IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Patricia A. Palmieri, Petitioner	:	
v.	:	No. 2106 C.D. 2011
Unemployment Compensation Board of Review, Respondent	:	
Cheryl Czaplinski, Petitioner	:	
v.	:	No. 2107 C.D. 2011
	:	Submitted: April 5, 2012
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: August 14, 2012**

Petitioners Patricia A. Palmieri and Cheryl Czaplinski (Claimants) petition for review of an order of the Unemployment Compensation Board of Review (Board), which denied Claimants unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law),[1]

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

based on willful misconduct. In so doing, the Board reversed the Unemployment Compensation Referee's (Referee) decision. For the reasons set forth below, we affirm.

Claimants filed for unemployment compensation benefits after being discharged from employment with Kirkland Village (Employer) on April 1, 2011. Claimants' claims were assigned to different UC Service Centers (Service Center). The Allentown UC Service Center and the UC Service Harrisburg Overflow Center each issued a separate determination finding their respective claimant ineligible for unemployment compensation benefits due to willful misconduct. Claimants appealed their respective Service Center's determination. Claimants agreed to consolidate their appeals, and a Referee conducted a hearing on the appeals.

At the hearing before the Referee, two witnesses testified on Employer's behalf. First, Regional Human Resources Director Jacqueline Palmer testified that Employer has a policy in effect that bars employees from neglecting residents. (Reproduced Record (R.R.) at 37a-38a.) Employer defines neglect as failure to provide a prescribed service, unless refused by a resident and such refusal is properly documented. (*Id.* at 57a-58a.) Employer views the policy with high import, so much so that a violation is sufficient cause to terminate any employee. (*Id.* at 37a-38a.) In fact, Ms. Palmer testified that Employer found three of its employees, including Claimants, in violation of that policy. (*Id.*) Ms. Palmer further testified that Employer annually reviews with its employees its Employee Handbook, which contains its policies. (*Id.*) Following the review, Employer asks employees to sign an acknowledgment form. (*Id.*) Indeed, both Claimants had signed the form indicating that they understood Employer's policies

and agreed with them. (*Id.*, Certified Record (C.R.), Item No. 13, Employer's Exhibits 3, 4.)

Wendy Smolenak, Director of Nursing, testified that Employer provides its nurses with individualized passwords to access its computer system for resident treatment records, referred to as the Millennium System (Millennium). (*Id.* at 44a.) Employer requires nurses to access the system during their shifts to record the medications and treatments given to residents before the arrival of the relieving shift's nurse. (*Id.* at 56a, 65a.) Nurses must record all data in Millennium after the treatments have been rendered. (*Id.* at 57a.) Ms. Smolenak also testified that, if nurses are unable to perform prescribed treatments because of resident refusal, they have to record the reason why a treatment was not performed in their nursing notes. (*Id.* at 46a, 54a.) The nurses must inform the nurses working the next shift of their inability to perform such treatments so that the incoming nurses can perform the outstanding treatment. (*Id.* at 46a, 57a.)

Ms. Smolenak testified that Employer assigned Claimants to work the 3:00 p.m. to 11:00 p.m. shift in its 22-bed dementia unit. (*Id.* at 54a, 59a.) As part of their duties, Claimants were responsible for administering and documenting treatments to Jane, a 96-year-old female resident with dementia who had sustained a skin tear on her left leg. (*Id.* at 44a-45a.) Jane had a history of combative behavior, in part, because she disliked being touched. (*Id.* at 49a.) Her attending physician had prescribed her daily wound care treatment to facilitate the healing of the tear. (*Id.* at 44a.) Specifically, the treatment was to be administered during the 3:00 p.m. to 11:00 p.m. shift. (*Id.* at 56a.)

Ms. Smolenak testified that during her shifts on March 13 and 15, 2011, Claimant Palmieri accessed Millennium and recorded that she had rendered

the prescribed wound care treatment to Jane. (*Id.* at 44a.) Similarly, Claimant Czaplinski, during her shift on March 14, 2011, accessed Millennium and recorded that she, too, had rendered the prescribed treatment to Jane.

