IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Rothberg, Petitioner	:	
v.	:	No. 2217 C.D. 2009
	:	Submitted: May 7, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: June 30, 2010

David Rothberg (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of a Referee which determined that Claimant is ineligible for unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

[1] Act of December 5, 1936, Second Ex. Sess. P.L. (1937) 2897, as amended, 43 P.S. § 802(e). Section 402(e) of the Law provides, in pertinent part:

> An employe shall be ineligible for compensation for any week-
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> * * *
>
> (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.

Claimant filed a claim for unemployment compensation benefits upon the termination of his employment as a shipping manager/superintendent with W. Rose, Inc. (Employer). The Scranton UC Service Center representative concluded that Claimant had been discharged for reasons that constitute willful misconduct under Section 402(e) of the Law based upon his failure to call off of work as required by Employer's policy. As a result, unemployment compensation benefits were denied.

Claimant appealed this determination and a hearing was conducted before a Referee at which Claimant testified and Employer's office manager and general manager testified. See N.T. 7/14/09[2] at 2-31. On July 17, 2009, the Referee issued a decision disposing of the appeal in which she made the following relevant findings of fact: (1) Claimant was last employed as a shipping manager/superintendent by Employer on March 23, 2009; (2) Employer has a policy, included in a union agreement, which provides for the termination of an employee that is absent from work for three or more consecutive workdays without notifying Employer of the absence unless the failure to provide such notice was due to circumstances beyond the employee's control; (3) Employer's policy requires employees to report their absence the night before or within two hours of their start time; (4) Employees could leave a voice message in Employer's office to report an absence; (5) Claimant was aware of this policy; (6) On March 24, 2009, Claimant called Employer's general manager to report that he was going into a psychiatric care unit the following day; (7) On March 25, 2009, Employer called Claimant on his cellular telephone, Claimant advised Employer that he could not

[2] "N.T. 6/15/09" refers to the transcript of the hearing conducted before the Referee on July 14, 2009.

talk with Employer as his therapist would not allow him to communicate with people and that he could not return to work until his therapist said so, and Claimant then ended the call; (8) Employer did not have any further contact with Claimant following the telephone call of March 25, 2009; (9) Claimant was a no call/no show for work on April 6, 2009, April 7, 2009 and April 8, 2009; (10) Claimant did not submit any medical documentation to Employer to substantiate any medical conditions that caused Claimant to be unable to work or that indicated when he could return to work; (11) On April 8, 2009, Employer sent Claimant a letter advising him that he was terminated for being absent from work for three consecutive workdays without calling or notifying Employer of the reasons or necessity of his absence; (12) After receiving Employer's letter, Claimant failed to submit any medical documentation to Employer to substantiate the necessity of his absence or indicate that there were circumstances beyond his control that prevented him from calling Employer to report his absence or for his failure to report for work. Referee Decision at 1-2.

Based on the foregoing, the Referee concluded:

> In the present case, the employer maintains a policy that requires employees to call to report their absence the night before or within two hours from their start time. The employer and union has a policy where three consecutive absences without permission or without notifying the employer would result in termination, unless the failure to request the permission to be absent was due to circumstances beyond the employee's control. As the Shipping Manager/Superintendent, the claimant should have been aware of the employer's policies, as he would implement the policies and disciplinary actions to employees. The claimant was a no call/no show for work for three consecutive workdays, and failed to submit any documentation to the employer of any conditions that prevented the claimant from reporting to work or failing to notify the employer of his absence. The Referee

> concludes as a manager and superintendent for the employer, and having been employed for nineteen years with the company, the claimant was well aware of the policies and procedure set forth by the employer in reference to contacting the employer about one's absence or providing competent documentation to support the absence and failure to notify the employer. The employer has met its burden that the claimant's actions rose to the level of willful misconduct as contemplated by Section 402(e) of the Law, therefore, the claimant is disapproved benefits.

Referee Decision at 2. Accordingly, the Referee issued an order affirming, as modified[3], the Service Center's decision denying Claimant unemployment compensation benefits. Id. at 3.

On August 3, 2009, Claimant appealed the Referee's decision to the Board. On October 13, 2009, the Board affirmed the Referee's decision by adopting and incorporating the Referee's findings and conclusions. See Board Decision.[4] Claimant then filed the instant petition for review.[5]

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[3] In her decision, the Referee also stated, in pertinent part:

> Section 401(d)(1) of the Law provides that compensation shall be payable to any employee who is or becomes unemployed, and who is able to work and available for suitable work. The basic purpose of the statutory requirements of availability is to establish that a claimant is genuinely and realistically attached to the labor force.
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> In the present case, the claimant credibly testified he was able and available for suitable work during the week at issue in this appeal. Therefore, there can be no denial of benefits under Section 401(d)(1) of the Law.

Referee Decision at 2-3. Accordingly, although the Referee disapproved benefits under Section 402(e) of the Law, she approved benefits for the waiting week ending April 11, 2009 under Section 401(d)(1) of the Law. Id. at 3.

[4] More specifically, the Board stated the following, in pertinent part:

> [T]he Board resolves the conflicts in testimony in favor of the

(Continued....)

In this appeal, Claimant contends the Board erred in determining that Employer had sustained its burden of proving that he was ineligible for compensation benefits under Section 402(e) of the Law. More specifically, Claimant asserts that the Board erred in concluding that Claimant failed to contact Employer regarding his absences from work because there is sufficient evidence demonstrating that Claimant reported his absences to Employer in compliance with Employer's work rule, and that there is sufficient evidence demonstrating that he was excused from reporting his absences to Employer in compliance with the work rule due to his mental illness.[6]

As noted above, pursuant to Section 402(e) of the Law, an employee is ineligible for unemployment compensation benefits when he had been discharged from work for willful misconduct connected with his work. Ductmate Industries, Inc. v. Unemployment Compensation Board of Review, 949 A.2d 338 (Pa. Cmwlth. 2008). The burden of proving willful misconduct rests with the

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> employer. The claimant failed to report to work or contact the employer after March 25, 2009. The claimant has not submitted any medical evidence to substantiate either his extended absence or his failure to call off from work due to mental illness….

Board Decision.

[5] This Court's scope of review in an unemployment compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992).

[6] Although Claimant raises additional claims in his appellate brief, such claims were neither raised in his appeal to the Board nor in the petition for review filed in this Court. As a result, these additional claims have not been preserved for appellate review. Pa.R.A.P. 1513(d), 1551(a); Eck v. Unemployment Compensation Board of Review, 651 A.2d 689 (Pa. Cmwlth. 1994).

employer. Id. Whether an employee's conduct constitutes willful misconduct is a question of law subject to this Court's review. Id.

A violation of an employer's work rules may constitute willful misconduct. Ductmate Industries, Inc.; Cassidy v. Unemployment Compensation Board of Review, 532 A.2d 524 (Pa. Cmwlth. 1987). An employer must establish the existence of the work rule and its violation by the employee. Ductmate Industries, Inc.; Cassidy. If the employer proves the existence of the rule and the fact of its violation, the burden of proof shifts to the employee to prove that he had good cause for his actions. Ductmate Industries, Inc.; Cassidy.

In addition, it is well settled that the Board is the ultimate finder of fact in unemployment compensation proceedings. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985); Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). Thus, issues of credibility are for the Board which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Peak; Chamoun. 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). This Court must examine the evidence in the light most favorable to the party who prevailed before the Board, and to give that party the benefit of all inferences that can be logically and reasonably drawn from the testimony. Id.

Claimant contends that there is sufficient evidence demonstrating that he reported his absences to Employer in compliance with Employer's work rule. However, when viewed in a light most favorable to Employer, our review of the certified record in this case demonstrates that there is substantial evidence supporting the Board's findings regarding the existence of Employer's work rule

requiring the reporting of absences, the reasonableness of the work rule, and the fact of its violation. More specifically, the testimony of Employer's office manager and general manager support the Board's findings in this regard. See N.T. 7/14/09 at 9-10, 17-18. Moreover, Claimant was aware of Employer's work rule. See Exhibit 3; N.T. 7/14/09 at 28.

As noted above, the Board was free to credit the foregoing evidence regarding the violation of Employer's work rule and to discredit evidence to the contrary. Peak; Chamoun. In addition, those findings are conclusive on appeal as they are supported by the foregoing substantial evidence. Taylor. Because Employer satisfied its burden of proof in this regard, the burden then shifted to Claimant to establish good cause for his actions. Ductmate Industries, Inc.; Cassidy.

In support of his burden, Claimant cites to evidence supporting his assertion that he did call Employer in compliance with the work rule. However, in its opinion, the Board specifically stated, "[t]he Board resolves the conflicts in the testimony in favor of employer. The claimant failed to report to work or contact the employer after March 25, 2009…." Board Decision.

As noted above, the Board is the ultimate finder of fact in unemployment compensation proceedings. Peak; Chamoun. In addition, issues of credibility are for the Board which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Id. Thus, the fact that there is evidence cited by Claimant which contradicts the Board's determination with respect to the violation of Employer's work rule does not compel the conclusion that the Board's determination in this regard should be reversed. See, e.g., Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-1109 (Pa. Cmwlth. 1994) ("[T]he fact that Employer may have

produced witnesses who gave a different version of events, or that Employer might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's Findings.").

In short, there is ample substantial evidence demonstrating the existence of Employer's work rule regarding the reporting of absences and the fact of its violation. In short, we will not accede to Claimant's request to revisit the Board's credibility determinations in this regard, and the Board did not err in determining that Claimant was ineligible for benefits pursuant to Section 402(e) of the Law by violating Employer's work rule. See Kells v. Unemployment Compensation Board of Review, 378 A.2d 495, 496 (Pa. Cmwlth. 1977) ("The real issue is whether or not the claimant's absences were reported to the employer in a proper and timely manner consistent with company rules. It is settled that a failure to so report 'does constitute willful misconduct justifying discharge and precluding the recovery of benefits.' [*Unemployment Compensation Board of Review v. Kells*, 349 A.2d 511, 513 (Pa. Cmwlth. 1975)], *citing Ferko v. Unemployment Compensation Board of Review*, [309 A.2d 72 (Pa. Cmwlth. 1973)]. *See also Gardner v. Unemployment Compensation Board of Review*, [372 A.2d 38 (Pa. Cmwlth. 1977)].").[7]

[7] As noted above Claimant also argues, in the alternative, that he was excused from reporting his absences as required by the work rule due to his mental illness. It is true that mental illness may constitute a good cause defense to a charge of willful misconduct if such illness prevents the employee from following an employer's directives and reasonable expectations. See, e.g., Offset Paperback v. Unemployment Compensation Board of Review, 726 A.2d 1125 (Pa. Cmwlth. 1999).

However, in Jordan v. Unemployment Compensation Board of Review, 684 A.2d 1096 (Pa. Cmwlth. 1996), we held that a claimant did not justify his failure to either report to work or off of work based on his general testimony that he suffered from an organic mood disorder and the submission of a physician's certification that he suffered from such a condition.

(Continued....)

More specifically, this Court stated the following, in pertinent part:

> Indeed, without further elaboration from the physician who filled out the certification, for example, there is simply no evidence from a qualified person concerning the relationship between the mood disorder and its effect on Claimant's ability to report either to work or off work. *See Brady v. Unemployment Compensation Board of Review*, [539 A.2d 936 (Pa. Cmwlth. 1988)] (holding that testimony by a person possessing sufficient skill, knowledge or experience in the field of mental disorders was necessary in a case involving a claimant who assaulted a co-worker of Vietnamese origin and argued that his actions were due to an impulsive manifestation of post-traumatic stress disorder thereby negating willful misconduct).
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> Similarly, we conclude that Claimant's testimony that he was suffering from the disorder on the days in question was insufficient to establish good cause. Although arguably an expert on his own condition, Claimant is not an expert in the field of mental disorders. *See Department of Navy v. Unemployment Compensation Board of Review*, [632 A.2d 622 (Pa. Cmwlth. 1993)] (holding that claimant's statements that he suffered from obsessive-compulsive disorder were insufficient to establish good cause to negate the willful misconduct of defrauding the government of nearly $300,000.00 by charging it for non-work related trips) *and Brady*….
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> Therefore, even though the Board found that Claimant was suffering from a "mood" on the days in question, we find it less than obvious from Claimant's testimony and from the terse physician certification that his failure even to report off work was due to a flare-up of his mood disorder. Further, assuming that his failure to report either to work or off work was due to his disorder, we conclude that the Board did not err in concluding that his behavior was a disregard of the standards an employer has a right to expect of an employee, with or without disabilities.

Id., 684 A.2d at 1100 (footnote omitted).

In the instant case, Claimant offered far less proof than that of the claimant in Jordan regarding any connection between his condition and his absences from work or his failure to call off work as required by Employer's work rule. Thus, as the Board properly noted, "[t]he claimant has not submitted any medical evidence to substantiate either his extended absence or his failure to call of from work due to mental illness…." Board Decision. In short, the Board

(Continued....)

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

Judge McCullough dissents.

did not err in affirming the Referee's decision as Claimant failed to sustain his burden in this regard, and Claimant's assertion to the contrary is patently without merit. Jordan.

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O R D E R

AND NOW, this 30th day of June, 2010, the order of the Unemployment Compensation Board of Review, dated October 13, 2009 at No. B-489894, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge