

to Employer's progressive disciplinary policy. Claimant received a second final warning on April 16, 2007 for work performance contributing to dusty conditions in the corridor on the third floor. On April 26, 2007, Employer found Claimant's assigned areas (holding area and its preparation room in the radiology department) in dusty and dirty condition; the next day he was discharged for contributing to unsanitary conditions, poor housekeeping and failure to maintain reasonable standards of work performance.

The Duquesne UC Service Center denied Claimant's application for benefits. The referee reversed after he concluded that Claimant's failure to perform his duties on April 26 was not so egregious that it demanded his separation. The Board reversed the referee's decision and made the following findings of fact:

2. In accordance with the employer's corrective disciplinary action policy, corrective action up to and including termination may be warranted for contributing to unsanitary conditions, poor housekeeping, or failure to maintain reasonable standards of work performance....
3. The claimant was or should have been aware of the employer's policy.
4. The claimant received a written warning on August 9, 2006, and final written warning on October 12, 2006, in regard to his work performance for contributing to unsanitary conditions and poor housekeeping.
5. On April 16, 2007, the claimant received a second final written warning in regard to his work performance for dusty conditions in the corridor on the third floor.
6. The claimant was taken off the fourth floor and was reassigned to clean the third.
7. The claimant believed that he was assigned to clean only the radiology department on the third floor.

8. The claimant believed that someone else was assigned to clean the hallways and corridors on the remainder of the third floor, outside of the radiology department.

9. On April 26, 2007, the employer found the holding area and holding area prep room in the radiology department to be dusty and dirty.

10. The claimant alleged that he had no knowledge of the dusty and dirty conditions found in the radiology department on April 26, 2007.

11. On April 27, 2007, the employer discharged the claimant for contributing to unsanitary conditions, poor housekeeping, and failure to maintain reasonable standards of work performance.

In its discussion, the Board noted that Section 402(e) of the Law provides that a claimant shall be ineligible for compensation in any week in which his unemployment is due to discharge from work for willful misconduct connected with the work. Noting that the employer has the burden of establishing that a discharge was for willful misconduct, the Board reasoned as follows:

While the term "willful misconduct" is not defined in the Law, the Board of Review and the Appellate Courts in numerous decisions have defined willful misconduct as an act of wanton or willful disregard of the employer's interests, a deliberate violation of the employer's rules, a disregard of the standards of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer's interests or of the employee's duties and obligations to the employer.

....

The Pennsylvania Courts have held that a deliberate refusal to comply with an employer's rule or policy ordinarily constitutes willful misconduct. The employer must prove the existence of the rule or policy and that it was violated, then the burden shifts to the claimant to prove good cause for the violation or that the policy was unreasonable.

The Board resolves the conflicts in the testimony, in relevant part, in favor of the employer and finds employer's testimony to be credible.

The employer established that after previous and final warnings, the claimant was discharged for contributing to unsanitary conditions, poor housekeeping, and failure to maintain reasonable standards of work performance, in violation of the employer's policy. [T]he claimant has not established good cause for the dirty and dusty condition of the areas which he was assigned to clean on April 26. The claimant's actions were a clear disregard of the employer's interests and rose to the level of willful misconduct in connection with his work.

Board Decision, pp. 2 - 3.¹

Claimant argues that an employee's misconduct must be intentional to be ineligible for benefits under Section 402(e) of the Law. He asserts that although an employer must provide evidence that the claimant willfully failed to perform work in a satisfactory manner, Employer only provided evidence to show that Claimant's job performance fell below its standard and did not allege that such performance was willful. Citing *Rung v. Unemployment Compensation Board of Review*, 689 A.2d 999 (Pa. Cmwlth. 1997), Claimant contends that this Court interprets willful misconduct to require an intentional disregard of the employer's interests. Also, Employer failed to provide any evidence, and the Board made no such finding, that Claimant's unsatisfactory performance was intentional or that he deliberately violated any rule requiring the employees to meet reasonable work performance standards under the reasoning in *BK Foods, Inc. v. Unemployment Compensation Board of Review*, 547 A.2d 873 (Pa. Cmwlth. 1988).

¹The Court's review is limited to determining whether constitutional rights were violated, an error of law was committed, a Board practice or procedure was not followed or 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). The Board is the ultimate fact finder. *Id.*

The Board responds that its findings are conclusive on appeal because Claimant failed to preserve a challenge to the findings in his statement of the questions involved, pursuant to Pa. R.A.P. 2116(a) and *Commonwealth v. Unger*, 494 Pa. 592, 432 A.2d 146 (1980). It states that under *ATM Corp. of Am. v. Unemployment Compensation Board of Review*, 892 A.2d 859 (Pa. Cmwlth. 2006), willful misconduct has been construed as a violation of work rules or a disregard of standards of behavior that an employer has a right to expect of its employees; that the employer has the burden to show the existence of a work rule and that the claimant violated the rule; and that the claimant then must prove that his/her actions did not constitute willful misconduct or that he/she had good cause under *Jordon v. Unemployment Compensation Board of Review*, 684 A.2d 1096 (Pa. Cmwlth. 1996). Furthermore, mere incompetence, inexperience or inability of an employee to perform assigned work does not constitute willful misconduct under *McCrea v. Unemployment Compensation Board of Review*, 487 A.2d 69 (Pa. Cmwlth. 1985), but willful misconduct nonetheless is established when Claimant's action or inaction amounts to a conscious disregard of the employer's interests.

The Board argues that the case *sub judice* is indistinguishable from *McCrea* where a hospital service aide assigned to clean patient rooms was denied benefits because she disregarded her supervisor's instruction to clean two rooms and instead chose to clean baby cribs, contending that she did not have time to clean the rooms. An inspection the next day showed that she failed to complete another assignment. Based on progressive disciplinary policy, the claimant was discharged one month later. The Court observed in *McCrea* that a claimant's poor work performance reflects an unwillingness to work to the best of one's ability and evidences a disregard for the standard of conduct that an employer had a right to

expect. In that regard, the Board argues that Claimant's recent performance was not attributable to his mere incompetence or inability to perform as he had been disciplined only during the last eight months of his employment. As in *McCrea* his conduct reflects an unwillingness to work to the best of his ability and evidences a disregard for the standard of conduct that Employer had a right to expect.

In a reply brief, Claimant argues that the Board's allegation that he failed to rebut or explain his alleged unsatisfactory work performance is contrary to the findings and the record. Claimant submits that, with regard to the April 13, 2007 incident, the Board found that he believed someone else was assigned to clean the area in question, and he testified that Employer did not inform him of allegations related to the April 26 incident until his discharge. As a result, he had no opportunity to rebut them. Claimant reiterates that a finding of willfulness is a prerequisite to the denial of benefits, and he argues that *McCrea* is distinguishable because the claimant there intentionally violated the supervisor's order and chose to perform other work whereas no evidence exists of his intentional conduct here.

When discharging an employee under Section 402(e) of the Law, the employer bears the burden of proving willful misconduct. *Jordon*. Although mere incompetence or inability does not constitute willful misconduct, it nonetheless is established when action or inaction by a claimant amounts to a conscious disregard of the employer's interests. *McCrea*. Once the employer meets its burden, the claimant must show good cause or that his/her actions did not constitute willful misconduct. *Jordon*. Based upon the record developed in the case *sub judice* and the findings made by the Board, the Court cannot agree that Employer met its burden to establish that Claimant committed willful misconduct.

The Board expressly found that Claimant was taken off of the fourth floor and reassigned to clean the third floor and he believed that he was assigned to clean only the radiology department on that floor. The Board found as well that Claimant believed that another employee was assigned to clean the hallways and corridors on the remainder of the third floor outside of the department. There is no dispute regarding the Board's findings that Claimant was discharged the day after Employer found the holding area and prep room in the radiology department to be dusty and dirty. The Board's findings are binding upon the Court if supported by substantial evidence, *see Glenn v. Unemployment Compensation Board of Review*, 928 A.2d 1169 (Pa. Cmwlth. 2007), and as such they must be reviewed to ascertain whether they support the conclusion that Claimant committed willful misconduct.

Evidently, the Board credited Claimant's testimony regarding what he believed to be the confines of his cleaning assignment on the third floor and to be the extent of cleaning required in the hallways and corridors by another employee. Claimant was given a final warning on April 16, 2007 related to the third floor corridor conditions and was discharged April 27, the day after Employer found dusty conditions in the radiology department holding area and preparation room. Pursuant to the Board's own findings, the Court cannot conclude as a matter of law that Claimant's conduct reflects a conscious or intentional disregard of Employer's interests. *See, e.g., BK Foods* (affirming the grant of benefits to claimant where a subordinate employee failed to make bank deposits that claimant was required to make but could be delegated to another employee). Because Employer failed to meet its burden of proving willful misconduct, the Court is compelled to reverse.

DORIS A. SMITH-RIBNER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kenneth Patterson,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1741 C.D. 2007
	:	
Unemployment Compensation Board of	:	
Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 12th day of September 2008, the Court reverses the order of the Unemployment Compensation Board of Review.

DORIS A. SMITH-RIBNER, Judge

areas were not the same. In addition, Claimant agreed his responsibilities included the radiology department. Finding of Fact No. 7; N.T. at 11-12, 14, 16.

This is sufficient support for the Board's conclusion Claimant failed to properly perform housekeeping duties in the areas Employer assigned him to clean on April 26, 2007, that is, the radiology department. Board Op. at 3. The circumstances surrounding the April 16 incident are of no moment. On April 26, 2007, Claimant knew his duties included the radiology department, which encompassed the holding areas. Claimant worked for Employer four years without incident which established his ability to perform the job properly. Thus, his unsatisfactory work performance on April 26 cannot be attributable to mere incompetence or inability. McCrea v. Unemployment Comp. Bd. of Review, 487 A.2d 69 (Pa. Cmwlth. 1985). I therefore agree with the Board's determination that Claimant's actions show a disregard of the standards of behavior Employer had the right to expect of Claimant.¹ Board Op. at 3.

Once Employer established that Claimant committed willful misconduct on April 26, 2007, Claimant bore the burden of proving just cause for his actions. Claimant, however, disavowed any knowledge of the April 26 incident. F.F. No. 10; N.T. at 20. He offered no justification for his failure to

¹ Willful misconduct is established where action or inaction by a claimant amounts to a conscious disregard of the employer's interests or constitutes behavior contrary to that which an employer has the right to expect of its employees. McCrea v. Unemployment Comp. Bd. of Review, 487 A.2d 69 (Pa. Cmwlth. 1985); Gardner v. Unemployment Comp. Bd. of Review, 454 A.2d 1208 (Pa. Cmwlth. 1983). In addition, poor work performance reflecting an unwillingness to work to the best of one's ability is indicative of a disregard of the standards of conduct an employer has the right to expect and may rise to the level of willful misconduct. Gardner.

properly clean the holding rooms and, as a result, failed to sustain his burden of proof.

Accordingly, I would affirm the denial of benefits.

ROBERT SIMPSON, Judge