

subsequently applied for unemployment compensation benefits, which were initially denied.

On Claimant's appeal before a referee, Claimant testified as follows. Employer allowed its employees to use lumber for personal use if the employee obtained a supervisor's permission. In late April 2007, Claimant placed lumber on a flatbed maintenance cart for personal use, that is, to ultimately build a picnic table. He neither removed the lumber from Employer's property nor altered the lumber in any way. After loading the lumber, Claimant sought a supervisor's permission to use the lumber for personal use. Because he worked third shift, however, a supervisor was not available and, therefore, he unloaded the lumber from the flatbed and placed it back on the pile from where he obtained it. Employer subsequently terminated Claimant for theft.

In opposition, Employer presented the testimony of its director of operations and its human resources manager. These representatives established Employer maintained a work rule prohibiting theft. In addition, these representatives testified Employer never permitted its employees to use lumber for personal projects and Claimant, in fact, stole the lumber. Following an investigation, and despite an inability to ascertain whether any lumber was actually missing from its inventory, Employer terminated Claimant for theft.

Upon review, the referee rejected Employer's evidence, accepted Claimant's testimony, and ultimately awarded Claimant benefits. In regard to the willful misconduct issue, the referee explained:

In this case, the referee resolves all conflicts in testimony in favor of [Claimant.] [Employer] did not provide the right testimony that the wood was being taken nor did [it] indicate that any was actually missing from any direct testimony of any persons who were present on the day that [Claimant] is alleged to have taken the wood. Therefore, the referee concludes [Employer] did not meet its burden of showing that there was willful misconduct connected with the work.

Referee Op., 7/6/2007, at 2. Employer appealed, and the Board affirmed by adopting the referee's decision in its entirety. Employer petitions for review.

Willful misconduct within the meaning of Section 402(e) includes behavior that evidences a willful disregard of the employer's interests, a deliberate violation of the employer's work rules, or a disregard of standards of behavior the employer can rightfully expect from its employees. Frazier v. Unemployment Comp. Bd. of Review, 833 A.2d 1181 (Pa. Cmwlth. 2003). Notably, the employer bears the initial burden of proving a claimant engaged in willful misconduct for purposes of determining the claimant's eligibility for unemployment compensation. Gillins v. Unemployment Comp. Bd. of Review, 534 Pa. 590, 633 A.2d 1150 (1993). Where an employer alleges willful misconduct due to a violation of a work rule, the employer is required to prove the existence and violation of a reasonable and known work rule. Burchell v. Unemployment Comp. Bd. of Review, 848 A.2d 1082 (Pa. Cmwlth. 2004). Once the employer establishes willful misconduct, the burden shifts to the claimant to prove his actions were justified or reasonable under the circumstances. Kelly v. Unemployment Comp. Bd. of Review, 747 A.2d 436 (Pa. Cmwlth. 2000).

In addition, in unemployment compensation proceedings, the Board is the ultimate fact-finder and is empowered to resolve conflicts in the evidence and to determine the credibility of witnesses. McCarthy v. Unemployment Comp. Bd. of Review, 829 A.2d 1266 (Pa. Cmwlth. 2003).² In making these determinations, the Board may accept or reject the testimony of any witness, in whole or in part. Id. The Board's findings are conclusive on appeal if the record, when viewed as a whole, contains substantial evidence to support those findings. Id. Thus, it is irrelevant whether the record contains evidence that would support contrary findings. Duquesne Light Co. v. Unemployment Comp. Bd. of Review, 648 A.2d 1318 (Pa. Cmwlth. 1994).

On appeal,³ Employer argues the Board's decision is not supported by substantial evidence. To this end, Employer asserts the unchallenged proposition that theft of its property is willful misconduct as a matter of law. Further, Employer highlights its evidence that Employer did not allow employees to use lumber for personal projects. Characterizing Claimant's testimony as unfounded allegations of intent to obtain permission, Employer contends that Claimant removed lumber from its place without prior permission. Employer contends Claimant concocted his defense after being confronted with taking the lumber.

² Our determination is ultimately based on the referee's findings because the Board adopted them as its own. See Zimmerman v. Unemployment Comp. Bd. of Review, 829 A.2d 735 (Pa. Cmwlth. 2003).

³ Our review in unemployment compensation cases is limited to determining whether the findings of fact were supported by substantial evidence, whether an error of law was committed, or whether constitutional rights were violated. Deal v. Unemployment Comp. Bd. of Review, 878 A.2d 131 (Pa. Cmwlth. 2005).

Employer's arguments fail. There is no dispute that Employer had a known work rule prohibiting theft. Nor is there any dispute that theft constitutes disqualifying willful misconduct. There is significant dispute, however, as to Claimant's state of mind in general and whether he intended to take the lumber without permission in particular.

To that end, the Board adopted the following findings, which were initially rendered by the referee:

3. Employees were permitted to use work product for their own personal use if they obtained a permission slip ... from [a supervisor.]
4. [Claimant] took lumber to build a table for his personal use, but returned the lumber to the lumber pile because his supervisor was not there to provide him with the necessary approval.
5. [Claimant] did not take any lumber for his personal use nor was he attempting to steal from [Employer].
6. ... [Claimant] inadvertently omitted to obtain the necessary permission slip.

Referee Op., 7/6/2007, Findings of Fact Nos. 3-6.

No legal error arises from the Board's focus on Claimant's intent. Both the judicial definition of willful misconduct, which is discussed more fully above, and the statutory definitions of the crime of theft include elements of a reprehensible state of mind. See 18 Pa. C.S. §§302(b) (specific intent to steal, intent to convert goods wrongfully to the taker's own use or to permanently deprive the owner of his

possession), 3921(a) (defining theft as the unlawful taking or exercise of unlawful control over movable property of another with the intent to deprive him thereof).

Nevertheless, Employer argues the Board's critical findings are not supported. We disagree. Rather, the Board's findings are supported by Claimant's credited testimony. Reproduced Record (R.R.) at 31a-32a, 33a.

The parties here presented conflicting evidence, especially as to intent. To this end, Claimant testified he neither stole nor intended to steal the lumber. R.R. at 31a-32a. In opposition, Employer maintained Claimant intended to steal the lumber when he first loaded it onto the cart, never sought a supervisor's approval to take the property, and did not restock the lumber as he indicated. R.R. at 24a-27a. Upon review, the Board credited Claimant's testimony and rejected Employer's evidence.

Employer bore the initial burden to prove Claimant committed an act that constitutes willful misconduct. Gillins. Because the Board rejected Employer's evidence on this issue, it clearly failed to establish Claimant committed willful misconduct by actually depriving the owner of its property without permission or by intending to do so. Burchell; Alexander v. Unemployment Comp. Bd. of Review, 588 A.2d 1341 (Pa. Cmwlth. 1991).

Employer's contentions on appeal amount to an invitation for this Court to draw a different inference regarding Claimant's intent. We decline the invitation, and we affirm the Board.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wirerope Works, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1729 C.D. 2007
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 6th day of March, 2008, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge