**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| Michael DiGuglielmo, | : | |
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| Petitioner | : | |
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| v. | : | No. 533 C.D. 2011 |
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| Unemployment Compensation Board of Review, | : | Submitted: August 5, 2011 |
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| | : | |
| Respondent | : | |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION**
**BY JUDGE COHN JUBELIRER** **FILED: October 11, 2011**

Michael DiGuglielmo (Claimant) petitions for review of the Order of the Unemployment Compensation Board of Review (Board) that affirmed the decision by an Unemployment Compensation Referee (Referee), who found Claimant ineligible for unemployment compensation (UC) benefits pursuant to Section 402(e) of the Unemployment Compensation Law[1] (Law) due to willful misconduct. On appeal, Claimant challenges the finding of ineligibility by the

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(e).

Board, asserting he demonstrated good cause for his willful misconduct, and he properly informed his employer that he was taking prescribed medications that made him drowsy.

Claimant was employed by Deer Meadows Retirement Community (Employer) as a Security Officer and was separated from his employment for violating Employer's policy against sleeping on the job. The UC Service Center found Claimant ineligible for UC benefits because there was insufficient information provided to determine whether Claimant had good cause for sleeping on the job. (Notice of Determination at 1, R. Item 3.) Claimant subsequently appealed, asserting that he was neither sleeping on the job nor engaging in willful misconduct. (Petition for Appeal, R. Item 4.) On December 28, 2010, a hearing was held before the Referee, who affirmed the Service Center's determination. Based on the evidence presented at the hearing, the Referee found the following:

1. The claimant was employed as a full time Security Officer with Deer Meadows Retirement Community earning $12 per hour. The claimant began employment March 22, 1999 and was last employed on October 25, 2010.

2. The employer has a policy which prohibits sleeping on the job, violation of which results in discharge from employment on the first offense.

3. The claimant was aware of the employer's policy.

4. On October 25, 2010, the Director of Human Resources and the Director of Building and Grounds observed the claimant at the front desk with his head down and his eyes closed.

5. The Director of Human Resources called the claimant's name on one occasion to which the claimant did not respond.

6. The Director of Human Resources called the claimant's name again, after which the claimant picked up his head and opened his eyes.

7. The Director of Human Resources informed the claimant he was not supposed to be sleeping, to which the claimant replied, "I know what's going on."

8. The claimant was suspended from employment pending [an] investigation, and was discharged from employment for sleeping on the job.

(Referee's Decision, Findings of Fact (FOF) ¶¶ 1-8.) Based on these facts, the Referee affirmed the Service Center's determination, finding that Claimant failed to establish a good cause for violating the Employer's policy against sleeping on the job. (Referee's Decision at 2-3.) Claimant appealed the Referee's decision to the Board, which adopted the Referee's findings of fact and conclusions of law except for a single erroneous statement of law, and upheld the Referee's determination that Claimant was ineligible for benefits. (Board's Decision at 1.) The Board found that Claimant never informed Employer that the medications he was taking could cause him to fall asleep on the job. (Board's Decision at 1.) Claimant now petitions this Court for review of the Board's Order.[2]

Claimant argues that: (1) the Board's decision rested on a misstatement of law; and (2) the Board's decision also rested on a misstatement of fact.[3]

[2] In unemployment proceedings, our "review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of facts are supported by substantial evidence in the record." Western and Southern Life Insurance Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

[3] In the Statement of Questions Involved portion of his brief, Claimant also raised the issue of whether the Referee committed an error of law by requiring Claimant to produce

(Claimant's Br. at 4.) Specifically, Claimant argues that the Board erred by deciding that it need not determine the type of evidence necessary for Claimant to prove his medical condition because Claimant never informed Employer about the medications he was taking. Further, Claimant asserts the Board ignored Claimant's testimony that he may have informed Employer about the medications he was taking.

Claimant first argues that the Board's decision not to determine the type of evidence necessary for Claimant to prove his medical condition was a misinformed one, as the Board erroneously concluded that Claimant was required to inform Employer about the effects of his medication before the incident that gave rise to his termination in order to establish good cause for his willful misconduct.

Under the Law, an employee is ineligible for UC benefits when his "unemployment is due to his discharge . . . from work for willful misconduct connected with his work." 43 P.S. § 802(e). While the Law does not define "willful misconduct," our courts have defined it as:

> (1) a wanton or willful disregard for an employer's interests; (2) a deliberate violation of an employer's rules; (3) a disregard for standards of behavior which an employer can rightfully expect of an employee; or (4) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations.

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competent *medical* evidence that the medications Claimant was taking made him drowsy. The Board addressed this error in its decision, correctly stating that the Claimant need only produce competent evidence. (Board's Decision at 1.)

Philadelphia Parking Authority v. Unemployment Compensation Board of Review, 1 A.3d 965, 968 (Pa. Cmwlth. 2010). When a claimant is terminated for a work-rule violation, the employer has the burden to establish the rule existed, the claimant knew of the rule, and the claimant violated the rule. Id. Also, the employer must establish that the claimant's actions were intentional or deliberate. Tongel v. Unemployment Compensation Board of Review, 501 A.2d 716, 717 (Pa. Cmwlth. 1985). Further, the employee's actions must be considered in light of all of the circumstances, including why he failed to obey the employer's policy. Navickas v. Unemployment Compensation Board of Review, 567 Pa. 298, 304, 787 A.2d 284, 288 (2001). Sleeping on the job is considered a prima facie act of willful misconduct because it falls outside the standards of behavior which an employer can rightfully expect and represents a wanton or willful disregard of the employer's interests. Biggs v. Unemployment Compensation Board of Review, 443 A.2d 1204, 1205 (Pa. Cmwlth. 1982). Once a prima facie showing of willful misconduct is made, an employee may rebut such a showing by demonstrating good cause for sleeping on the job. Id.

In the instant case, Employer maintains, and Claimant does not dispute, that it had a policy against sleeping on the job, punishable by immediate termination upon the first offense. (Hr'g Tr. at 7, R. Item 7.) Claimant knew of the policy, as evidenced by his signature on a form indicating receipt of the employee handbook and his own testimony. (Hr'g Tr. at 7, 10, R. Item 7.) Further, two witnesses, both deemed credible by the Referee, testified that they saw Claimant asleep at his post in dereliction of his duty to maintain the security and safety of the residents and employees of the retirement community. The Referee was particularly swayed by

the testimony of Bruce McNamee, the Director of Human Resources at the retirement community. (Referee's Decision at 2.) Mr. McNamee testified that, after being informed that Claimant appeared to be asleep on duty, he approached Claimant and observed him for approximately ten seconds, noticing that Claimant was sitting still with his head down and his eyes closed. (Hr'g Tr. at 6, R. Item 7.) Sensing that Claimant was asleep, Mr. McNamee said Claimant's first name aloud, but received no response. (Hr'g. Tr. at 6, R. Item 7.) After another few seconds, Mr. McNamee called out Claimant's name again in a louder tone of voice. (Hr'g. Tr. at 6, R. Item 7.) At this point, Claimant opened his eyes, lifted his head, and said, "I know what's going on." (Hr'g. Tr. at 6, R. Item 7.) The Referee ultimately determined, and there is substantial evidence to demonstrate, that Employer "met its burden in establishing the existence of its policy and the fact of its violation." (Referee's Decision at 2.)

Because Employer met its burden, the burden now shifts to Claimant to demonstrate good cause for his actions. Philadelphia Parking Authority, 1 A.3d at 968. While Claimant provided inconsistent testimony with regard to whether he actually fell asleep or was simply in a daze, he maintains that any blame for the condition in which he was found lies with the medications he was taking. Claimant also argues that in order to establish good cause and, therefore, maintain eligibility for UC benefits, he was not required to inform Employer about his medications and any adverse effects they might have on his ability to perform his job.