Ms. Smolenak further testified that on March 16, 2011, a nurse asked her to inspect the gauze wrap dressing on Jane's leg. (*Id.* at 42a.) The date on the dressing denoted that Jane's dressing had not been changed since March 12, 2011. (*Id.*) The dressing was disheveled. (*Id.*) Ms. Smolenak testified that it was Employer's protocol to write the date on the dressing at the time of dressing change. (*Id.*)

Ms. Smolenak also testified that on March 10, 2011, Claimants attended work training on skin care procedures. (*Id.* at 46a.) The professional training highlighted Employer's emphasis on a wide array of skin care issues affecting residents. (*Id.* at 46a-47a.) Ms. Smolenak further testified that, despite the training, Claimants did not follow the skin care procedures when treating Jane, because they neither rendered the prescribed treatment to her nor imparted her alleged refusal to accept it to the incoming shift's nurse. (*Id.* at 48a.) Moreover, Ms. Smolenak testified that Claimants did not note in their respective nursing notes that the wound care treatment had not been performed on Jane's leg. (*Id.* at 54a.) Ultimately, following its internal investigation, Employer dismissed Claimants for violating its policy on resident neglect, because they failed to render the prescribed treatment to Jane. (*Id.* at 34a-37a.)

In response, Claimants testified that Jane had refused the treatment that they had attempted to perform during their respective shifts. (*Id.* at 67a, 86a-87a.) Notwithstanding Jane's refusal, Claimants admitted that the prescribed treatment was necessary. (*Id.* at 74a-75a, 91a.) Claimants also agreed

that Jane had a history of refusing treatments because she disliked being touched. (*Id.* at 67a-68a, 86a-88a.)

Contrary to Employer's assertions, Claimants testified that, at the end of their respective shifts, they orally communicated to the incoming shift's nurses that Jane had refused to accept the treatment. (*Id.* at 69a, 87a.). They also claimed that, despite Employer's policy to the contrary, it was customary for nurses to enter the treatments in the system before they actually were performed in an effort to save time. (*Id.* at 65a, 85a, 92a.) Indeed, Claimants admitted to frequently having entered data in Millennium before treatments were rendered, including on the three days in March, because it was a common and accepted practice to do so. (*Id.* at 65a, 80a-81a, 85a, 92a-93a.) Claimant Czaplinski testified that once nurses record and submit treatments in Millennium as completed or refused, the system does not permit nurses to make any alterations. (*Id.* at 72a-73a.) Nurses have, however, two ways to alter or correct the data entries after submission: (1) contact the pharmacy; or (2) fill out a paper form that is associated with Millennium. (*Id.* at 72a-73a, 80a.) Thus, once the nurse entered treatments in Millennium as completed or refused, they could not make any changes to their entries without following certain approved methods. (*Id.* at 73a.)

In explaining their failure to correct the submitted data entries in Millennium, Claimant Czaplinski testified that Employer did not provide the nurses with the paper form necessary to make the changes. (*Id.* at 72a.) She admitted, however, that completing the paper form was not the only method of correcting data entry errors. (*Id.* at 73a). In fact, Claimant Czaplinski testified to having used the pharmacy to correct data entry errors in the system. (*Id.* at 72a-73a.) Claimant Palmieri agreed with Claimant Czaplinski's testimony

regarding Millennium. (*Id.* at 85a.) Other reasons given by Claimants for failing to correct the data entries and to record Jane's refusal in their respective nursing notes included simply forgetting, being too busy, or Employer's prohibition against overtime. (*Id.* at 67a, 75a, 80a, 88a, 95a.)

Following the hearing, the Referee issued decisions for each Claimant, which reversed the Service Center's determinations, thereby finding Claimants eligible for unemployment compensation benefits. (*Id.* at 20a-22a, 25a-27a.) Employer appealed the Referee's orders to the Board.

On appeal, the Board reversed the Referee's decisions. In so doing, the Board issued its own findings of fact and conclusions of law. As to Claimant Palmieri, the Board found as follows:

> 1. The claimant was last employed as a licensed practical nurse by Kirkland Village from November 20, 2007, and her last day of work was April 1, 2011. The claimant worked full-time and was paid $23.68 per hour.
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> 2. The claimant, with assistance from two nursing assistants, was responsible for the care of patients in a 22[-]bed dementia unit.
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> 3. The claimant's job duties included assigning work to nursing assistants, administrati[ng] and documentati[ng] of medication and treatments, feeding and bathing residents, telephone calls, preparing for admissions, responding to patient alarms, making rounds, and counting narcotics.
>
> 4. In accordance with the employer's policy, resident/client neglect is cause for disciplinary action, up to and including termination.
>
> 5. The claimant was aware of the employer's policy.

6. Jane is a 96[-]year[-]old female resident with dementia who disliked being touched and has a history of combative behavior, striking staff and refusing treatments.

7. It is company protocol when a dementia patient refuses a treatment for the nurse to make another attempt to give the treatment; however, if the patient continues to refuse, the nurse is not to force the treatment on the patient.

8. In accordance with a doctor's order, Jane was to receive daily wound care with a dressing change for a cut on her lower left leg during the 3:00 p.m. to 11:00 p.m. shift.

9. It was customary practice of the claimant and other LPNs to access computerized patient treatment record once per shift and data enter all treatments that had been performed.

10. It was not customary to enter treatments that had not been performed as having been performed.

11. The Millennium computer system used by the employer does not allow a treatment record to be corrected or altered by a nurse after data has been entered. Millennium provides a form to be submitted for correction or deletion of a data entry error.

12. The employer did not provide employees with the form.

13. If the claimant was unable to give the treatment during the shift, she annotated the nursing notes of the reason the treatment had not been given and informed the relieving shift's nurse of the need to give the treatment.

14. On March 13, 2011, and March 15, 2011, the claimant worked 3:00 p.m. to 11:00 p.m. During

her shift, she completed treatment records indicating she had performed Jane's treatment.

15. On March 13, 2011, and March 15, 2011, the claimant attempted but was unable to complete the treatment because Jane refused the treatment.

16. The claimant was busy and forgot to make note of the patient's refusal in the nursing notes.

17. However, the computer system still incorrectly showed that the patient had received the treatment.

18. The claimant did not notify the night shift nurse that she had been unable to complete the treatments.

19. On March 16, 2011, the Director of Nursing learned Jane's dressing had not been changed since March 12, 2011.

20. The Director of Nursing questioned the claimant.

21. On April 1, 2011, the claimant was discharged for resident neglect because she indicated in the computer that she had completed the treatment on the patient when she had not.

22. The claimant did not have good cause for her actions.

(*Id.* at 10a-12a.) As to Claimant Czaplinski, the Board's decision mirrored the decision relating to Claimant Palmieri, save for findings of fact numbers 1, 14, and 15. (*Id*. at 15a-17a.) Those findings indicated that Czaplinski's date of hire was March 24, 2010, her rate of pay was $22.68 per hour, and she worked only on March 14, 2011. (*Id*.) The Board characterized Claimants' actions as having "falsified" records with regard to treating a patient. (*Id*. at 10a-12a, 15a-17a.)

Based on the findings above, the Board concluded that Claimants engaged in willful misconduct and failed to credibly establish good cause for their actions. (*Id.*) Accordingly, the Board determined that Claimants were ineligible for unemployment compensation benefits. (*Id.*) Claimants now petition this Court for review.[2]

On appeal,[3] Claimants appear to attempt to argue that the Board's findings of fact are not supported by substantial evidence. Claimants also argue that the Board erred in concluding that their actions constituted willful misconduct. Alternatively, Claimants argue that the Board erred in concluding that their actions were not justified.

First, to the extent that Claimants may be attempting to argue that substantial evidence does not exist to support the Board's findings of fact, we note that Claimants, in their petitions for review and their brief, do not identify with specificity any findings of fact that they contend are not supported by substantial evidence. Rather, Claimants take the general position that there was insufficient evidence of record to show a willful or wanton disregard of Employer's interests, a deliberate violation of Employer's rules, or a willful disregard of the standards of behavior which Employer has a right to expect of an employee. Claimants support that position by arguing that Employer trained Claimants to prematurely enter treatment information in Millennium and Claimants properly informed the

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[2] On December 20, 2011, we granted the Board's motion to consolidate Claimants' appeals.

[3] This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.

relieving nurses of their inability to provide the treatment. Although findings of fact made by the Board that are not specifically challenged generally are conclusive upon review, *Salamak v. Unemployment Compensation Board of Review*, 497 A.2d 951 (Pa. Cmwlth. 1985), Claimants petitions for review and briefs may be interpreted as challenging whether substantial evidence exists to support findings of fact numbers 10 and 18, which, respectively provide that "[i]t was not customary to enter treatments that had not been performed as having been performed," and that "[C]laimant did not notify the night shift nurse that she had been unable to complete the treatments." (*Id.* at 10a-12a, 15a-17a.)

Substantial evidence is defined as relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp. Bd. of Review*, 502 A.2d 738, 740 (Pa. Cmwlth. 1986). In determining whether there is substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn from the evidence. *Id.* A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record as a whole. *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The Board's findings of fact are conclusive on appeal only so long as the record, taken as a whole, contains substantial evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 286, 485 A.2d 359, 365 (1984). "The fact that [a party] may have produced witnesses who gave a different version of the events, or that [the party] might view the testimony differently than the Board is not grounds for reversal if substantial evidence supports the Board's findings." *Tapco, Inc. v. Unemployment Comp. Bd. of Review*, 650 A.2d 1106 (Pa. Cmwlth.

