IN THE COMMONWEALTH COURT OF PENNSYLVANIA

McKissick Trucking, Petitioner	:	
	:	No. 1902 C.D. 2007
v.	:	Submitted: February 15, 2008
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: April 24, 2008

McKissick Trucking (Employer) petitions for review of the order of the Unemployment Compensation Board of Review (Board) reversing a referee's decision to deny benefits to Donald C. Frederick (Claimant) under Section 402(e) of the Unemployment Compensation Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e) (willful misconduct). Employer's statement of the questions involved is whether the Board's decision that Claimant properly performed his job duties was supported by substantial evidence; whether the Board committed an error of law in finding that Claimant did not commit willful misconduct; whether Claimant disregarded the substantial interests of Employer; and whether Employer violated its progressive disciplinary policy.[1]

[1]The Court's review 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 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).

Claimant was employed as a truck driver for Employer from March 3, 2006 to April 10, 2007 when he was discharged for failing to follow safe practices. On April 10, 2007, Claimant was assigned to transport a load of five 9000-pound coils on a flatbed truck, secured by chains and covered with a tarp. Claimant asserts that he checked to ensure that the load was properly secured both before and shortly after leaving the warehouse as required by Employer's rules.[2] While in transit, Claimant had to make a "panic stop" at an intersection due to a car running a red light. Reproduced Record, R.R. at 128a. He proceeded to a nearby truck stop and inspected the load to ensure that it was still secured and had not shifted during the stop and then returned to the highway where one of the coils fell off the truck. He received a citation for transporting an unsecured load but pled guilty to a lesser charge. After an Employer review panel investigation, Claimant was discharged because "he had not properly checked his load after making a 'panic stop'. The employee was aware of the employer rule to make sure the load is

[2]Rule 2.4, "Inspection Requirements" in Employer's cargo securement handbook states, in relevant part:

> Pre-trip
> - Make sure that cargo is properly distributed and adequately secured (according to the regulations).
> - Make sure that all securement equipment and vehicle structures are in good working order and used consistent with their capability.
>
> …
>
> Periodic inspections during transit
> - Inspect cargo and securing devices.
> - Adjust cargo or load securement devices as necessary to ensure that cargo cannot shift on or within, or fall from, the commercial motor vehicle.
> - As necessary, add more securing devices[.]

R.R. at 172a.

secure if the driver has reason to believe the load shifted." Letter to Altoona UC Service Center, R.R. at 26a. Claimant has no prior history of discipline.

The UC Service Center found Claimant eligible for benefits. The referee reversed, concluding that Claimant knew of and violated Employer's rules contained in its cargo securement handbook and the Federal Motor Carrier Safety Regulations that placed responsibility on the driver to ensure that loads are secured while in transit.[3] The referee also concluded that Claimant's failure to properly inspect the load constituted willful misconduct and that given the severity of the accident Employer could discharge Claimant immediately, notwithstanding its progressive disciplinary policy.[4] The Board, however, found credible Claimant's testimony that he "checked the chains and looked under the tarp, including to see if the coils had moved from where he had set them," Board Finding of Fact 11, and "believed that the load was still secure." *Id*. at 12. The Board also found that no one was injured and that no damage occurred when Claimant made the panic stop,

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[3]Section 391.13(a) ("Responsibilities of drivers") of the Federal Motor Carrier Safety Regulations, 49 C.F.R. §391.13 (2008), states in relevant part: "a motor carrier shall not … permit a person to drive … unless the person … [c]an ... determine whether the cargo he/she transports … has been properly located, distributed, and secured in or on the commercial motor vehicle he/she drives[.]"

[4]Employer's policy states, in relevant part:

> [3.2] [D]iscipline notices will be issued according to the following levels: 1. Verbal warning in written form. 2. Written warning in written form. 3. Second written warning in written form. 4. Temporary suspension without pay in written form. 5. Termination.
>
> …
>
> 3.4 Following any accident, ticket, and/or equipment damage, a review board will meet to determine the cause of accident, ticket, and/or damage, the extent of responsibility attributed to the employee, and action to be taken by the company.

R.R. at 198a.

and based on its findings it could not conclude that Claimant intentionally or knowingly violated Employer's policies and that his conduct rose to the level of willful misconduct. The Board stated that "even if the claimant had violated the employer's policy he would still be entitled to benefits due to the employer's failure to follow its progressive disciplinary policy." Board Opinion, p. 4.

Employer argues that the Board's findings of fact are not supported by substantial evidence and that it capriciously disregarded competent evidence. It contends that Claimant's testimony that he inspected the load was contradicted by two other employees and that his written statement of the accident did not mention that he checked the load. Employer points out that the Board's conclusions do not refer to Employer's testimony or to the citation issued to Claimant. Citing *Department of Navy v. Unemployment Compensation Board of Review*, 632 A.2d 622 (Pa. Cmwlth. 1993), it submits that a citation for carrying an unsecured load creates a presumption of guilt and that the Board erred by failing to determine whether Claimant's guilty plea to a lesser offense established that he was culpable for the unsecured load.

