IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Philadelphia Parking Authority, Petitioner	:	
v.	:	No. 2335 C.D. 2008
Unemployment Compensation Board of Review, Respondent	:	Submitted: May 15, 2009

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: October 15, 2009

The Philadelphia Parking Authority (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) which reversed an order of a Referee, and concomitantly granted benefits to Evelyn T. Robinson (Claimant) pursuant to the Unemployment Compensation Law (the Law).[1] We affirm.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §§751-914.

Claimant worked for Employer as a full time cashier from July 5, 2006, through June 9, 2008. During May of 2008, Claimant received multiple written warnings from Employer for, *inter alia*, being deliberately slow in opening her lane in her parking garage assignment, exceeding allowed break times and taking extra breaks without permission, refusing to carry out mandatory instructions to close out, and leaving an assigned area without permission. On June 7, 2008, Claimant received a written warning from Employer for refusing to attend to a customer and failing to timely process the customer's ticket. Effective June 9, 2008, Employer discharged Claimant for gross and willful misconduct.

Claimant thereafter applied to the Philadelphia Unemployment Compensation Service Center for benefits under the Law, which the Service Center denied, finding Claimant ineligible under Section 402(e) of the Law, 43 P.S. §802(e).[2] Claimant timely appealed, and a hearing ensued before a Referee. Following the receipt of testimony and evidence from both parties, the Referee

[2] Section 402(e) provides, in relevant part:

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

43 P.S. § 802(e).

affirmed the Service Center's determination by order dated July 30, 2008, finding Claimant ineligible for benefits under Section 402(e). Claimant then timely appealed to the Board.

By decision and order dated November 20, 2008, the Board reversed the Referee, and granted Claimant benefits under Section 402(e). In its decision, the Board emphasized that benefits will not be denied under Section 402(e) of the Law if no willful misconduct exists in the final incident for which a claimant was discharged. The Board expressly credited Claimant's testimony that, in regards to the final incident of June 7, 2008, any delay in processing her customer was due to the customer's use of a credit card. The Board concluded that thusly, Claimant did not refuse to attend to the customer, that Employer therefore had not met its burden to show willful misconduct under the Law, and that Claimant was therefore not ineligible for benefits under Section 402(e). The Board distinguished any misconduct alleged by Employer related to the May 2008 warnings to Claimant on the basis that Employer's termination of Claimant was based upon the alleged misconduct of June 7, 2008. Employer now petitions for review of the Board's order.

Initially, we note that this Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in

violation of a claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003). 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). Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992).

Whether an employee's conduct constituted willful misconduct is a matter of law subject to this Court's review. Miller v. Unemployment Compensation Board of Review, 405 A.2d 1034 (Pa. Cmwlth. 1979). The burden of proving willful misconduct rests with the employer. Brant v. Unemployment Compensation Board of Review, 477 A.2d 596 (Pa. Cmwlth. 1984). In order to prove willful misconduct by showing a violation of employer rules or policies, the employer must prove the existence of the rule or policy and that it was violated. Caterpillar, Inc. v. Unemployment Compensation Board of Review, 654 A.2d 199 (Pa. Cmwlth. 1995). Willful misconduct has been judicially defined as that misconduct which must evidence the wanton and willful disregard of employer's

interest, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from its employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional substantial disregard for the employer's interest, or the employee's duties and obligations. Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 351 A.2d 631 (1976).

Employer presents one issue for review: whether the Board erred in concluding that Claimant's conduct did not rise to the level of willful misconduct. We note at the outset of our analysis that there is no dispute in this matter regarding Employer's policies, including the policy requiring that an employee render prompt, polite, and efficient service to the public, for which a violation will be cause for disciplinary action up to and including termination, and that Claimant was given, and was aware of, Employer's policies.

We first address Employer's repeated reliance upon the multiple incidents for which Claimant was written up in May 2008 prior to the June 7, 2008, incident for which Claimant was terminated.[3] Interwoven with Employer's other arguments in support of its sole issue on appeal, Employer repeatedly and emphatically refers to the prior May 2008 incidents as additional, or supporting,

[3] Employer's witness expressly testified that Claimant was terminated as a result of the incident of June 7, 2008, in which Claimant allegedly refused to attend to a customer in her *(Continued....)*

grounds for Claimant's termination. We agree with the Board's statement that while such incidents may give Employer the right to discharge Claimant, they are not determinative of Claimant's eligibility under the Law for the willful misconduct alleged on June 7, 2009. See Board Opinion at 3. Notwithstanding a history of job-related misconduct, an employer must still prove that the final incident of misconduct for which a claimant was purportedly terminated contained an element of willfulness; should the employer fail to establish that the final incident constituted willful conduct, the employer has also failed to prove the required causal connection between the claimant's purported culpable behavior, and the termination. See Southeastern Pennsylvania Transportation Authority v. Unemployment Compensation Board of Review, 525 A.2d 458 (Pa. Cmwlth. 1987); Crib Diaper Service v. Unemployment Compensation Board of Review, 98 A.2d 490 (Pa. Super. 1953). As such, Employer's arguments regarding Claimant's prior alleged instances of misconduct are of no moment to the issue on appeal *sub judice*.

Next, we address Employer's reliance upon the Referee's credibility determinations, and the weight accorded to the evidence thereby. These prior credibility determinations, and the concomitant weighing of the evidence by the

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parking lane. Reproduced Record (R.R.) at 8a.

Referee, are not relevant to the matter on review before this Court. In Unemployment Compensation proceedings, 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 Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985). As such, Employer's arguments which amount to a request to this Court to revisit the Board's credibility determinations, or to reweigh the evidence of record, are without merit.

Relatedly, Employer also cites to selected evidence of record that Employer deems credible, and which support Employer's preferred version of the facts at issue. It is axiomatic that when reviewing an agency's findings of fact, it is irrelevant that other evidence of record could support other findings than those that were made; the relevant inquiry is whether substantial evidence supports the findings that were actually made by the factfinder. See generally, Hercules, Inc.; Braun v. Unemployment Compensation Board of Review, 506 A.2d 1020 (Pa. Cmwlth. 1986). Notwithstanding Employer's failure to argue that any specific findings made by the Board in this matter are not supported by substantial evidence, we emphasize that our careful and thorough review of the record as a whole reveals such substantial evidence supporting each of the Board's findings.

Employer next argues that, even if Claimant's explanation for her conduct on June 7, 2008, was credible, her refusal to properly inform her customer

of what was going on, and Claimant's general attitude as evidenced by that customer's subsequent written complaint to Employer, constitute willful misconduct. Again, Employer's argument amounts to a request that this Court reweigh the evidence presented, and make a credibility determination inapposite to that made by the Board. The Board wrote:

> In the instant matter, the [E]mployer asserted that the [C]laimant was discharged from her job for gross and willful misconduct. The final incident on June 7, 2008, was when the [C]laimant allegedly refused to attend to a customer for over 20 minutes, **The [C]laimant credibly denied this allegation.** The [C]laimant, on the other hand, credibly testified that the customer's transactions took time because the customer paid by using a credit card. **Therefore, the Board concludes that the [C]laimant did not refuse to attend a customer on June 7, 2008, and, thus, the [E]mployer failed to meet its burden.**

Board Opinion at 3 (emphasis added).

Employer emphasizes that the written complaint lodged by the customer, in the wake of the June 7, 2008, incident, constitutes credible evidence that Claimant refused to properly inform her customer of the cause of the delay, and further evidences Claimant's improper demeanor and attitude in dealing with the customer. Employer, however, fails to acknowledge that the written complaint, while entered into evidence is this matter, was not corroborated by any eyewitness testimony, or by any other evidence, and was not found credible by the Board. The

Board's weighing of that evidence, and its credibility determinations thereon, control on appeal. Peak; Hercules, Inc..

Finally, Employer argues that the Board capriciously disregarded[4] evidence of record, and that the Board failed to properly review the entirety of the record. Employer's arguments on this issue echo its argument throughout its brief to this Court; essentially, Employer argues that because the Board did not find Employer's witnesses and evidence more credible than Claimant's, and weighed the record as a whole in Claimant's favor, the Board capriciously disregarded Employer's evidence. In essence, Employer argues that its evidence is so credible that it could not have been disbelieved. We disagree, based on the clear record of this case.

The Board's opinion as a whole evidences its review of the record in this matter, inclusive of Employer's evidence, as demonstrated in part by the Board's express reference thereto within its findings and discussion. Board Opinion at 1-3. Notwithstanding Employer's implied assertion on this issue, the Board's failure to credit Employer's evidence, or to conclude that Employer's

[4] Appellate review for the capricious disregard of material, competent evidence is an appropriate component for review if such disregard is properly before the reviewing court. Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002); Jackson v. Unemployment Compensation Board of Review, 933 A.2d 155 (Pa. Cmwlth. 2007). The capricious disregard standard is not to be applied in such a manner as would intrude upon the Board's fact-finding role and discretionary decision-making authority. *(Continued....)*

evidence outweighs that presented by Claimant, does not constitute a capricious disregard of Employer's evidence.[5] A capricious disregard of competent evidence constitutes a disbelief of testimony which someone of ordinary intelligence could not possibly challenge, and/or could not entertain the slightest doubt as to its truth. McFadden v. Unemployment Compensation Board of Review, 806 A.2d 955 (Pa. Cmwlth. 2002). Claimant in the matter *sub judice* submitted testimony explaining her actions on June 7, 2008, which testimony contradicted that of Employer and thusly provides a basis for a challenge as to the truth of Employer's evidence. R.R. at 8a. Therefore, the Board's mere failure to credit Employer's version of events on that date cannot be seen as a disbelief of testimony which someone of ordinary intelligence could not possibly challenge, or as to which someone could not entertain the slightest doubt as to its truth. Id.

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

Wintermyer.

[5] Employer also appears to argue, implicitly, that the Board's failure to expressly mention evidence in its favor constitutes a capricious disregard of that evidence. We disagree. The Board's failure to reference, in its opinion, every piece of evidence presented by either or both parties does not constitute capricious disregard thereof; no such requirement exists under the Law, or within our precedents.

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O R D E R

AND NOW, this 15th day of October, 2009, the order of the Unemployment Compensation Board of Review dated November 20, 2008, at B-478131, is affirmed.

JAMES R. KELLEY, Senior Judge