1994). Similarly, even if evidence exists in the record that could support a contrary conclusion, it does not follow that the findings of fact are not supported by substantial evidence. *Johnson v. Unemployment Comp. Bd. of Review*, 504 A.2d 989, 990 (Pa. Cmwlth. 1986).

As to finding of fact number 10, Ms. Smolenak testified that nurses must record all data in Millennium *after* the treatments are rendered, and that if nurses are unable to perform prescribed treatments because of resident refusal, they must record in their nursing notes the reason why a treatment was not performed. (R.R. at 46a, 54a, 57a.) In an unemployment case, it is well-settled that 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 Comp. Bd. of Review*, 509 Pa. 267, 276, 501 A.2d 1383, 1388 (1985). Although Claimants provided contrary testimony, asserting that nurses, as instructed by Employer, frequently entered treatment information before the treatment was provided, the Board found Employer's testimony to be more credible. Ms. Smolenak's testimony, therefore, constituted substantial evidence to support a finding that "[i]t was not customary to enter treatments that had not been performed as having been performed." (*Id.* at 10a-12a, 15a-17a.)

As to finding of fact number 18, Ms. Smolenak testified that Claimants did not inform the incoming shift's nurses of Jane's alleged refusal of treatment. (*Id.* at 48a.) Ms. Smolenak also testified that Claimants did not note in their respective nursing notes that the wound care treatment had not been performed on Jane's leg. (*Id.* at 54a.) The Board specifically discredited Claimants' testimony that they informed the relieving nurses of their inability to complete the treatments for Jane, which is well within its discretion.

We must conclude, therefore, that findings of fact numbers 10 and 18 are supported by substantial evidence of record. Moreover, Claimants' argument that this Court should reweigh the evidence to find in their favor is beyond our scope of review.

We next address Claimant's contention that the Board erred in concluding that Employer proved willful misconduct.[4] Section 402(e) of the Law provides, in part, that an employee shall be ineligible for compensation for any week in which "his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." The employer bears the burden of proving that the claimant's unemployment is due to the claimant's willful misconduct. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363, 369 (Pa. Cmwlth. 2008). The term "willful misconduct" is not defined by statute. The courts, however, have defined "willful misconduct" as:

> (a) wanton or willful disregard for an employer's interests, (b) deliberate violation of an employer's rules, (c) disregard for standards of behavior which an employer can rightfully expect of an employee, or (d) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003). An employer, seeking to prove willful misconduct by showing that the claimant violated the employer's rules or policies, must prove the existence of the rule or policy, and that the claimant violated it. *Walsh*, 943 A.2d at 369. However,

[4] Whether or not an employee's actions amount to willful misconduct is a question of law subject to review by this Court. *Nolan v. Unemployment Comp. Bd. of Review*, 425 A.2d 1203, 1205 (Pa. Cmwlth. 1981).

once an employer has met its burden, the burden then shifts to the claimant to show good cause as justification for the conduct considered willful. *McKeesport Hosp. v. Unemployment Comp. Bd. of Review*, 625 A.2d 112, 114 (Pa. Cmwlth. 1993) (citing *Mulqueen v. Unemployment Comp. Bd. of Review*, 543 A.2d 1286 (Pa. Cmwlth. 1988)).

Here, Employer established that it had policies in place that governed resident neglect as well as procedures to properly use Millennium. Employer also established that it had a policy in effect for reporting refused treatments to an incoming shift's nurse. Employer's Regional Human Resources Director credibly testified that Claimants were aware of Employer's policies as contained in its Employee Handbook. In fact, Claimants each had signed an acknowledgment form indicating that they understood Employer's policies and agreed with them. Further, Employer's Director of Nursing credibly testified that Claimants attended work training on skin care procedures where Employer emphasized the importance of treating skin wounds on elderly residents. Yet, despite the known policies and training, Claimants failed to adhere to Employer's expectations when they failed to perform the prescribed treatment on Jane and recorded them as having been performed.

Claimants contend, however, that their actions did not amount to willful misconduct because they were inadvertent.[5] In support of their contention,

[5] Claimants point out that the Northampton County Area Agency on Aging (Agency), a division of the county's Department of Human Services, determined in its investigation that Claimants did not neglect Jane. The Agency's investigation and determination are not material to the resolution of this case, because the issue before us is not whether Claimants violated the Agency's rules. We, therefore, limited our inquiry to whether Claimants' actions were in violation of Employer's policies.

Claimants cite to *Navickas v. Unemployment Compensation Review Board*, 567 Pa. 298, 787 A.2d 284 (2001). In *Navickas*, the Pennsylvania Supreme Court rejected this Court's decision requiring "an *ad hoc* 'higher standard of care' for health care workers, which apparently would permit any act of negligence or inadvertence on the part of a health care worker, standing alone, to be deemed willful misconduct." *Navickas*, 567 Pa. at 307-08, 787 A.2d at 290. The facts in the instant case are distinguishable from *Navickas*. The Court in *Navickas* found that a claimant had been discharged from employment for negligently making a medication error, not for violating a work rule. We note that in *Navickas* there was a work rule at issue with which the claimant complied, but did so negligently.[6] In contrast, here, Claimants simply failed to comply with Employer's policies.

We disagree with Claimants' contention that their employment was terminated only as result of inadvertent acts. Although Claimants' failure to document Jane's alleged refusals in Millennium and in their nursing notes and to communicate the alleged refusals to the incoming nurses may have been inadvertent, Claimants' initial entries in Millennium that they had completed treatments when, in fact, they had not, were not inadvertent acts. Rather, at the time Claimants made those entries, they knew that they had not yet provided such treatments. Hence, Claimants acts of recording treatment information prior to

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[6] The Supreme Court in *Navickas* stated that the claimant:

> was aware that she was required, under [her employer's] policies, to look up medication in a reference book . . . before administering the medication to a patient. On the day in question, [the claimant] glanced at the reference book but did not read it carefully enough because she thought she had administered the medication previously and knew the proper dilution.

Navickas, 567 Pa. at 300-01, 787 A.2d at 286.

providing the treatments, in contravention of Employer's policies, were intentional and deliberate. These deliberate and intentional actions constituted a violation of Employer's policies. Thus, Employer established willful misconduct by proving the existence of the policy, as well as Claimants' deliberate violation of that policy. *Walsh*, 943 A.2d at 369.

Finally, we address Claimants' argument that the Board erred in concluding that their actions were not justified. Once an employer has met this burden of establishing willful misconduct, however, we must determine whether the claimant established good cause. *McKeesport Hosp.*, 625 A.2d at 114. To prove "good cause," claimants must demonstrate that their actions were justifiable and reasonable under the circumstances. *Kelly v. Unemployment Comp. Bd. of Review*, 747 A.2d 436, 439 (Pa. Cmwlth. 2000).

Here, Claimants argue that they had good cause for violating Employer's policy because it was a common, past practice among Employer's nurses to enter treatment data in Millennium prior to performing the treatment. As we established in *Seton Company v. Unemployment Compensation Board of Review*, 663 A.2d 296 (Pa. Cmwlth. 1995), however, an acceptable past practice is a practice that "is unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as fixed and established practice *accepted by both employer and employees*." *Seton Co.*, 663 A.2d at 299 (emphasis added). Here, Employer's Director of Nursing specifically stated that she had no knowledge of any past practice of nurses routinely entering treatments in the system prior to having performed them. (R.R. at 52a.) Thus, Claimants failed to establish a past practice that was acceptable to both Employer and employees.

Claimants also argue that they had good cause for entering treatment information before it was provided, because they experienced difficulties with Millennium, were too busy, and were not allowed to work overtime. As a result of the working conditions, they simply forgot to correct the false data entries. Nonetheless, as we noted above, the Board did not find Claimants' testimony credible, and instead it found that Claimants had falsified patient records.[7] We, therefore, note that Claimants' proffered reasons for failing to adhere to Employer's policies were insufficient justification for flouting them and do not constitute good cause.

Accordingly, we affirm the Board's order.

P. KEVIN BROBSON, Judge

[7] Claimants' entering of the data prior to attempting to provide the treatment is particularly troubling because they were fully cognizant of Jane's combative nature and frequent refusals to accept treatments. We, therefore, observe that given Jane's known disposition, Claimants had reason to expect that Jane may refuse the treatment. As a result, they should have been aware of the dangers or pitfalls of entering Jane's prescribed treatment as completed before it was provided because of the alleged difficulty in changing submitted data entries in Millennium.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.	:	No. 2106 C.D. 2011
Unemployment Compensation Board of Review, Respondent	:	
Cheryl Czaplinski, Petitioner	:	
v.	:	No. 2107 C.D. 2011
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 14th day of August, 2012, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

P. KEVIN BROBSON, Judge