

a Request for Reconsideration of the October 31, 2011 order. (R. Item 13.) The Board acknowledged receipt of Claimant's Request for Reconsideration on November 14, 2011, and informed Claimant that his request did not relieve him of any responsibility to appeal the Board's October 31, 2011 order to this Court within thirty days from the date the order was issued. (R. Item 14.) On December 9, 2011, Claimant filed a pro se letter with this Court seeking to appeal the Board's October 31, 2011 order. Thereafter, the Board denied Claimant's Request for Reconsideration by order mailed December 13, 2011. (R. Item 15.)

In accordance with this Court's Internal Operating Procedures² our Chief Clerk, in response to Claimant's December 9, 2011 communication, notified Claimant, by letter dated February 8, 2012, of the correct procedures to perfect his appeal of the Board's October 31, 2011 order. Therein, Claimant was advised that

concluded that such conduct constituted willful misconduct "because it [was] a disregard of the standards of behavior that an employer may expect of an employee." (Board Op. at 2.) The Board discredited Claimant's testimony that he was not sleeping on the job and determined that Claimant did not credibly show good cause for his conduct. (Board Op. at 2.) Accordingly, the Board concluded that Claimant was ineligible for benefits pursuant to Section 402(e) of the Law. (Board Op. at 2.)

² See IOP § 211, 210 Pa. Code § 69.211, which provides:

When the chief clerk receives a written communication that evidences an intention to appeal an adjudication of a state administrative agency but does not conform to the rules for an appellate petition for review, the chief clerk shall time-stamp the written communication with the date of receipt. The chief clerk shall advise the party by letter (1) of the procedures necessary to perfect the appeal and (2) that the date of receipt of the communication will be preserved as the date of filing of the appeal if that party files a fully conforming petition for review within 30 days of the date of the chief clerk's letter. If the party fails to file a fully conforming petition for review within that period, the chief clerk shall advise the party by letter that the court will take no further action in the matter.

Id.

the December 9, 2011 date would be preserved as the date of filing his appeal; however, if this date was more than thirty days from the mailing date of the Board's order being appealed, his appeal may be dismissed as untimely. Claimant was instructed to file his Petition for Review in accordance with the Pennsylvania Rules of Appellate Procedure within thirty days in order to perfect his appeal. As instructed, Claimant filed a Petition for Review with this Court on February 17, 2012, appealing the Board's October 31, 2011 order.

On March 20, 2012, this Court dismissed Claimant's appeal from the Board's October 31, 2011 order as untimely pursuant to Pennsylvania Rule of Appellate Procedure 1512(a)(1)³ because Claimant's pro se communication attempting to appeal that order was received December 9, 2011, more than thirty days after the Board's order was entered. On March 26, 2012, Claimant filed an application with this Court seeking reconsideration of our March 20, 2012 order. By order dated April 19, 2012, our Court vacated its March 20, 2012 order and granted Claimant's application because this Court has previously treated untimely appeals from a decision on the merits as timely appeals from denials of reconsideration. However, we limited review by our Court on appeal to the Board's December 13, 2011 order denying Claimant's Request for Reconsideration.

On July 9, 2012, the Board filed its first application to quash Claimant's Petition for Review and brief. The Board contended that Claimant had failed to include and, therefore, preserve in his Petition for Review and brief to this Court,

³ Rule 1512(a)(1) mandates that a petition for review or appeal of a quasi-judicial order must be filed within thirty days after the entry of the order. Pa. R.A.P. 1512(a)(1).

the issue of whether the Board abused its discretion by denying Claimant's Request for Reconsideration. By order entered July 10, 2012, we denied the Board's application to quash Claimant's Petition for Review because it was timely filed from the Board's December 13, 2011 order denying reconsideration and Claimant had preserved issues reviewable by this Court.

On July 16, 2012, the Board filed a second application to quash Claimant's Petition for Review and brief. Therein the Board asserted that, because it did not rule on Claimant's Request for Reconsideration within thirty days of the request, it was deemed denied as of December 12, 2011; thus, the Board had no jurisdiction to issue the December 13, 2011 order. Therefore, the Board contended, its December 13, 2011 order was void and the appeal therefrom was invalid. In addition, the Board averred that Claimant's Petition for Review filed on December 9, 2011 could not have constituted an appeal of the Board's reconsideration order because the appeal was filed prematurely before issuance of the Board's December 13, 2011 order. Claimant filed a timely answer to the Board's application to quash. By order entered July 18, 2012, this Court denied the Board's application because Claimant's Request for Reconsideration resulted in a deemed denial thirty days after filing, or December 12, 2011, and the Petition for Review was timely from the deemed denial for the reasons stated in our April 19, 2012 order.

In opposition to Claimant's appeal now before this Court, the Board raises in its brief the same arguments it raised in its applications to quash Claimant's Petition for Review and brief. While we appreciate the Board's confidence in its positions, the Court already considered and disposed of these arguments in the July 10, 2012 and July 18, 2012 orders denying the applications to quash. As such, we

will not revisit the Board's arguments on jurisdiction and Claimant's failure to preserve issues for review. Therefore, in accordance with our April 19, 2012 order, the sole issue presently before this Court is whether the Board abused its discretion by denying Claimant's Request for Reconsideration of the Board's order on the merits.

Requests for reconsideration are governed by Section 101.111 of the Board's regulations which provides, in pertinent part, that "any aggrieved party may request the Board to reconsider its decision." 34 Pa. Code § 101.111(a). A request "will be granted only for good cause in the interest of justice without prejudice to any party." 34 Pa. Code § 101.111(b). As this Court has previously noted:

Because the decision to grant or deny a request for reconsideration is a matter of administrative discretion, this Court's review of that decision is limited to determining whether the Board abused its discretion. Georgia-Pacific Corporation v. Unemployment Compensation Board of Review, . . ., 630 A.2d 948 ([Pa. Cmwlth.] 1993). An abuse of discretion occurs if the Board's decision demonstrates evidence of bad faith, fraud, capricious action or abuse of power. Id. In addition, the Board's own regulations provide that it may grant a request for reconsideration and rehearing only where there is "good cause" to do so and that ruling is subject to review by this Court. 34 Pa. Code § 101.111; Bennett v. Unemployment Compensation Board of Review, . . ., 470 A.2d 203 ([Pa. Cmwlth.] 1984). In determining whether "good cause" exists, the Board must consider whether the party requesting reconsideration has presented new evidence or changed circumstances or whether it failed to consider relevant law. Georgia-Pacific Corporation.

Ensle v. Unemployment Compensation Board of Review, 740 A.2d 775, 779 (Pa. Cmwlth. 1999). The party asserting that the Board abused its discretion has the burden of proof. Georgia-Pacific Corporation, 630 A.2d at 951.

In this matter, Claimant requested that the Board reconsider its October 31, 2011 order because he did not “believe that all facts on [his] behalf were considered in this decision.” (Request for Reconsideration, R. Item 13.) As support for this assertion, Claimant attached a letter outlining his reasons for disagreeing with the Board’s denial of UC benefits. In the letter, Claimant disputed the Board’s finding that he was sitting asleep in a dark room when he should have been working. Claimant alleged that: (1) he was not sleeping, but sitting in the room waiting for a supervisor to arrive so that he could begin working; and (2) the room was anything but dark. Claimant included pictures of the room to prove to the Board that the room was not dark. In essence, Claimant’s Request for Reconsideration was based upon his disagreement with the Board’s credibility findings. (Request for Reconsideration, R. Item 13; Claimant’s Letter to Board, R. Item 13.)

Claimant does not directly address whether the Board abused its discretion in denying reconsideration of the October 31, 2011 order on the merits in his brief and reply brief filed in support of this appeal. Rather, Claimant argues that the Board’s decision finding him ineligible for UC benefits was in error because F/J Hess & Sons’ (Employer) owner’s testimony was insufficient to prove that he was sleeping on the job. Thus, Claimant asserts, the Board should not have believed Employer’s testimony. In other words, Claimant is challenging the merits of the Board’s October 31, 2011 order. However, the Board’s decision on the merits is not before this Court because Claimant did not appeal that order within the time allowed. As stated previously, our Court permitted Claimant to proceed with this appeal but we limited the issue to whether the Board abused its discretion in denying Claimant’s Request for Reconsideration because Claimant’s appeal from

that order was timely. However, in reviewing the Board's denial, we note that it is well-settled that the Board may not grant reconsideration merely to revisit credibility issues. Ensle, 740 A.2d at 779-80. Since Claimant only argues that the credibility determinations were incorrect, Claimant has failed to demonstrate that the Board abused its discretion in denying reconsideration; we must, therefore, uphold the Board's determination.

Moreover, even if Claimant had timely appealed the Board's October 31, 2011 order, his argument that the Board erred in finding him ineligible for UC benefits would not prevail. The Board specifically resolved the conflicts in the testimony in favor of Employer and found Employer's testimony credible that Claimant was sleeping on the job. (Board Op. at 1-2.) The Board further discredited Claimant's testimony that he was just "resting his eyes or waiting for a supervisor." (Board Op. at 2.) Finally, the Board determined that Claimant "failed to credibly show good cause for sleeping on the job." (Board Op. at 2.)

The law is clear that the Board is the ultimate finder of fact, and "questions of credibility and evidentiary weight" are matters for the Board as fact finder and not for a reviewing court. Freedom Valley Federal Savings & Loan Association v. Unemployment Compensation Board of Review, 436 A.2d 1054, 1055 (Pa. Cmwlth. 1981). As such, the Board is free to accept or reject the testimony of a witness regardless of whether there is corroborating evidence or whether the testimony is self-serving. The important factor is whether the Board's findings are supported by substantial evidence. Substantial evidence is defined as "such relevant evidence which a reasonable mind would accept as adequate to support a conclusion." Guthrie v. Unemployment Compensation Board of Review, 738 A.2d

518, 521 (Pa. Cmwlth. 1999). A witness’s testimony may provide substantial evidence for a factual finding. See Holt v. Unemployment Compensation Board of Review, 840 A.2d 1071, 1072-73 (Pa. Cmwlth. 2004) (citing witnesses’ testimony as substantial evidence for a finding of the Board). Here, the Board accepted Employer’s owner’s testimony as credible.⁴ Therefore, the Board’s finding that Claimant was sleeping on the job is supported by substantial evidence. Accordingly, the Board did not err by concluding that Claimant’s conduct rose to the level of willful misconduct resulting in Claimant being ineligible for UC benefits pursuant to Section 402(e) of the Law.

For the foregoing reasons, the Board’s deemed denial of Claimant’s Request for Reconsideration is affirmed.

RENÉE COHN JUBELIRER, Judge

⁴ Although Claimant challenged the credibility and sufficiency of Employer’s evidence in his Request for Reconsideration, he did so based on photographic evidence that Claimant did not submit during the hearing. Notably, Claimant neither alleged in his request that this evidence was unavailable to him at the time of the Referee’s hearing nor did he request the opportunity to offer additional evidence at another hearing. See 34 Pa. Code § 101.111(a)(1) (An aggrieved party may request that if the Board grants a request for reconsideration to “grant further the opportunity to . . . [o]ffer additional evidence at another hearing.”).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael E. Conners,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2467 C.D. 2011
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

NOW, November 9, 2012, the Unemployment Compensation Board of Review's deemed denial of the Request for Reconsideration of its October 31, 2011 order entered in the above-captioned matter is **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge