

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael R. Forte, :
Petitioner :
 :
v. : No. 2503 C.D. 2011
 : Submitted: August 31, 2012
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI

FILED: September 20, 2012

Michael R. Forte (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of a Referee finding him ineligible for unemployment compensation benefits under 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 that “[a]n employe shall be ineligible for compensation for any week ... [i]n which his unemployment is due to his discharge ... from work for willful misconduct connected with his work....”

Claimant worked as a part-time flagger for Flagger Force (Employer) from May 24, 2010, to June 30, 2011, when he was discharged for willful misconduct² for refusing to comply with an Employer directive regarding the use of his slow/stop paddle used to direct traffic at a construction site. Claimant filed for unemployment compensation benefits with the UC Service Center, which determined that Claimant was ineligible for benefits under Section 402(e) of the Law for engaging in willful misconduct without showing good cause for his actions.³ Claimant appealed.

Before the Referee, to demonstrate that Claimant engaged in willful misconduct, Employer's operations specialist, Christina Chasnov (Chasnov), testified that Claimant had gone through flagger certification class and that he was instructed

² The burden of proving willful misconduct rests with the employer. *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518, 521 (Pa. Cmwlth. 1999). When a claimant is terminated for refusing to comply with an employer directive, the employer has the burden to establish the reasonableness of the directive and that the claimant refused to comply. *Blue v. Unemployment Compensation Board of Review*, 616 A.2d 84, 85 (Pa. Cmwlth. 1992), *appeal denied*, 534 Pa. 641, 626 A.2d 1159 (1993). A claimant's refusal to comply with a reasonable verbal directive, even in the absence of a rule violation, may constitute willful misconduct. *Bailey v. Unemployment Compensation Board of Review*, 457 A.2d 147, 149 (Pa. Cmwlth. 1993). Once the employer meets its burden, the burden shifts to the claimant to show good cause for his refusal to comply with the directive. *Blue*, 616 A.2d at 86. A claimant has good cause if his actions are reasonable and justifiable under the circumstances. *Docherty v. Unemployment Compensation Board of Review*, 898 A.2d 1205, 1208-09 (Pa. Cmwlth. 2006). Whether an employee's conduct constitutes willful misconduct and whether a claimant has proved good cause are questions of law subject to our review. *Department of Corrections v. Unemployment Compensation Board of Review*, 943 A.2d 1011, 1015-16 (Pa. Cmwlth. 2008).

³ The Service Center also issued a determination that Claimant received a non-fault overpayment that is not at issue in this appeal.

in the proper procedures of how to hold a slow/stop paddle at a work site.⁴ Chasnov stated that Employer's quality assurance inspector, Arlette Creekmur (Creekmur) and Employer's branch manager observed Claimant at a work site holding his slow/stop paddle incorrectly, that he was given a verbal warning, and that he was told how to properly hold the paddle. Chasnov stated that she later received a call from Creekmur that Claimant was again at the site holding his paddle incorrectly. Chasnov testified that Employer again taught Claimant the proper way of holding his paddle and gave him the opportunity to improve, but he failed to acknowledge that he was doing anything wrong. Because Employer could not have him on the road directing traffic anymore, she testified that he was terminated.

Creekmur testified that on June 23, 2011, she and Employer's branch manager went to the work site and saw Claimant holding the slow/stop paddle upside down to the ground. Creekmur explained that the job site was an intermittent flagging operation that stopped traffic to permit work vehicles to cross the roadway. Creekmur stated that Claimant explained that he was holding the paddle incorrectly because holding it upright was confusing to motorists. Creekmur testified that she told Claimant that she understood his reasons for holding the paddle incorrectly, but that it was still improper use of the paddle, and that if he held the paddle upright as required and turned the stop side of the paddle toward him, it would reveal nothing to traffic and only the slow sign would be visible. Creekmur stated that she explained that the company policy was the company policy, and that the proper way to hold the paddle was upright. Creekmur testified that Claimant then held the slow/stop paddle

⁴ Employer's Flagger Training Workbook was introduced into evidence as Exhibit E-1.

correctly. Creekmur stated that she returned to the work site a few days later and saw Claimant again holding the paddle incorrectly. Creekmur stated that Claimant again asserted that holding it as directed would be confusing to motorists.

Claimant testified that Creekmur was at the site in the middle of June 2011, but that she expressed disapproval of where he stood on the road and not his use of the slow/stop paddle. He testified that he told Creekmur that he was following the foreman's instructions regarding his position on the road, and that his use of the paddle was not an issue until Creekmur's second visit to the site. Claimant stated that on June 30, 2011, Creekmur again appeared at the site, that she observed him holding the paddle down to the ground, and that she told him that this was improper. Claimant testified that he complied with her request, but explained that holding the paddle upright caused confusion for motorists and that he put it down due to safety concerns. Claimant stated that he was never instructed regarding the proper use of the paddle in such a work situation, and that he was merely acting with safety as the priority and to keep traffic moving.

The Referee found that Employer provided Claimant with training and instruction on how to properly use the paddle that had a sign indicating slow on one side and stop on the other; that Employer's quality assurance inspector saw Claimant holding the slow/stop paddle incorrectly on June 23, 2011, asked Claimant why it was down to the ground, and that Claimant explained that he believed that it would be less confusing to traffic to hold it down when he did not want to interfere with the flow of traffic; that the quality assurance inspector told Claimant that she understood his reasoning, but instructed him to hold the paddle upright while he was on duty; that

the quality assurance inspector returned to the work site a few days later and saw Claimant again holding his paddle incorrectly; that the quality assurance inspector again corrected Claimant to hold the paddle upright; and that Claimant was then discharged. (Referee's Decision at 1.) The Referee specifically accepted as credible Employer's evidence establishing willful misconduct based on Claimant's refusal to comply with a reasonable directive, and rejected as not credible Claimant's testimony regarding his good cause for refusing to comply with Employer's directive. (*Id.* at 2.)⁵ Based on the foregoing, the Referee affirmed the Service Center's determination

⁵ Specifically, the Referee found:

The Employer credibly established that it provided Claimant with training on how to properly hold his slow/stop paddle. The Employer also provided credible testimony that when the quality assurance inspector saw the Claimant holding his paddle upside down, she corrected him and instructed him that he should [hold] it properly right side up. After the quality assurance inspector saw the Claimant continuing to disregard the Employer's training and instructions, the Claimant was discharged.

The Claimant presented testimony that he believed his method of holding the slow/stop paddle upside down was more effective than the Employer's method. Although the Claimant is entitled to his personal opinion on the best way to hold the slow/stop paddle, while working for the Employer, the Claimant should follow the Employer's directives. The Claimant has not shown that the Employer's directive to hold the slow/stop sign right side up was dangerous or provided him with any other compelling reasons to disregard the Employer's directive. Further, the Claimant's testimony is rejected as not credible. The Claimant originally testified that he did not receive instruction or training on the proper way to hold a paddle when working on a haul road. The Employer[']s witness produced a Flagger Training Handbook which contained instructions for using a slow/stop paddle on haul roads. The Claimant produced his own copy of the same handbook and tried to assert that his method was safer or superior to the one the Employer promoted.

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that Claimant was ineligible for benefits under Section 402(e) of the Law. (*Id.*) Claimant appealed to the Board, which adopted the findings and conclusions of the Referee in their entirety. This appeal by Claimant followed.⁶

In this appeal, Claimant contends that he did not engage in willful misconduct because: Employer's written work rule only relates to stopping and releasing traffic, and there is no further instruction regarding how to hold the sign after traffic has been released; he had good cause for disregarding Employer's directive because he and other workers invert the paddle due to safety concerns; and he received a good review after the first incident, he was denied the opportunity to resolve the issue with the owner, and he did not receive a warning that he would be fired.

However, as indicated, Claimant was discharged for willful misconduct relating to his refusal to comply with Employer's oral directive that he hold the slow/stop paddle upright while he was on duty, and not the written work rule for

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Because the Claimant's testimony is rejected as not credible, and because the Employer's testimony was credible, the Employer was able to meet its burden of proving that the Claimant was discharged for violating a reasonable Employer directive.

(Referee's Decision at 2.)

⁶ Our review of the Board's decision is limited to determining whether there was a constitutional violation or an error of law, whether any practice or procedure of the Board was not followed, and whether the necessary findings of fact are supported by substantial evidence. *Glenn v. Unemployment Compensation Board of Review*, 928 A.2d 1169, 1171 n.1 (Pa. Cmwlth. 2007).

using the paddle on haul roads. A claimant's refusal to comply with a reasonable verbal directive, even in the absence of a rule violation, may constitute willful misconduct. *Bailey*, 457 A.2d at 149. Moreover, it is not necessary that an employer's reasonable directive be written in order for this Court to determine that an employee's violation thereof constitutes willful misconduct; an employer can deal with its employees on a non-written basis and expect its oral directives to be followed. *Graham v. Unemployment Compensation Board of Review*, 840 A.2d 1054, 1057 (Pa. Cmwlth. 2004). Assuming that Claimant is correct that the written rule does not apply,⁷ he still committed willful misconduct by repeatedly failing to follow Employer's reasonable oral directive as found by the Board.

Regarding whether he had good cause not to follow Employer's directive, there is substantial evidence supporting the Board's determination that Claimant engaged in willful misconduct by refusing to comply with a reasonable Employer directive. Since Employer satisfied its initial burden of proof with competent and credible evidence, the burden shifted to Claimant to prove that he had good cause for refusing to comply with Employer's reasonable directive. While Claimant testified that he refused to comply with the directive due to safety concerns, the Board rejected his evidence supporting his purported good cause as not credible.⁸

⁷ Contrary to Claimant's assertion, the written rule provides that on haul roads, "[w]hen releasing traffic, turn the paddle a quarter-turn so the word STOP faces you. The sign should be parallel to the shoulder so that neither STOP nor SLOW face traffic from either direction." (Exhibit E-1 at 15.) Thus, the rule clearly applies when traffic has been released and continues while traffic flows until it has been stopped.

⁸ The Board is the ultimate finder of fact in unemployment compensation proceedings. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 277, 501 A.2d 1383, 1389 (1985); *Chamoun v. Unemployment Compensation Board of Review*, 542 A.2d 207, 208 (Pa. Cmwlth. (Footnote continued on next page...))

We will not accede to Claimant's request to reweigh the evidence he presented to support his burden of proof that was specifically rejected by the Board as not credible, and the mere fact that it presents a different version of events does not compel reversal of the Board's order.⁹

Finally, as to his claims that because he received a good review prior to the conduct precipitating his discharge that he was denied the opportunity to resolve the issue with the owner, and that he did not receive a warning that he would be fired, they are of no moment. Claimant deliberately and repeatedly violated a reasonable Employer directive without good cause. This conduct supports a finding of willful misconduct and there is no requirement in the Law that a claimant first be warned

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1988). 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.* Findings of fact are conclusive on appeal if the record contains substantial evidence to support the findings. *Taylor v. Unemployment Compensation Board of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The fact that a witness has presented a version of the facts different from that accepted by the Board is not a basis for reversal if substantial evidence supports the Board's findings. *Tapco, Inc. v. Unemployment Compensation Board of Review*, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994). As the burdened party with respect to establishing good cause, Claimant had to meet both his burden of production and his burden of persuasion. *See Kirkwood v. Unemployment Compensation Board of Review*, 525 A.2d 841, 844 (Pa. Cmwlth. 1987).

⁹ As a corollary to this claim, Claimant also relies on his self-serving testimony that Employer's quality assurance workers had previously approved this practice. However, assuming that there is credible evidence supporting this assertion, Employer specifically warned Claimant about this practice, Claimant initially refrained from inverting the paddle for a while per the directive, and then proceeded to do so once again which precipitated his discharge. Past leniency does not excuse willful misconduct after a claimant has been warned about strict enforcement of a rule. *City of Greensburg v. Unemployment Compensation Board of Review*, 590 A.2d 388, 390 (Pa. Cmwlth. 1991); *Bullock v. Unemployment Compensation Board of Review*, 402 A.2d 734, 737 (Pa. Cmwlth. 1979).

that a deliberate violation of an employer work directive could result in termination.
Graham, 840 A.2d at 1058.

Accordingly, the Board's order is affirmed.

DAN PELLEGRINI, President Judge

