IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Manuel Guzman, Petitioner	:	
v.	:	No. 337 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	Submitted: October 8, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: November 10, 2010

Manuel Guzman (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) reversing the decision of a Referee, and determining that Claimant is ineligible for unemployment compensation benefits pursuant to 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, in pertinent 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

(Continued....)

Claimant filed a claim for unemployment compensation benefits upon the termination of his employment as a COS Enveloper, Series II with East Penn Manufacturing Company (Employer). The Allentown UC Service Center representative concluded that Claimant had been discharged for reasons that constitute willful misconduct under Section 402(e) of the Law. As a result, unemployment compensation benefits were denied.

Claimant appealed this determination and a hearing was conducted before a Referee. See N.T. 9/17/09[2] at 1-52. On September 29, 2009, the Referee issued a decision disposing of the appeal in which she determined that Claimant had been discharged for reasons that do not constitute willful misconduct under Section 402(e) of the Law. As a result, the Referee issued an order reversing the Service Center's determination and granting Claimant unemployment compensation benefits.

On October 6, 2009, Employer appealed the Referee's decision to the Board. On February 3, 2010, the Board issued a decision in which it made the following relevant findings of fact: (1) Employer has a Code of Conduct which divides rule violations into three groups, and the accumulation of three violations of a rule or rules in Group 1 within a 12-month period is just cause for termination; (2) included in Rule 18 of Group 1 violations is the failure to wear personal protective equipment such as safety shoes, safety glasses, face shields, aprons, leggings, gloves and flame retardant clothes as required by management and Employer's Health & Safety Department; (3) included in Rule 20 of Group 1

> connected with his work, irrespective of whether or not such work is "employment" as defined in this act.

[2] "N.T. 9/17/09" refers to the transcript of the hearing conducted before the Referee on September 17, 2009.

violations is the failure to wear respiratory protection while working in areas where air sampling or blood levels indicate that such protection is needed and is mandated by the Health & Safety Department; (4) all employees' blood levels are tested regularly and, in Claimant's department, all employees are required to wear a respirator for either a full shift or a half shift depending on their blood lead levels; (5) Claimant was aware of these rules; (6) all employees are required to wear hearing protection for the entire shift in Claimant's department; (7) in May of 2008, due to his blood lead level, Claimant was required to wear his respirator for a full shift; (8) on May 30, 2008, Claimant was observed by his supervisor with his respirator off and hanging around his neck; (9) the incident was noted, and Claimant was told that the next rule violation would be documented for management; (10) on September 25 and 30, 2008, Claimant's supervisor documented Claimant's continued respirator violations; (11) on October 2, 2008, Claimant received a Group 1, Rule 18 violation for his failure to wear personal protective equipment; (12) prior to a plant shutdown from June 27 through July 5, 2009, Claimant received his blood level notification that he was required to wear the respirator for full shifts; (13) on July 8, 2009, Employer's Health & Safety officer observed Claimant without his either his respirator or his hearing protection on; (14) Claimant received both a Group 1, Rule 18 violation for failing to wear his hearing protection, and a Group 1, Rule 20 violation for his failure to wear his respirator; (15) Claimant was terminated for accumulating three Group 1 rule violations within a 12-month period; (16) although Claimant asserted that he was on his way to use a telephone to report a broken machine at the time he was seen not wearing his hearing protection or respirator, he was observed near the machinery and not near a telephone; (17) Claimant was not given permission by his supervisor to remove his respirator on July 8, 2009. Board Decision at 1-3.

Based on the foregoing, the Board concluded:

The employer demonstrated the existence of its policies regarding failure to wear protective personal equipment and respiratory protection while working in its facility. The claimant had received various warnings in regard to his failure to wear his respirator. The claimant never advised the employer that he was having a problem wearing the respirator or that he was unable to communicate properly while wearing the respirator. The employer demonstrated that a supervisor specifically advised the claimant that he should not be removing his respirator to talk and showed the claimant how to pull the respirator away from his face at the nose area so that he could talk. The Health and Safety officer advised the claimant that he could remove his respirator for a short breather, but only if it was approved by his supervisor.

On July 8, 2009, the Health and Safety officer observed the claimant for at least 30 seconds without his respirator and without hearing protection. The claimant had not been given permission by his supervisor to remove his respirator. The claimant asserts that he was on his way to use the telephone to call maintenance to fix a broken machine and that he could not talk or hear properly while wearing the respirator and hearing protection. The employer's witnesses credibly established that the claimant was standing by machinery when failing to wear his respirator and hearing protection and that he was not near a phone. Even if claimant needed to use the phone, he has failed to explain why he did not keep his respirator and hearing protection on until he was ready to use the phone. The claimant has not established good cause for violating employer's policies, especially in light of his previous warnings. As the claimant had received a Group 1 violation on October 2, 2008, and two Group 1 violations for the July 8, 2009 incident, the employer properly followed its policy by discharging the claimant for having three Group 1 violations within a twelve month period. The employer has met its burden of establishing that the claimant's conduct was attributable to willful misconduct in connection with his work. Benefits are denied under Section 402(e) of the Law.

Board Decision at 4-5. Accordingly, the Board issued an order reversing the Referee's decision and denying Claimant unemployment compensation benefits. Id. Claimant then filed the instant petition for review.[3]

In this appeal, Claimant contends the Board erred in determining that Claimant was ineligible for compensation benefits under Section 402(e) of the Law. We do not agree.