A medical condition may constitute good cause for a claimant's noncompliance, and does not need to be proved by an expert medical witness. "To establish such a claim, a claimant is not required to produce expert testimony, but rather need only introduce 'competent evidence.'" Id. However, this Court has concluded that a claimant's informative communication with the employer should be considered in sustaining the employee's burden to establish good cause for a violation and, when feasible, the claimant must inform the employer of the reason for failing to comply with the rules. Rebel v. Unemployment Compensation Board of Review, 692 A.2d 304, 307 (Pa. Cmwlth. 1997); Bortz v. Unemployment Compensation Board of Review, 464 A.2d 609, 610 (Pa. Cmwlth. 1983).

While the employee's informative communication with the employer is only one consideration in sustaining the employee's burden to establish good cause, it is an incredibly strong consideration, indeed often a decisive one. In support of its holding in Bortz, this Court noted numerous instances where the claimants established good cause, in part, by first informing their respective employers of the reasons for their conduct.[4] Further, in Klapec Trucking Co. v. Unemployment Compensation Board of Review, 503 A.2d 1122, 1124 (Pa. Cmwlth. 1986), this Court overturned the Board's decision to grant benefits to a truck driver who, after

[4] McLean v. Unemployment Compensation Board of Review, 476 Pa. 617, 621, 383 A.2d 533, 535 (1978) (an employee who refused to drive an improperly repaired truck had previously informed his employer of the truck's condition); Gwin v. Unemployment Compensation Board of Review, 427 A.2d 295, 297 (Pa. Cmwlth. 1981) (an employee had previously expressed his fear of a dangerous boring mill to his employer); cf. Dearolf v. Unemployment Compensation Board of Review, 429 A.2d 1284, 1286 (Pa. Cmwlth. 1981) (a claimant's refusal to follow an order at work was unreasonable because the claimant had not offered an explanation to the employer for his noncompliance before his appeal). Bortz, 464 A.2d at 611.

being ordered to unload and reload his truck, failed to advise his employer that he was only a half hour away from exceeding the fifteen hours on duty rule under federal regulations. In doing so, we stated:

> [W]e conclude that this case presents a situation where the employee was obliged to inform the employer of his reason for noncompliance and that his failure to do so not only vitiates what would otherwise have been good cause for noncompliance, but also operates to remove the stain of unreasonableness from the employer's order.

Id. at 1125 (internal citations omitted).

Recently, in Philadelphia Parking Authority, this Court upheld the Board's decision not to find a bank worker who was fired for sleeping on the job ineligible for benefits because she had previously informed her employer of her lack of work and sleep apnea. Philadelphia Parking Authority, 1 A.3d at 969. Assigned to work in the money room from 3:30 p.m. to midnight, the claimant would often become drowsy while sitting for hours on end with little or no work to do. Id. at 967. She informed her employer of this, requesting more work to keep her alert, but she was only given two extra assignments. Id. Furthermore, several months before her discharge the claimant had been diagnosed with sleep apnea, a condition that caused her to fall asleep unwittingly. Id. After learning of her condition, the claimant immediately informed her employer. Id. In light of all these facts, this Court determined that the employer had failed to establish its burden of proving that the claimant had deliberately violated work-place rules. Id. at 969. We were especially persuaded by the fact that the claimant took affirmative steps to inform her employer about her problems and that she needed more work to help keep her awake. Id. "Although [c]laimant fell asleep during her shift, [c]laimant attempted

to resolve her drowsiness problem in a responsible manner that protected the interests of [e]mployer." Id.

Therefore, despite Claimant's assertion to the contrary, these cases support the Board's determination that Claimant was required to inform Employer that he was taking medications that could cause him to fall asleep, especially considering Claimant's awareness of Employer's express policy against sleeping on the job. Accordingly, we reject Claimant's argument.

