IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Darin S. Dixon, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 1296 C.D. 2012
	:	Submitted: December 21, 2012

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: January 24, 2013

Darin S. Dixon (Claimant) challenges the order of the Unemployment Compensation Board of Review (Board) which reversed the referee's determination that Claimant was not ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1]

> The facts, as found by the Board, are as follows:
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> 1. The claimant was last employed as a Bartlett Operator by Griffin Industries from April of 2008, until December of 2011, at a final rate of $17.31 per hour; his last day of work was December 13, 2011.
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> 2. A Bartlett is a large truck with the capabilities of carrying a trailer.

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

3. The employer has a policy, of which the claimant was aware, that a driver who has two (2) preventable accidents in a three (3) year period will be subject to discharge; an accident is defined as one causing at least $1,500.00 in damages.

4. The employer has a committee which reviews all accidents to determine whether they were 'preventable.'

5. The training provided by the employer to all of its employees includes a video apprising them that they are required to walk around their truck to ensure that the way is clear before backing up.

6. The claimant was aware of the information contained in the training video.

7. On December 12, 2011, the claimant left a vehicle which was 'staged' in order to move another truck to the upper parking lot.

8. Because nothing was behind the claimant's truck before he left for the upper lot, he simply climbed in and began to back up without walking around his truck.

9. As the claimant backed, he struck another truck that had pulled in behind his truck while he was moving away the other truck.

10. The damage caused by the vehicle exceeded $1,500.00, such that it was considered an 'accident' by the employer.

11. Upon review, the accident was determined to have been 'preventable' because the claimant would not have struck the truck if he had first walked around his truck, as required.

12. Because this was the claimant's second infraction in a three (3) year period, he was discharged from his employment.

> 13. The claimant filed for unemployment compensation benefits.

Board Opinion, June 11, 2012, (Opinion), Findings of Fact Nos. 1-13 at 1-2.

The Board determined:

> Here, the credible and convincing evidence proffered by the employer established its policy regarding the proper backing up technique to be observed by its employee drivers, of which the claimant was admittedly aware. Further, the employer established that the claimant did not follow this policy. Thus, the burden shifted to the claimant to show that he had 'good cause' for his failure to follow the proper backing up technique. In this regard, although the claimant testified that he believed it to be unnecessary under the circumstances prevailing at the time of the accident, the Board concludes that the claimant has failed to establish 'good cause' within the meaning of Section 402(e) of the Law. As such, the claimant is not entitled to unemployment compensation benefits.

Opinion at 3.

Claimant contends that the Board erred when it denied benefits where Claimant's actions were not deliberate or intentional and where the Board made no findings in that regard.[2] Because Claimant's actions were not deliberate or intentional when he did not "walk around" his truck before he entered the vehicle and backed up into another vehicle, Claimant argues that he did not commit willful misconduct, and the Board erred when it denied benefits.

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[2] This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or essential findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

Whether a Claimant's conduct rises to the level of willful misconduct is a question of law subject to this Court's review. Lee Hospital v. Unemployment Compensation Board of Review, 589 A.2d 297 (Pa. Cmwlth. 1991). Willful misconduct is defined as conduct that represents a wanton and willful disregard of an Employer's interest, deliberate violation of rules, disregard of standards of behavior which an Employer can rightfully expect from the employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the Employer's interest or employee's duties and obligations. Frick v. Unemployment Compensation Board of Review, 375 A.2d 879 (Pa. Cmwlth. 1977). The Employer bears the burden of proving that it discharged an employee for willful misconduct. City of Beaver Falls v. Unemployment Compensation Board of Review, 441 A.2d 510 (Pa. Cmwlth. 1982). The Employer bears the burden of proving the existence of the work rule and its violation. Once the Employer establishes that, the burden then shifts to the Claimant to prove that the violation was for good cause. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

Claimant does not challenge the determination that Griffin Industries (Employer) had a work rule that required a truck driver to "walk around" his truck to ensure there is a clear path to back up. Claimant also does not challenge that he violated the rule but argues that there was no evidence of record to establish that his actions were deliberate or willful, see Frazier v. Unemployment Compensation Board of Review, 411 A.2d 580 (Pa. Cmwlth. 1980), because he noted that there was nothing behind his truck when he left to move another vehicle to the upper lot.

When he returned to his truck, he did not think it necessary to conduct a "walk around" because of the short amount of time that he was away from his truck.

In Heitczman v. Unemployment Compensation Board of Review, 638 A.2d 461 (Pa. Cmwlth. 1994), this Court addressed a similar factual situation. Michael G. Heitczman (Heitczman) worked as a truck driver for Central Air Freight Service (Central). Central had a policy that required truck drivers to back up as infrequently as possible, and, if they had to back up, to get out of the truck and make a "walk around" to ensure that the path was clear to avoid accidents. Heitzcman was aware of the rule. On November 25, 1992, Heitczman decided to back up his truck to move it in order to attempt to receive a better radio signal. Heitczman did not walk completely around his truck to see if anything blocked its path. He then backed up and hit a light standard. The light standard fell on the roof of the truck which resulted in an undetermined amount of damage to the truck and approximately $6,300 in damage to the light standard. Central terminated Heitczman for his violation of Central's policy. Heitczman sought unemployment compensation benefits. The Unemployment Compensation Service Center denied his claim. The referee reversed and determined that Heitczman did not directly violate the policy because the light standard was located in his blind spot and he could not see it when backing up. The Board reversed the referee because Heitczman did not provide adequate justification for his violation of Central's rule. Heitczman, 638 A.2d at 462-463.

Heitczman petitioned for review with this Court and argued that he did not commit willful misconduct because he did not deliberately decide to back

up the truck improperly and, thus, his conduct was merely negligent. Heitczman, 638 A.2d at 463.

> This Court affirmed:
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> > In Marysville [Body Works, Inc. v. Unemployment Compensation Board of Review, 419 A.2d 238 (Pa. Cmwlth. 1980)], an employee violated a shop rule by punching the time card of another employee. Finding that employee's action was solely based on mistake, we affirmed the Board's grant of unemployment compensation benefits. However, in this case, there is no question of mistake. Claimant [Heitczman] knew of the existence of the work rule, specifically failed to follow it by backing up his truck without making a 'walk around' and, as a result hit the light standard that crashed onto the roof of his Employer's [Central] truck. Such conduct is not the type of inadvertence, i.e. negligence, that . . . Marysville addressed, but is more akin to the disobedience of a direct instruction.

Heitczman, 638 A.2d at 464.

Here, Claimant like Heitczman was aware of the virtually identical rule which required a truck driver to walk around his truck before entering it to back up. Claimant failed to follow the rule and backed into another vehicle. In Heitczman, this Court held that such a violation of a rule was not mere negligence, as Claimant asserts, but was "akin to the disobedience of a direct instruction." Heitczman, 638 A.2d at 464. Following Heitczman, this Court agrees with the Board that Employer established that it had a rule in place which Claimant violated such that his action constituted willful misconduct unless Claimant provided good cause for his action. The Board specifically found that Claimant did not have good cause.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 24th day of January, 2013, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge