IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ira V. Harris,	:	
Petitioner	:	
	:	
v.	:	No. 1098 C.D. 2008
	:	Submitted: October 24, 2008
Unemployment Compensation Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: December 31, 2008

Ira V. Harris (Claimant) petitions *pro se* for review of the order of the Unemployment Compensation Board of Review (Board) that adopted the findings and conclusions of the referee and affirmed the referee's decision denying benefits to Claimant based on Section 402(e) of the Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e) (willful misconduct). Claimant questions whether the Board's findings are supported by substantial evidence and whether unemployment benefits may be denied on the basis of willful misconduct for allegedly having violated the attendance policy of an employer if the employer did not abide by its own policy.

Claimant was a full-time customer service employee for Precision Response Corporation (Employer). His wife, Marlene B. Jones, worked for the same company and on the same schedule. Employer has a written policy under

which employees are assessed points for absences. One point is assessed for an absence if the employee calls Employer. Two points are assessed for being absent without calling Employer (no call/no show). The policy contains a corrective discipline process under which Employer is to provide employees a verbal warning for two points, a written warning for four points, a final written warning for six points and consideration for termination for more than six points. The policy also states that employees are dismissed after the third instance of no call/no show. Employer's written bereavement policy allows three regularly scheduled workdays of leave time upon the death of an immediate family member.

On November 20, 2007, Claimant's wife called Employer and advised that her brother had died. She and Claimant were granted bereavement leave for November 21, 23 and 24. Claimant did not report to work after November 24, but Employer extended the bereavement period. Claimant and his wife testified that on November 26 the wife called and spoke to Employer's operations manager and requested and was granted additional time off for both of them. By December 3 they had not returned to work, although Employer's team leader for attendance testified that she called and spoke to Claimant on November 28 and was informed that Claimant had left a message for the operations manager that he would be returning to work on November 30. The team leader also testified that Claimant was a no call/no show on November 26, 28 and 30 and December 1, 2 and 3. On December 4 or 5, 2008, Claimant's wife called Employer to say that she and Claimant would return to work the next day but was told that their employment had been terminated. The UC Service Center *granted* Claimant's application for unemployment benefits.

The referee found in relevant part that Employer granted the request of Claimant and his wife for bereavement leave; that on November 24 Employer extended the leave when neither appeared for work; that Claimant's wife allegedly spoke with and informed Employer's operations manager on or about November 26 that she and Claimant would return to work on December 2; that Claimant did not return to work on December 2; that Employer's attendance policy provides for termination for an employee's third instance of no call/no show; that Claimant was a no call/no show on November 26, 28 and 30 and December 1, 2 and 3; that his wife called on December 4 to report that she and Claimant would return the next day and was informed of their discharge; that the discharge was for violation of the policy; and that Claimant did not establish justification for his absences.

Despite having found that the leave was extended on November 24, the referee stated that Claimant was discharged on November 24 when he failed to return to work. The referee concluded that Employer had established Claimant's violation of the policy and that he failed to show good cause for doing so or failed to show that the policy was unreasonable. The referee reversed the UC Service Center and denied benefits. The Board adopted his findings and conclusions and affirmed the denial of benefits.

The Court's review of the Board's order is limited to determining whether constitutional rights were violated, an error of law was committed, a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record. *Glenn v. Unemployment Compensation Board of Review*, 928 A.2d 1169 (Pa. Cmwlth. 2007). Substantial evidence is such relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Walsh v. Unemployment Compensation Board of Review*,

943 A.2d 363 (Pa. Cmwlth. 2008). The Board is the ultimate fact-finder and determiner of witness credibility and is free to reject even uncontradicted testimony. *Glenn*; *Daniels v. Unemployment Compensation Board of Review*, 755 A.2d 729 (Pa. Cmwlth. 2000). Further, an employer has the burden of proving willful misconduct, which has been defined by the courts as including conduct that amounts to a deliberate violation of an employer's rules. *Allen v. Unemployment Compensation Appeal Board*, 638 A.2d 448 (Pa. Cmwlth. 1994).

Claimant raises similar arguments to those made by his wife in her appeal at No. 1097 C.D. 2008. He contends that the Board erred in finding that he was a no call/no show on November 26, 28 and 30 and December 1, 2 and 3 and that he did not establish justification for those absences because Employer did not satisfy its burden of proof with respect to those matters. The Board contends that its findings are supported by the evidence and that after Employer satisfied its burden Claimant failed to prove good cause, thus justifying the Board's order. The Board made no express findings as to credibility and except for Findings Nos. 13 and 16 (discussed later) the findings are essentially undisputed and consistent with the testimony of all the witnesses.

Claimant states in the argument section of his brief submission that the record does not support the Board's findings that he was a no call/no show on November 26, 28 and 30 and December 1, 2 and 3, that he violated Employer's attendance policy and that he showed no justification for the absences. These findings form the basis for the Board's affirmance of the denial of benefits. The record is clear that Claimant and his wife both testified that on November 26 the wife made a telephone request of Employer's operations manager for them to be allowed additional leave until after December 1 and for the wife to be allowed to

call after December 1 to advise of the exact date of their return to work and that the operations manager approved the request. In Finding No. 8, the Board states that Employer extended the leave for Claimant and his wife when they did not return to work after November 24, but neither that finding nor any other states the period of time for which their leave was extended. Finding No. 10 states that Claimant's wife allegedly spoke with the operations manager on or about November 26 and stated that they would return to work on December 2. Findings Nos. 11 and 13 state, *inter alia*, that Claimant did not report to work on November 26, 28 and 30 and December 1, 2 and 3.

If the operations manager approved additional leave to an unspecified date after December 1, then conceivably all of Claimant's absences were pursuant to approved leave. If the operations manager approved additional leave only until December 2, then the only no calls/no shows would have been December 2 and 3, which would not have been grounds for discharge under the policy. Finding No. 16 that Claimant did not establish justification for his absences is wholly dependent on the Board's findings that he violated the policy. As there is inherent conflict or inconsistency in the Board's findings, which calls into question whether they support its conclusion that Claimant committed willful misconduct, the Court is compelled to remand this case along with the wife's case at No. 1097 C.D. 2008 for clarification, additional findings if necessary and a new decision.[1]

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[1]Claimant's wife also applied for unemployment benefits, but their cases were never consolidated even though they arise from the same events and they requested a single hearing. The separate hearings were weeks apart and a different referee presided at each, and the findings differ in material respects. The Court has no power to harmonize the two records into a single set of facts reflecting what it believes happened in the same events that control the two cases. Consolidation of cases such as these would be more efficient for the referees' office, the Board and the Court. *See* 43 P.S. §825; 34 Pa. Code §101.22.

Claimant lastly argues that he could not be found to have willfully violated Employer's policy because he was never given verbal or written warnings provided as corrective action. The Board does not address this issue, but because of its disposition the Court need not address the issue either other than to note that where an employer promulgates a specific disciplinary system, a discharge under that system may not be deemed to be for willful misconduct if the employer fails to follow the policy. *PMA Reinsurance Corp. v. Unemployment Compensation Board of Review*, 558 A.2d 623 (Pa. Cmwlth. 1989). In any event, Claimant did not raise the issue at the hearing, and it therefore is waived. Pa.R.A.P. 1551(a). Accordingly, the Court vacates the Board's order and remands this case to the Board for clarification of its findings and additional fact finding, if necessary, and for a new decision. On remand, the Board shall consolidate this case with the one filed by Claimant's wife and shall expedite decision in both cases.

DORIS A. SMITH-RIBNER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ira V. Harris, Petitioner	:	
v.	:	No. 1098 C.D. 2008
Unemployment Compensation Board of Review, Respondent	:	

ORDER

AND NOW, this 31st day of December, 2008, the order of the Unemployment Compensation Board of Review is vacated, and this case is remanded for expedited decision according to the foregoing opinion.

Jurisdiction is relinquished.

DORIS A. SMITH-RIBNER, Judge