Claimant next takes issue with the Referee's unenumerated finding that Claimant did not notify Employer that he was taking medications that might cause him to fall asleep. (Referee's Decision at 2.) Claimant insists that he testified at length about his need for the medications and that he informed his direct supervisor, Roger Heckman, that he was taking such medications. (Claimant's Br. at 4.) Essentially, Claimant argues that the Board's finding that he did not notify Employer is not supported by substantial evidence.

"It is now axiomatic in an unemployment compensation case, that the findings of fact made by the Board, or by the referee as the case may be, are conclusive on appeal so long as the record, taken as a whole, contains substantial evidence to support those findings." Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). Substantial evidence has been subsequently defined as "such relevant evidence which a reasonable mind might accept as adequate to support a conclusion." Philadelphia Gas Works v. Unemployment Compensation Board of Review, 654 A.2d 153, 157

(Pa. Cmwlth. 1995). That a claimant might believe a different version of the events took place does not create grounds for reversal if the Board's findings are supported by substantial evidence. Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994).

Claimant's testimony reveals that he told Mr. Heckman that he was taking medications in a general sense, but Claimant admitted multiple times, upon being asked by Employer, the Referee, and his counsel, that he had not informed Mr. Heckman that the medications had a sedating effect. (Hr'g Tr. at 14-15, 17, R. Item 7.) In fact, upon being asked by his attorney whether he had informed Mr. Heckman of the possible side effects of the medications, the best Claimant could offer was that he *may* have told Mr. Heckman. (Hr'g Tr. at 18, R. Item 7.) In that same line of questioning, Claimant admitted he was not certain which of the numerous medications he was taking he had discussed with Mr. Heckman.[5] Further, while Claimant testified that he gave Mr. Heckman documentation

[5] The relevant portion of the transcript from the Referee's hearing reads:

> Q: Is it possible that you're not sure whether you told him that one of the side effects of the medication is that it make [sic] you drowsy?
> A: Could be, yes.
> Q: Then why would you have said no that you did not tell him, if you weren't sure.
> A: *Because there's so many here medications here, I'm not sure which ones we discussed.* We discussed diabetes medications, steroids, which I'm taking. And he had his comments on steroids, how bad they were. (inaudible) of the medications.
> Q: So to reiterate, *you may have told him of the side effects of the pain medication*.
> A: Yes.

(Hr'g Tr. at 18-19, R. Item 7) (emphasis added). Employer ultimately objected to this line of questioning as leading, but only after the questions had been answered by Claimant.

detailing medications he was taking, he could not recall whether the documents contained information regarding the side effects of the various medications or even mentioned the two medications that he specifically testified about. (Hr'g Tr. at 15, R. Item 7.) Additionally, he did not offer copies of the documents into evidence. (Hr'g Tr. at 15, R. Item 7.)

Accordingly, despite not listing it as an enumerated fact, the Referee noted in her reasoning that she was not convinced that the available evidence supported a finding that Claimant had informed Employer about the side effects of the medications he was taking. "[T]he record is void of any evidence to establish the claimant notified the employer or provided documentation to the employer to establish[,] as a result of medications, the claimant's ability to perform his job may have been compromised." (Referee's Decision at 2.) The record, as a whole, supports this finding. Therefore, we conclude that the Referee, and subsequently the Board, properly determined that, despite being required to disclose the effects his medications might have on his job performance, Claimant failed to do so. It follows that Claimant did not establish good cause for violating Employer's work rule prohibiting sleeping on the job and, thus, he is not eligible for UC benefits under the Law.[6]

[6] The Board contends that its Findings of Fact are binding on this Court because Claimant failed to challenge them in his Petition for Review. However, Claimant's Petition for Review shows that Claimant specifically referred to the unenumerated fact discussed above and, more importantly, the Board's Findings of Fact are conclusive on appeal in this matter because they are supported by substantial evidence. Taylor, 474 Pa. at 355, 378 A.2d at 831.

Accordingly, we affirm the Order of the Board.

**RENÉE COHN JUBELIRER, Judge**

Senior Judge Friedman concurs in the result only.

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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**O R D E R**

**NOW**, October 11, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

**RENÉE COHN JUBELIRER, Judge**