

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Port Authority of Allegheny County, :  
Petitioner :  
 :  
v. : No. 282 C.D. 2010  
 : Submitted: August 20, 2010  
Unemployment Compensation :  
Board of Review, :  
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: September 28, 2010

Port Authority of Allegheny County (Employer) petitions for review of the February 2, 2010, order of the Unemployment Compensation Board of Review (UCBR) reversing the decision of the referee to deny David H. Allenbaugh (Claimant) unemployment compensation benefits. The referee had concluded that Claimant was not entitled to benefits because his discharge was the result of willful misconduct under section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> The UCBR, however, determined that Employer failed to satisfy its burden of

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<sup>1</sup> 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 an employee 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.” 43 P.S. §802(e).

proving willful misconduct under the Law and entered an order awarding Claimant benefits. We vacate the UCBR's order and remand for further proceedings.<sup>2</sup>

Claimant worked as a bus driver for Employer from December 23, 1986, until his termination on August 20, 2009. (UCBR's Findings of Fact, No. 1.) Claimant was discharged for allegedly assaulting his route foreman on Claimant's bus. (UCBR's Findings of Fact, No. 2.) Claimant denied the allegation. (UCBR's Findings of Fact, No. 3.) After a disciplinary hearing, Employer discharged Claimant for violating a provision of Employer's Performance Code (Performance Code) that prohibits an employee from "[e]ngaging in acts of violence, fighting, intimidating or threatening behavior on duty or on Port Authority property." (Performance Code at 3.)

Claimant filed an application for unemployment benefits, which was denied by the local service center. Claimant then appealed to the referee, who held an evidentiary hearing on October 27, 2009. At the hearing, Employer presented no first-hand evidence regarding the alleged assault. (UCBR's Findings of Fact, No. 3.) Instead, Employer attempted to offer into evidence a surveillance video taken from Claimant's bus that purported to show Claimant's assault of his foreman. Claimant's counsel objected to the video's admission. The referee initially overruled the objection and stated that he wanted to view the video. (N.T., 10/29/09, at 6-8.)

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<sup>2</sup> Our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704. Whether an employee's conduct constitutes willful misconduct is a question of law subject to our review. *Andrews v. Unemployment Compensation Board of Review*, 633 A.2d 1261, 1262 (Pa. Cmwlth. 1993). The burden of establishing willful misconduct is on the employer. *Rivera v. Unemployment Compensation Board of Review*, 526 A.2d 1253, 1255 (Pa. Cmwlth. 1987).

Employer then attempted to introduce two still photos depicting the incident, which were derived from the same video. Claimant's counsel objected, and the referee sustained the objection on the ground that the photos could not be authenticated. (*Id.* at 10-11.) Regarding the photos, the referee stated, "Sustained. ... I'll mark these as the Employer's 1<sup>st</sup> exhibit, leave them in the file with the objection sustained." (*Id.* at 11.) Claimant then took the witness stand and testified that he did not assault his co-worker. (*Id.* at 11-12.)

Later in the proceeding, upon an inquiry by Claimant's counsel regarding the video, the referee said, "And I guess we'll mark that as the Employer's 2<sup>nd</sup> Exhibit and leave it in the file with the objection sustained. And note for the record that -- would you open that door please?" (*Id.* at 12.)<sup>3</sup> The referee never completed his sentence, and the hearing was adjourned moments later.

In his October 30, 2009, order, the referee concluded that Employer satisfied its burden of proving that Claimant was discharged for willful misconduct. The referee explained his decision as follows:

Claimant's counsel argued that the video was not sufficiently authenticated because there was no witness who could testify to

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<sup>3</sup> According to Employer, at this point Claimant and his counsel left the room, closing the door behind them and leaving the referee with only Employer's counsel present. (Employer's Brief at 8 n.1.) Thus, the referee asked Employer's counsel to open the door so that he could speak with Claimant's counsel. (N.T., 10/29/09, at 12.) Claimant's counsel then apologized, and the referee said:

[W]e weren't finished and I -- I didn't want to be in the room with the door closed and the Employer's counsel only. So unless there's something else, closing statements or argument, then I'll close the record.

