IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kerwin W. Boshman, Petitioner	:	
v.	:	No. 2416 C.D. 2009
Unemployment Compensation Board of Review, Respondent	:	Submitted: April 16, 2010

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: September 1, 2010

Kerwin W. Boshman (Claimant), *pro se*, petitions for review of an order of the Unemployment Compensation Board of Review (Board) affirming an order of a Referee denying benefits to Claimant pursuant to Section 402(e) of the Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(e). We affirm.

The following are the facts as found by the Referee, and adopted by the Board, in this matter. Claimant worked for Fox Transport Ltd. (Employer) as a full time truck driver for a period of nineteen months, ending on May 22, 2009. As part of his employment, Employer required that Claimant learn to operate a pallet

jack to effect the unloading of his trailer, and Employer provided Claimant with training on the proper operation thereof. On his last day of work, Claimant refused to take a load that required the use of a pallet jack, and Employer thereafter suspended Claimant for three days. At the end of the three-day suspension, Claimant failed to return to work, and Employer discharged him for insubordination.

Claimant applied for benefits under the Law at the Scranton Unemployment Compensation Job Center, which found Claimant eligible for benefits under Section 402(e) of the Law.[1] Employer appealed the Job Center's Determination, and a hearing ensued before a Referee.

Before the Referee, Employer appeared with its attorney, and Claimant appeared *pro se*. Employer presented testimony and evidence that Claimant had been trained to use forklifts, including a pallet jack, and had received a certificate of training therefor dated May 12, 2008, as well as a forklift operator training card. Original Record, Transcript of Testimony 8-19-09 (hereinafter, "Tr.") at 6-8. Employer also testified that Claimant had successfully made the

[1] Section 402(e) reads:

> Ineligibility for compensation
>
> 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).

same delivery run as the one which ultimately resulted in his termination, prior to the date of his termination. Id. at 8. Employer testified that on the date at issue herein, Claimant was assigned the same delivery, and responded that he did not want to take the delivery because it was unsafe, and took too long. Id. at 9-10. Claimant further told his supervisor that he also would not take the next day's delivery, which represented the same delivery that he had just refused. Id. Employer then requested that Claimant turn his Employer-related paperwork, and go home. Id. at 10. Employer testified that as of that time, Claimant was suspended for three days, and that Claimant failed to report to work thereafter. Id.

Claimant introduced a forklift operator safety training card in his own name dated February 7, 2009. Id. at 12-13; Ex. C-1. Claimant testified, *inter alia*, that for a prior delivery to the same destination as the one at issue, Claimant had another driver who was delivering a separate load unload Claimant's cargo for him. Id. at 15. When Claimant was assigned the same delivery again, he requested from Employer's dispatcher that he be switched with the other driver who had previously helped him, on the basis that the other driver was trained to use the pallet jack, which Claimant was unable to use. Id. at 15-16. Claimant testified that his request was denied, and that his supervisor then requested his "card" which the supervisor tore up and threw away. Id. Claimant further stated that the supervisor threatened to reduce his hours, and told him to go home until the supervisor was ready to call him. Id. at 16. Claimant testified that he never received a call from his supervisor or anyone else on behalf of Employer, and only found out that he was terminated when he subsequently received his paycheck. Id. Claimant stated

that his paycheck had been docked by $150.00, about which he called Employer for explanation. Id. Claimant was told the money had been docked for the cost of his uniform, which money Claimant could receive if he returned the uniform. Id. Claimant testified he returned to Employer's business to return the uniform. Id. at 16-17. Claimant testified that he had never been informed that he had been suspended, or that he had been terminated, until he figured out the termination in the wake of his receipt of his paycheck docked for the cost of his uniform. Id.