Next, Employer argues that willful misconduct exists where there is a disregard of the standards of behavior that an employer has a right to expect of its employees. Citing *Baglivo v. Unemployment Compensation Board of Review*, 734 A.2d 452 (Pa. Cmwlth. 1999), Employer contends that misconduct need not be intentional to establish willful misconduct. Claimant disregarded proper standards of behavior by failing to take reasonable steps to ensure safety by climbing up on the flatbed for close inspection of the coils following the panic stop and by calling the dispatcher for help upon noticing that the load was unsecured. Also, the occurrence of the accident proves that Claimant did not properly inspect the load.

Lastly, it could discharge Claimant immediately because the disciplinary policy allows a review panel to recommend disciplinary action for an employee involved in any accident, ticket or equipment damage. It cites *Frigm v. Unemployment Compensation Board of Review*, 642 A.2d 629 (Pa. Cmwlth. 1994), for a proposition that serious offenses may warrant immediate discharge.

The Board counters that its findings are supported by substantial evidence because it found credible Claimant's testimony that he properly inspected the load following the panic stop. Furthermore, there was no capricious disregard of evidence because the Board considered Employer's testimony and evidence of the citation. The Board notes that it is entitled to make credibility determinations and that no caselaw supports Employer's position that receipt of a traffic citation establishes willful misconduct. Moreover, *Department of Navy* is distinguishable as Claimant contested the charge of transporting an unsecured load and pled guilty to a lesser charge, the specific identity of which is not in the record, and the high burden of capricious disregard under *Leon E. Wintermeyer, Inc. v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002), was not met as Employer failed to show that the Board disregarded relevant evidence.

As a final matter, the Board determined that even if Claimant violated Employer's rules, he still is entitled to benefits because Employer failed to follow its own progressive disciplinary policy. It cited *Johnson v. Unemployment Compensation Board of Review*, 744 A.2d 817 (Pa. Cmwlth. 2000) (stating that an employer must follow the specific disciplinary system it promulgated), and *PMA Reinsurance Corp. v. Unemployment Compensation Board of Review*, 558 A.2d 623 (Pa. Cmwlth. 1989) (holding that employer may discharge claimant but must do so in accord with its own rules if claimant is to be held ineligible for benefits).

The Board's findings are conclusive on appeal when supported by substantial evidence, *Taylor v. Unemployment Compensation Board of Review*, 474 Pa. 351, 378 A.2d 829 (1977), but the Board's conclusions nonetheless are subject to judicial review if it is clear beyond doubt that they were based upon a capricious disregard of competent evidence. The Court in *Wintermeyer* explained that such a situation may exist where the Board expressly refused to resolve any conflicts in the evidence and to make essential credibility determinations. As well, the employer has the burden of proving willful misconduct, *City of Beaver Falls v. Unemployment Compensation Board of Review*, 441 A.2d 510 (Pa. Cmwlth. 1982), and an employer cannot prove willful misconduct merely by showing that an employee committed a negligent act. *Grieb v. Unemployment Compensation Board of Review*, 573 Pa. 594, 827 A.2d 422 (2003). Instead, it must present evidence to show that the conduct was intentional and deliberate. *Id*.

The Court concludes that the Board's findings of fact were supported by substantial evidence and that it resolved conflicts in the evidence in favor of Claimant and made all essential credibility determinations. *Wintermeyer*. That the Board did not address the citation in its conclusions, while finding that Claimant was in fact cited, does not establish a capricious disregard of evidence because he was not convicted of carrying an unsecured load. Nor is there any agreement with Employer that the Board failed to consider testimony from its witnesses. Likewise, *Department of Navy* is inapposite as the Court held there that where an employer sustains its burden of proof with substantial evidence that an employee committed theft, directly or indirectly, of employer property, that conduct constitutes willful misconduct as a matter of law and is not subject to the "good cause" rationale. This principle does not apply to the present case, which involved no theft and, as

the Board found, no loss or damage to Employer or any conviction for carrying an unsecured load. No basis exists for concluding, as a matter of law, that Claimant's conduct amounted to willful misconduct. Also, the fact that the Board did not expressly address Claimant's omission of his inspection of the load in his written statement does not establish capricious disregard where the Board found credible his testimony that he "never thought" to include it at the time. R.R. at 134a.

Based on the Board's findings, supported by substantial evidence in the record, it correctly concluded that Claimant did not commit willful misconduct. In *Baglivo* the claimant was disciplined on four separate occasions in the six-month period preceding a major accident caused by his negligence, and the Court held that repeated acts of negligence can rise to the level of willful misconduct. That case is distinguishable because Claimant had no prior history of discipline. In addition, Employer's argument that the Board must accept Employer's explanation of the accident unless Claimant presents evidence to show an alternate explanation lacks merit because, in this case, the burden of proof is on Employer, not Claimant. *City of Beaver Falls*. Based on its decision that the Board's findings are supported by substantial evidence and that there was no capricious disregard of evidence, the Court need not discuss the alternative argument involving Employer's failure to follow its progressive disciplinary policy, and it accordingly affirms.

DORIS A. SMITH-RIBNER, Judge

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O R D E R

AND NOW, this 24th day of April, 2008, the Court affirms the order of the Unemployment Compensation Board of Review.

DORIS A. SMITH-RIBNER, Judge