(*Id.* at 13.)

the identity of the objects and persons shown, the time and place of making the video and that the video was a true representation of the scene. But the employer's witness gave un rebutted testimony that the employer maintains video monitors on its buses and that the video came from the bus that the claimant was on.

(Referee's Decision/Order at 2.) The referee then determined that Claimant's act of pushing or shoving his foreman satisfied the definition of willful misconduct under the Law.<sup>4</sup> (*Id.*) Therefore, he affirmed the denial of benefits.

Claimant timely appealed to the UCBR. The UCBR noted that, at the hearing before the referee, Claimant's counsel objected to the admission of both the video and the still photos; however, the UCBR found that "[t]he referee sustained those objections." (UCBR's Order at 2.) As a result, the UCBR concluded that "[a]bsent first-hand evidence that the claimant engaged in the conduct alleged, the Board is constrained to hold that the employer failed to satisfy its burden of proof." (*Id.*) Thus, the UCBR reversed the referee's order. Employer now petitions for review of that decision.

On appeal, Employer asserts that the UCBR erred in finding that the referee sustained Claimant's objection to the video.<sup>5</sup> Employer argues that, although at the end of the hearing the referee said that the objection to the video was sustained,

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<sup>4</sup> "Willful misconduct" is defined as: (1) wanton and willful disregard of the employer's interests; (2) deliberate violation of the rules; (3) disregard of standards of behavior that an employer rightfully can expect from its employees; or (4) negligence that manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or the employee's duties and obligations. *Andrews*, 633 A.2d at 1262.

<sup>5</sup> Employer does not challenge the UCBR's finding that the referee sustained the objection to the still photos.

a review of the entire record, including the referee's written decision, indicates that the referee intended to overrule Claimant's objection to the video. Conversely, the UCBR asserts that because the referee said the objection was sustained, the video was excluded and, thus, Employer failed to satisfy its burden of proof.

We conclude that the record is unclear as to the referee's ruling on Employer's proffered video evidence. Because the UCBR based its determination solely on its finding that the referee excluded this evidence, we are compelled to vacate the UCBR's order and remand.

We agree with Employer that there are inconsistencies between the referee's statements at the hearing regarding the video and his written decision. The referee initially *overruled* Claimant's objection to the video and viewed the thirty-second clip depicting the incident. (N.T., 10/29/09, at 8, 10.) At the end of the hearing, however, the referee said the objection to the video was *sustained*. (*Id.* at 12.) The referee then attempted to note something for the record, but he was interrupted when Claimant and his counsel exited the hearing room. (*Id.* at 12-13.) The referee never explained his ruling on the video at the hearing. Subsequently, in his written decision, the referee found that the video was properly authenticated and that Claimant did, in fact, assault his foreman on the bus. (Referee's Decision/Order at 2; Referee's Findings of Fact, No. 3.) As Employer correctly points out in its brief, the referee's decision could only have been based on the admission of the video, as that was Employer's only evidence of the assault.

Recognizing this discrepancy, the UCBR now asserts that even if the referee did intend to admit the video into evidence, the UCBR would have found that

the video was not properly authenticated. This assertion, however, is pure speculation. The UCBR made no findings of fact or conclusions of law on the issue of the video's admissibility. The UCBR merely found that the referee excluded the video and concluded that, without the video, Employer failed to prove willful misconduct.

After reviewing the entire record, we cannot find substantial evidence to support the UCBR's determination that the referee excluded the video. Accordingly, we vacate the UCBR's order and remand the matter to the UCBR. We direct the UCBR to further remand the matter to the referee for additional findings of fact and conclusions of law limited to the issue of the admissibility of Employer's proffered video evidence.

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ROCHELLE S. FRIEDMAN, Senior Judge

