

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert P. Kaiser, :
 :
 Petitioner :
 :
 v. : No. 14 C.D. 2011
 : Submitted: July 8, 2011
 Unemployment Compensation :
 Board of Review, :
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: October 13, 2011

Robert P. Kaiser (Claimant) petitions for review from an order of the Unemployment Compensation Board of Review (Board), which affirmed the order of the referee and denied benefits. We affirm.

Claimant was employed by U R S Corporation (Employer) as a full-time Senior Environmental Technician Supervisor from July 5, 2005 until his last day of work on May 14, 2010. Claimant filed an application for unemployment compensation benefits. The Allentown UC Service Center (Service Center) issued a Notice of Determination denying Claimant's application on the basis that Claimant was ineligible

for benefits under Section 402(e) of the Unemployment Compensation Law¹ (Law) for willful misconduct.

Claimant timely appealed the Service Center's notice to the referee. A hearing was held on September 27, 2010, at which Claimant appeared and testified. Employer chose not to appear. Based upon the testimony and evidence presented, the referee made the following findings. Claimant's position required him to drive a company truck to various work sites four to five days a week. Claimant was required to have a valid driver's license in order to perform this job. Claimant was charged with Driving Under the Influence (DUI) sometime in September 2009. On May 12, 2010, Claimant attended a court hearing for the DUI; Claimant was found guilty of DUI and lost his driving privileges. Claimant's Class "C" driver's license in the Commonwealth of Pennsylvania was immediately suspended for a period of 18 months. Claimant informed his direct supervisor that his Pennsylvania driver's license had been suspended. On May 14, 2010, Claimant was discharged. The referee determined that Claimant was required to have a valid driver's license as a prerequisite of employment and that Claimant lost his driver's license through his own fault. The referee ultimately concluded that Claimant was ineligible for benefits pursuant to Section 402(e) of the Law for willful misconduct. By decision dated May 26, 2010, the referee affirmed the decision of the Service Center and denied benefits.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e). This section provides:

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 this act;

From this decision, Claimant filed an appeal with the Board. The Board adopted the findings and conclusions of the referee in their entirety. The Board added that since Claimant admitted that he drove a company truck four out of five days of the week, admitted that his license was necessary to perform his job, and that, but for the loss of his license, continuing work would have been available to him, the evidence is sufficient to establish that Claimant's driving was clearly connected to his work, so as to conclude that the loss of Claimant's license because of a non-work-related DUI rose to the level of willful misconduct. The Board rejected Claimant's allegations that he was discharged for other reasons as not credible. The Board ultimately concluded that Claimant is ineligible for benefits pursuant to Section 402(e) of the Law for willful misconduct. By decision dated December 8, 2010, the Board affirmed the referee's decision and denied benefits. From this decision, Claimant has filed the instant appeal.

Claimant presents the following issues for our review:

1. Whether the job held by Claimant required him to have a valid Pennsylvania driver's license and whether the finding is supported by competent substantial evidence.
2. Whether the Board committed an error of law by not granting a rehearing to allow after-discovered highly relevant evidence on the controlling issue of the need for a valid driver's license.

Claimant contends that the Board's finding that his job required him to have a valid Pennsylvania driver's license is not supported by substantial evidence. 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). Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). The Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

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. Caterpillar, 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).

Here, Claimant admitted that he lost his driver's license due to a non-work-related DUI conviction on May 12, 2010. Certified Record (C.R.), Item No. 2, Claimant Questionnaire, 5/23/10; C.R., Item No. 7, Notes of Testimony (N.T.), 9/27/2010, at 5. In his Claimant Questionnaire, Claimant cited the loss of this license as the reason for his discharge. C.R., Item No. 2, Claimant Questionnaire. Claimant also indicated on the form that his license was necessary for him to perform his job. Id. Such admissions possess high evidentiary value and are received on the theory that one would not say anything against his own interest unless it was true. Louk v. Unemployment Compensation Board of Review, 455 A.2d 766, 768 n.4 (Pa. Cmwlth. 1983). At the hearing, Claimant testified that he drove to different job sites at least four or five times a week, that part of the responsibility of his position was to get to the jobsite, and that he had used a company truck as the means of transportation. C.R., Item No. 7, N.T. at 4. Claimant acknowledged that, had his license not been suspended, continuing work was available for him in his position. C.R., Item No. 2, Claimant Questionnaire; C.R., Item No. 7, N.T. at 7. While Claimant attempted to revoke his written admission by testifying that he was not required to maintain a valid driver's license as a condition of employment because he could drive with a co-worker or hire a private driver, the Board rejected this testimony as not credible. Although Employer did not appear at the hearing, Claimant's own admission constitutes substantial evidence to support Employer's burden of proof. See Vann v. Unemployment Compensation Board of Review, 494 A.2d 1081 (Pa. Cmwlth. 1985). We, therefore,

conclude that the Board properly denied benefits pursuant to Section 402(e) of the Law.

Next, Claimant contends that the Board erred by not granting a rehearing to allow after-discovered highly relevant evidence on the controlling issue of the need for a valid driver's license. We disagree.

The Board's regulations provide:

(a) within ten days after the issuance of the decision of the Board ... any aggrieved party may request the Board to reconsider its decision and if allowed, to grant further the opportunity to do the following:

(1) Offer additional evidence at another hearing.

(b) Such requests will be granted for good cause in the interest of justice without prejudice to any party. The parties shall be notified of the ruling of the Board on each such request. The request for reconsideration and the ruling of the Board shall be made a part of the record and subject to review in connection with any further appeal to the Commonwealth Court.

34 Pa. Code §101.111. This Court has previously stated “[t]he denial of an application for rehearing will be reversed only for clear abuse of discretion.” Asplundh Tree Expert Co. v. Unemployment Compensation Board of Review, 470 A.2d 1097, 1098 (Pa. Cmwlth. 1984). “An application for rehearing may be refused where it is not apparent that the evidence which the applicant proposes to adduce was not available at the original hearing.” Id.

Here, the evidence Claimant attempted to present is an affidavit from the Vice President for Employer. Claimant maintains that this statement was not available at the hearing because Employer chose not to appear. Claimant could have obtained and offered this affidavit at the hearing or subpoenaed the witness to testify. The evidence was readily available at the time of the hearing, but Claimant did not

believe it was necessary to his case.² We, therefore, conclude that the Board did not commit an abuse of discretion in denying Claimant's application for rehearing.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

² Claimant was not represented by counsel at the hearing. Any lay person who chooses to represent himself in a legal proceeding must assume the risk that his lack of expertise and legal training may prove to be his undoing. Groch v. Unemployment Compensation Board of Review, 472 A.2d 286 (Pa. Cmwlth. 1984).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert P. Kaiser, :
 :
 Petitioner :
 :
 :
 v. : No. 14 C.D. 2011
 :
 :
 Unemployment Compensation :
 Board of Review, :
 Respondent :

ORDER

AND NOW, this 13th day of October, 2011, the order of the Unemployment Compensation Board of Review, at Decision No. B-510251, dated December 8, 2010, is AFFIRMED.

JAMES R. KELLEY, Senior Judge