As noted above, pursuant to Section 402(e) of the Law, an employee is ineligible for unemployment compensation benefits when he had been discharged from work for willful misconduct connected with his work. Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518 (Pa. Cmwlth. 1999). The burden of proving willful misconduct rests with the employer. Id. Whether an employee's conduct constitutes willful misconduct is a question of law subject to this Court's review. Id.

Although willful misconduct is not defined by statute, it has been described as: (1) the wanton and willful disregard of the employer's interests; (2) the deliberate violation of rules; (3) the disregard of standards of behavior that an employer can rightfully expect from his employee; or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or the employee's duties and obligations. Id. (citing Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review, 309 A.2d 165, 168-169 (Pa. Cmwlth. 1973)).

[3] This Court's scope of review in an unemployment compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992).

Thus, a violation of an employer's work rules and policies may constitute willful misconduct. Id. An employer must establish the existence of the work rule and its violation by the employee. Id. If the employer proves the existence of the rule, the reasonableness of the rule, and the fact of its violation, the burden of proof shifts to the employee to prove that he had good cause for his actions. Id. The employee establishes good cause where his actions are justified or reasonable under the circumstances. Id.

In addition, it is well settled that the Board is the ultimate finder of fact in unemployment compensation proceedings. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985); Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). Thus, 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. Peak; Chamoun. 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). This Court must examine the evidence in the light most favorable to the party who prevailed before the Board, and to give that party the benefit of all inferences that can be logically and reasonably drawn from the testimony. Id.

When viewed in a light most favorable to Employer, our review of the certified record in this case demonstrates that there is substantial evidence supporting the Board's findings regarding the existence of Employer's policies regarding the failure to wear personal protective equipment and respiratory protection, the reasonableness of the policies, and the fact of their violation. See N.T. 9/17/09 at 5-8, 9-14, 19-20, 21-26, 32-33. More specifically, the testimony of Employer's Personnel Coordinator, Claimant's Supervisor, Employer's Health and

Safety Technician, and Employer's Personnel Director support the Board's findings in this regard. See id.

As noted above, the Board was free to credit the foregoing evidence regarding the violation of Employer's policies and to discredit evidence to the contrary. Peak; Chamoun. In addition, those findings are conclusive on appeal as they are supported by the foregoing substantial evidence. Taylor. As Employer satisfied its burden of proof in this regard, the burden then shifted to Claimant to establish good cause such that his actions were justified or reasonable under the circumstances. Guthrie.

In support of his burden, Claimant cites to evidence supporting his assertion that his actions were justified due to a breakdown in the machinery at the plant. See Appellant's Brief at 6-7. However, in its opinion, the Board specifically stated, "The employer's witnesses credibly established that the claimant was standing by machinery when failing to wear his respirator and hearing protection and that he was not near a phone. Even if claimant needed to use the phone, he has failed to explain why he did not keep his respirator and hearing protection on until he was ready to use the phone. The claimant has not established good cause for violating employer's policies, especially in light of his previous warnings." Board Opinion at 4.

As noted above, the Board is the ultimate finder of fact in unemployment compensation proceedings. Peak; Chamoun. In addition, 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. Thus, although Claimant presented evidence which, if believed, could satisfy his burden of proof, the Board rejected his testimony offered in support thereof and its determination in this regard is patently not subject to our review.

Moreover, the fact that there is evidence cited by Claimant in his appellate brief which contradicts the Board's determinations with respect to good cause for the violation of Employer's policies does not compel the conclusion that the Board's determinations in this regard should be reversed. See, e.g., Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-1109 (Pa. Cmwlth. 1994) ("[T]he fact that Employer may have produced witnesses who gave a different version of events, or that Employer might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's Findings.").

In short, there is ample substantial evidence demonstrating the existence of Employer's work safety policies, the reasonableness of the policies, and the fact of their violation. As a result, the Board did not err in determining that Claimant is ineligible for benefits pursuant to Section 402(e) of the Law.[4]

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

[4] See, e.g., Moran v. Unemployment Compensation Board of Review, 973 A.2d 1024 (Pa. Cmwlth. 2009) (A claimant engaged in willful misconduct, thereby precluding the award of benefits under Section 402(e) of the Law, where he forgot to apply the brake and chock when parking a work truck in violation of a known work safety rule, resulting in the truck rolling away and damaging property.); Heitczman v. Unemployment Compensation Board of Review, 638 A.2d 461 (Pa. Cmwlth.), petition for allowance of appeal denied, 538 Pa. 660, 648 A.2d 791 (1994) (A claimant engaged in willful misconduct, thereby precluding the award of benefits under Section 402(e) of the Law, where he failed to walk around his truck and inspect the area before backing up in violation of a known work safety rule, resulting in the truck backing into a light pole.). See also Department of Transportation v. Unemployment Compensation Board of Review, 479 A.2d 57, 58 (Pa. Cmwlth. 1984) ("A conclusion that the employee has engaged in disqualifying willful misconduct is especially warranted in such cases where, as here, the employee has been warned and/or reprimanded for prior similar conduct.").

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O R D E R

AND NOW, this 10th day of November, 2010, the order of the Unemployment Compensation Board of Review, dated February 3, 2010 at No. B-494707, is AFFIRMED.

JAMES R. KELLEY, Senior Judge