Claimant additionally testified that the only forklift training he had ever received was in the form of a thirty-minute video, and that he had never received instruction on the actual pallet jack, which Employer did not own. Id. at 18. Claimant testified that he had only needed to unload a delivery with a pallet jack twice before during his employment, which times the delivery had actually been unloaded by the other driver as noted above, and by an employee of the facility to which he delivered. Id. Claimant testified that he had been hired to work nights and to "drop and switch trailers," which was all he was supposed to do. Id. Claimant also testified that when taking the quiz associated with his classroom forklift training, he had been given the answers by Employer's trainer, Dave Brown. Id. at 19. Upon cross-examination, Claimant admitted that he had signed Employer's training log in a previous year. Id. Claimant further stated that he did not refuse to take the delivery at issue on the day of his termination, but simply stated that he would be unable to unload it despite the delivery customer's policy that the driver unload the freight delivered. Id. Claimant further testified that he had previously informed his supervisor that he was unable to unload his

delivery at the same customer location following his only prior delivery to that location. Id. at 22-23.

In rebuttal to Claimant's testimony, Employer testified that all of the 25-30 drivers employed thereby operate a variety of forklifts, and that Employer had never had a problem with any driver receiving training for, and being able to operate, a forklift. Id. at 25. Employer further testified that he had never been advised that Claimant was unable to operate the pallet jack, had never been informed that another driver or a delivery customer had unloaded Claimant's load for him previously (for which Employer would have been charged an additional fee), and that at the time Claimant was suspended Employer turned to Claimant's dispatcher, in Claimant's presence, and told her to "put him out for three days," after which statement Claimant walked out and left Employer's office. Id. at 25-26.

Following the conclusion of the hearing, the Referee issued a Decision and Order dated August 24, 2009. The Referee found Employer's testimony and evidence more credible than Claimant's, and concluded that Claimant had acted in a manner that was contrary to Employer's best interests. The Referee concomitantly denied Claimant benefits under Section 402(e) of the Law, concluding that Employer had met its burden thereunder.

Claimant timely appealed to the Board. By Decision and Order dated November 6, 2009, the Board found Employer's testimony credible, adopted and incorporated the Referee's findings and conclusions, and affirmed. Claimant now appeals to this Court.

This Court's scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are not supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Kirkwood v. Unemployment Compensation Board of Review, 525 A.2d 841 (Pa. Cmwlth. 1987).

Claimant presents one issue for review: whether the Board erred in affirming the Referee's order in stating that Claimant was qualified to operate a pallet jack.

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 his 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). 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).

Claimant argues, in essence, that the Board's *de facto* finding that Claimant was properly trained to operate a pallet jack is error, or not supported by substantial evidence. Claimant argues that pursuant to the United States

Department of Labor, Occupational Safety & Health Administration (OSHA), Claimant was to receive hands-on training on an actual pallet jack, in addition to the video and question-and-answer training provided by Employer. Claimant attaches to his brief a copy of what he asserts are the relevant OSHA guidelines on this subject.[2]

Unfortunately, Claimant has waived this argument by failing to present it before the Referee. An unemployment compensation claimant waives review of an issue by neglecting to raise and preserve it before the Referee. Johnson v. Unemployment Compensation Board of Review, 869 A.2d 1095 (Pa. Cmwlth.), petition for allowance of appeal denied, 585 Pa. 699, 889 A.2d 90 (2005). Claimant has failed to indicate in his brief precisely where this issue was raised before the Referee, and our thorough review of the transcript to this matter reveals that Claimant did not raise this argument prior to his appearance before this Court. While we are sympathetic to the plight of an unemployed *pro se* Claimant's choice to represent himself in proceedings under the Law, it is axiomatic, and long established in our Courts, that any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove to be his undoing. Shaffer v. Unemployment Compensation Board of Review, 928 A.2d 391 (Pa. Cmwlth. 2007). As such, we will not address Claimant's argument on this issue.

[2] We emphasize that this Court, in its appellate function, may not consider any supplemental information appended to a brief that is not part of the certified record on appeal. Croft v. Unemployment Compensation Board of Review, 662 A.2d 24 (Pa. Cmwlth. 1995).

While the foregoing presents the sum and total of Claimant's literal argument to this Court, his brief can also fairly be read to challenge the substantial evidence supporting the Board's findings of fact.[3] 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 v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). Our review of the record as a whole in this matter reveals that the Board's findings are supported by substantial evidence of record, as recounted above in our recitation of the testimony before the Referee.

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

[3] To the extent that Claimant's argument can be read as challenging the credibility determinations as made by the Board, we emphasize 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 Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985). As such, we will not disturb the credibility determinations made by the Board on appellate review.

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O R D E R

AND NOW, this 1st day of September, 2010, the order of the Unemployment Compensation Board of Review dated November 6, 2009, at B-491030, is affirmed.

JAMES R. KELLEY, Senior Judge

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HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

CONCURRING OPINION
BY JUDGE COHN JUBELIRER **FILED: September 1, 2010**

I concur with the result and rationale of the majority opinion. However, I write separately to clarify why I believe Kerwin W. Boshman (Claimant) waived the argument he is now attempting to make to this Court. Throughout the proceedings in this case, Claimant has maintained that he had good cause for failing to comply with the directive of Fox Transport Ltd. (Employer) to make a delivery which required the use of a pallet jack because he was not properly trained to operate this equipment. Employer presented evidence before the Unemployment Compensation Referee (Referee) that Claimant had received training and certification, which was found credible by both the Referee and the

Unemployment Compensation Board of Review (Board). Before this Court, Claimant argues that the training class he received was legally insufficient because it did not meet the United States Department of Labor, Occupational Safety and Health Administration (OSHA) regulation found at 29 C.F.R. § 1910.178, which requires employers to provide hands-on or practical training for powered industrial trucks.

The majority opinion concludes that Claimant waived this argument, stating that "Claimant has failed to indicate in his brief precisely where this issue was raised before the Referee, and our thorough review of the transcript to this matter reveals that Claimant *did not raise this argument prior to his appearance before this Court*." Boshman v. Unemployment Compensation Board of Review, No. 2416 C.D. 2009, slip op. at 7 (Pa. Cmwlth. September 1, 2010) (emphasis added). I believe that, without further explanation, this statement may be somewhat confusing.

From the beginning, Claimant has argued that he lacked the proper training to operate a pallet jack. In his testimony before the Referee, Claimant stated that Employer "never took me out on the floor . . . to run the double pallet jack because [Employer] don't [sic] even own this double pallet jack." (Referee Hr'g Tr. at 18.) Claimant also stated that "my understanding in job training . . . you have a video and then go out onto the floor in the warehouse to try and drive one." (Referee Hr'g Tr. at 20.) However, Claimant made no reference to OSHA or the OSHA regulations during his testimony and did not explain the legal basis for his argument that he should have had hands-on training. In his Petition for Appeal filed with the Board, Claimant made his first reference to OSHA, specifying that

he "contacted OSHA and spoke with them about proper training and they stated that by federal law you must have hands on training and testing to be certified." (Claimant's Petition for Appeal to the Board, September 1, 2009.) However, Claimant neither referred to, nor provided a copy of, any specific OSHA regulation mandating that he receive actual hands-on training when he submitted his Petition for Appeal to the Board. It was not until Claimant filed his Petition for Review with this Court that he referenced and provided a copy of the particular OSHA regulation upon which he is now relying to show that the training he received from Employer was legally insufficient under OSHA regulations. However, because Claimant did not identify to the Referee or the Board the legal basis of his argument as being the OSHA regulation upon which he is now relying, Claimant failed to properly preserve the argument that he is now attempting to make to this Court and, therefore, unfortunately, it is waived.[1] Dehus v. Unemployment Compensation Board of Review, 545 A.2d 434, 436-37 (Pa. Cmwlth. 1988). Accordingly, with this clarification, I am compelled to join in the majority opinion.

RENÉE COHN JUBELIRER, Judge

[1] It is possible that if Claimant, in his Petition for Appeal to the Board, had referred to the specific OSHA regulation upon which he is now attempting to rely, the Board may have been able to take administrative notice of the same.