the Board, Claimant admitted in his application for benefits filed with the Department of Labor and Industry, Bureau of UC Benefits and Allowances, that he was discharged because he had failed the breathalyzer test because he was drinking the night before. R.R. at 1A. Claimant's admissions to the Department, in and of themselves, constitute substantial evidence to support the Board's finding the Claimant's violated Employer's policy. See Louk v. Unemployment Compensation Board of Review, 455 A.2d 766 n.4 (Pa. Cmwlth.

1983) (finding that admissions against interest were admissible as exceptions to the hearsay rule).

Furthermore, Claimant testified before the Referee that he "blew hot" on the breathalyzer test. Id. at 56A. While Claimant now contends before this Court that the Referee sustained his attorney's objection to the foregoing testimony, a review of the transcript of the Referee's hearing belies Claimant's contention. Specifically, the following exchange occurred between the Referee, Claimant and Claimant's counsel:

> R. Okay. And you said that you were drinking previously?
> C. Yes.
>
> R. How much did you have to drink previously?
> C. I don't know. I still blew hot the next morning, so…
>
> CL. Well, I'm going to object to the – that's what I don't want to get into is the – because if we're dealing with work, we're dealing with the actual work site, not what he would've done on non-company time outside of the work. That would be the…
>
> R. Right. I guess what I'm trying to figure out is when he stopped night before. I mean, what time did you have to report to work, and when did you stop drinking?
> C. Oh, I'm not exactly sure what time I stopped, but I had to be at work at 7:00 and I didn't show up until 9:00.
>
> R. Okay. And you don't recall when you stopped drinking the night before?
> C. No, . . .

R.R. at 56A. Accordingly, Claimant's contention that his testimony does not support a finding that he reported for work under the influence of alcohol is

without merit.[4] It is clear from the foregoing exchange that his attorney was not objecting to Claimant's testimony that he "blew hot" the next morning. To the contrary, Claimant's attorney was objecting to Claimant's testimony regarding his activities outside the workplace. In addition, even after Claimant's attorney objected, Claimant continued, without further objection, to testify that he was drinking the night before August 13, 2009. Moreover, the Board rejected Claimant's testimony as not credible that certain cold medicine he allegedly consumed in the early morning hours of August 13, 2009, may have contributed to his positive breathalyzer result.

Therefore, we conclude that the Board properly determined that Claimant violated Employer's policy prohibiting an employee from reporting for work under the influence of alcohol and that such finding is supported by Claimant's own statements and testimony. The Board's order denying Claimant unemployment compensation benefits pursuant to Section 402(e) of the Law is affirmed.

JAMES R. KELLEY, Senior Judge

[4] Claimant's admission during the Referee's hearing also, in and of itself, provides substantial evidence in support of the Board's finding that Claimant violated Employer's policy. See Braun v. Unemployment Compensation Board of Review, 506 A.2d 1020, 1021-22 (Pa. Cmwlth. 1986) (finding that an admission made by a party during a Referee's hearing was not hearsay).

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O R D E R

AND NOW, this 7th day of March, 2011, the order of the Unemployment Compensation Board of Review entered in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge