

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David W. Ross,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 579 C.D. 2012
	:	
Unemployment Compensation	:	Submitted: September 21, 2012
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER¹**

FILED: January 4, 2013

Petitioner David W. Ross (Claimant) petitions for review of the Order of the Unemployment Compensation Board of Review (Board) that affirmed the Unemployment Compensation (UC) Referee's (Referee) decision finding Claimant ineligible for UC benefits pursuant to Section 402(e) of the UC Law (Law).² On appeal, Claimant argues that the Board's Order must be reversed because: (1) the Board erred in relying upon uncorroborated hearsay evidence; and (2) substantial

¹ This opinion was reassigned to the authoring judge on December 11, 2012.

² Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(e).

evidence does not support the finding that Claimant committed willful misconduct. Discerning no error, we affirm the Board.

Claimant filed an internet claim for UC benefits on November 5, 2011 after being discharged from employment with Bonnell's Collision Center (Employer), where he worked as a full-time licensed mechanic. The Erie UC Service Center denied the claim because Claimant showed a willful disregard of Employer's interests, without good cause, when Claimant passed a co-worker's vehicle for inspection even though it did not meet the state inspection guidelines. (Notice of Determination at 1, R. Item 5.) Claimant appealed to the Referee. After a hearing on December 30, 2011, at which Claimant and Employer's two witnesses appeared and testified, the Referee made the following findings of fact:

1. The Claimant was last employed full-time as a Certified Inspection Auto Technician by Bonnell's Collision Center from December 17, 2006, through November 4, 2011, earning \$19.00 per hour.
2. On August 11, 2011, an employee from the Fairview, Pennsylvania shop brought a car to the Claimant for the Claimant to inspect.
3. The inspection revealed two defective rust holes in the frame of the car.
4. The Claimant approved the car for inspection but informed the owner of the car that the holes would need [to be] repaired.
5. The owner of the car sold the car to a retail car lot and the car lot sold the car to a new owner.
6. In October 2011, the customer that bought the car was informed by an inspection mechanic that the car never should have passed inspection.

7. The customer is in the process of suing Bonnell[’s] Collision Center due to illegally inspecting a car.
8. On November 4, 2011, both the Claimant and the other employee were discharged due to illegally inspecting a vehicle.

(Referee Decision, Findings of Fact (FOF) ¶¶ 1-8.) Based upon these findings, the Referee concluded that Claimant committed willful misconduct when “Claimant inspected a car for a co-worker that did not meet the Pennsylvania Inspection Guidelines” and did not present any evidence to show that there was good cause for his actions. (Referee Decision at 2.) Claimant appealed the Referee’s Decision to the Board. (Petition for Appeal, R. Item 11.)

Upon review, the Board adopted the Referee’s findings of fact and conclusions of law, and affirmed the Referee’s determination of Claimant’s ineligibility for UC benefits under Section 402(e) of the Law. In its Order, the Board specifically discredited Claimant’s assertion that the vehicle “met all of the criteria to be given a state inspection sticker despite having two (2) areas of corrosion.” (Board Order.) The Board further explained that although Section 175.80(e)(5) of the Pennsylvania Inspection Code (Code), 67 Pa. Code § 175.80(e)(5),³ required Claimant “not to pass the vehicle for inspection if any frame components were rotted or in a deteriorated condition,” Claimant “admits

³ Section 175.80(e)(5) of the Code provides that a mechanic must “[i]nspect the vehicle frame and *reject* if one or more of the following apply: (i) [t]he vehicle frame is not in solid condition . . . , (iii) [t]he frame components are missing, cracked, rotted or broken or are in deteriorated or dangerous condition.” 67 Pa. Code § 175.80(e)(5) (emphasis added).

passing the vehicle for inspection with deterioration of the frame.” (Board Order.) Claimant now petitions this Court for review.⁴

Claimant first maintains that “all of [E]mployer’s evidence regarding whether the car should have passed inspection was purely hearsay evidence.” (Claimant’s Br. at 9.) Claimant contends that the Board erred in relying upon uncorroborated hearsay testimony that Claimant should not have passed a vehicle for inspection with two rust holes in its frame. Claimant argues that he was the only witness with firsthand knowledge of whether the vehicle met the inspection criteria and he believed, in his discretion, that the vehicle did meet the criteria. Claimant maintains that any statements about what other mechanics may have said to the purchaser of the vehicle, or to Employer’s witnesses, were hearsay and that hearsay cannot corroborate hearsay. Essentially, Claimant contends that there is no substantial evidence to support the Board’s finding that there were two defective rust holes in the frame of the vehicle that required Claimant not to pass the vehicle for inspection. (FOF ¶ 3.)

Substantial evidence is defined as “relevant evidence upon which a reasonable mind could base a conclusion.” Johnson v. Unemployment Compensation Board of Review, 502 A.2d 738, 740 (Pa. Cmwlth. 1986). In determining whether there is substantial evidence to support the Board’s findings,

⁴ “The Court’s 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 fact 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).

this Court “must examine the testimony in the light most favorable to the prevailing party below, giving that party the benefit of any inferences which can be drawn logically and reasonably from the evidence.” Id. A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record as a whole. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The Board’s findings of fact are conclusive on appeal only when the record taken as a whole contains substantial evidence to support them. Penflex, Inc. v. Bryson, 506 Pa. 274, 286, 485 A.2d 359, 365 (1984). It is well-settled that hearsay testimony, admitted without objection, will be given its natural, probative effect and may support a finding of fact “[i]f it is corroborated by any competent evidence in the record.” Walker v. Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976). “[I]t is unnecessary that the finding of willful misconduct be supported by substantial evidence absent the hearsay; if it were, the Walker rule would be without effect. All that is necessary is that facts adding weight or confirming the hearsay be established by competent evidence.” Socash v. Unemployment Compensation Board of Review, 451 A.2d 1051, 1053 (Pa. Cmwlth. 1982). Here, Claimant’s “argument reflects a misapprehension of the nature of corroborating evidence.” Id.

Employer’s Manager testified that Claimant never should have passed the vehicle for inspection because it had two holes in its frame, but that another employee from another shop location brought the car to Claimant because “if the car had been inspected by someone else it would not have passed inspection.” (Hr’g Tr. at 4.) Although Manager admitted that she did not personally inspect this

vehicle, (Hr'g Tr. at 5, 7), she also testified that after Claimant passed the vehicle for inspection, the employee sold the vehicle to a retail car lot that sold it to another person who discovered multiple things wrong, and then sued Employer. Manager testified that "we are responsible under the law for our mechanics when they improperly [pass a vehicle for inspection]." (Hr'g Tr. at 4.)

Employer's second witness, a licensed physical damage appraiser (Appraiser), testified as follows about Claimant's inspection of his co-worker's vehicle on August 11, 2011:

At that point [Claimant] had pointed out two defected areas on the vehicle. One was on the front engine cradle. There was a hole in it which he had circled with crayon. The other one was on the right rear frame rail towards the door mount. There was a supporting bracket in there that had a large rust through area. The vehicle was passed then . . . the other employee [drove] the vehicle offsite. [The other employee] was later terminated after the inspection. [The other employee] had sold the vehicle to [a retail car lot]. He had noted to them that it had a clean inspection sticker on it. At that point [the retail car lot] put it out for sale. They sold the vehicle to a gentleman . . . [who] had purchased the vehicle for his father . . . [and who] had taken it to his personal mechanic. He looked at the vehicle and said there's two areas that were marked out on the vehicle that wouldn't/shouldn't have passed state inspection. At that point the owner of the vehicle took it back to [the retail car lot] and their mechanic had looked at it and also stated that it would not pass state inspection. At that point the owner had called me . . . and asked what we were going to do about it since it had our mechanic's name on the sticker. [Ultimately] the customer returned to me . . . asking us to make it right.

(Hr’g Tr. at 8-9.) Appraiser further testified that the frame now “had . . . about a half dollar size hole in it that was rotted out,”⁵ would have to be replaced with a used part, and that Claimant was discharged for putting a sticker on a vehicle that should not have passed state inspection. (Hr’g Tr. at 9.) Appraiser explained that an inspection sticker cannot be put onto a vehicle with holes in the frame and the holes must be fixed before the vehicle can receive an inspection sticker, noting that certified inspection mechanics know this requirement and understand that they are doing something wrong if they put a sticker on a vehicle without first repairing the holes. (Hr’g Tr. at 9.)

Claimant understood that the Code requires the frame of a passenger car or light truck to be in solid condition. (Hr’g Tr. at 13.) In attempting to explain the definition of “solid condition,” Claimant testified that: the hole in the frame of the car he was inspecting was a “rust hole . . . about the size of a dime”; the diameter of the frame “is probably two and [one] half to two and three quarters of an inch”; and he determined that “the vehicle should be okay for a year” because “the size of the dime compared to two and [one] half inches.” (Hr’g Tr. at 13.) Claimant further testified that he put a footnote on the work order that “these things need to be addressed in the near future” and that he “felt it was okay at that time.” (Hr’g Tr. at 13.) Claimant acknowledged that there were *two* rust holes, and he informed the owner of the vehicle, his co-worker, that these things should be corrected in the near future. (Hr’g Tr. at 13.)

⁵ Appraiser testified that the retail car lot did not re-inspect the vehicle because the inspection sticker was only two months old at the time. (Hr’g Tr. at 10.)

Thus, Claimant had firsthand knowledge of the vehicle at the time he inspected it and admitted that there were two rust holes in the frame. (Hr’g Tr. at 13.) Therefore, Employer’s witnesses’ testimony, despite including unobjected to hearsay, adds weight to and corroborates Claimant’s competent testimony that the rust holes existed when Claimant inspected the vehicle. Accordingly, viewing this testimony in the light most favorable to Employer as the prevailing party below, the record confirms that there is substantial evidence to support the Board’s finding that there were two defective rust holes in the frame of the vehicle at the time Claimant inspected it. (FOF ¶ 3.)

Claimant next argues that substantial evidence does not support the Board’s determination of willful misconduct. Claimant contends that Employer did not meet its burden of proof.⁶

“Whether a claimant’s conduct [constitutes] willful misconduct is a question of law reviewable by this Court.” Orend v. Unemployment Compensation Board of Review, 821 A.2d 659, 661 (Pa. Cmwlth. 2003). Section 402(e) of the Law provides that a claimant will not be eligible for UC benefits when “his

⁶ In arguing that Employer did not meet its burden of proof, Claimant first contends that neither party submitted the Code into evidence. However, the Commonwealth Documents Law provides that “[t]he contents of the code, of the permanent supplements thereto, and of the bulletin, shall be judicially noticed,” 45 Pa. C.S. § 506, and this Court may review the Code without it being introduced into evidence. Claimant next argues that the Appraiser is not qualified to explain the nuances of the Code; however, this testimony merely goes to the weight of the evidence that the Board must weigh in making its factual findings and credibility determinations. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985).

unemployment is due to his discharge . . . from work for willful misconduct connected with his work.” 43 P.S. § 802(e). Although Section 402(e) does not define the term “willful misconduct,” the Supreme Court has defined it as:

“an act of wanton or willful disregard of the employer’s interest, a deliberate violation of the employer’s rules, a disregard of standards of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer’s interest or of the employe’s duties and obligations to the employer.”

Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 83-84, 351 A.2d 631, 632 (1976) (quoting Moyer v. Unemployment Compensation Board of Review, 110 A.2d 753, 754 (Pa. Super. 1955)). The employer has the burden of proving that an employee was discharged for willful misconduct. Graham v. Unemployment Compensation Board of Review, 840 A.2d 1054, 1056 (Pa. Cmwlth. 2004). The Board, as the ultimate fact finder, is entitled to make its own determinations as to witness credibility and evidentiary weight, and it is empowered to resolve conflicts in the evidence. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985).

Although Claimant acknowledged that the vehicle had two rust holes in its frame when his co-worker brought the vehicle to him for inspection, he still passed it with the notation that the holes must be addressed in the near future. (Hr’g Tr. at 13.) Claimant then testified that he passed the vehicle believing that he had the discretion to overlook the holes in its frame⁷ and believing that the holes were small enough that the vehicle still could pass. (Hr’g Tr. at 12-14.) However, the

⁷ Claimant took these actions despite the provisions of Section 175.80(e)(5) of the Code.

Board *specifically discredited* Claimant's testimony that the vehicle met all the criteria to be given a state inspection sticker, despite having two areas of corrosion, and concluded that the Code required that Claimant not pass the vehicle for inspection if any frame components were rotted or in a deteriorated condition. (Board Order.) Agreeing with the Board's conclusion, we observe, as a matter of law, that under the Code mechanics do not have discretion when they inspect a vehicle whose frame is not in a solid condition. Because the frame was not in solid condition when it contained dime-sized rust holes, but was in a deteriorated condition in violation of Section 175.80(e)(5)(i) and (iii) of the Code, 67 Pa. Code § 175.80(e)(5)(i) and (iii), Claimant, as a matter of law, violated state law when he passed his co-worker's vehicle for inspection. Thus, Claimant did not have any discretion but, instead, was required to reject this vehicle for inspection. Therefore, in passing his co-worker's vehicle for inspection with two holes in its frame, while simultaneously telling the co-worker that the holes would have to be repaired, Claimant's behavior evidenced a willful disregard of Employer's interests and a disregard of the standards of behavior that Employer had a right to expect from its employees, constituting willful misconduct pursuant to Section 402(e) of the Law.

Accordingly, we affirm the Board's Order.

RENÉE COHN JUBELIRER, Judge

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	Petitioner	:	
		:	
v.		:	No. 579 C.D. 2012
		:	
Unemployment Compensation		:	
Board of Review,		:	
	Respondent	:	

ORDER

NOW, January 4, 2013, the Order of the Unemployment Compensation Board of Review entered in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David W. Ross, :
 :
 Petitioner :
 :
 :
 v. : No. 579 C.D. 2012
 : Submitted: September 21, 2012
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 Unemployment Compensation :
 Board of Review, :
 Respondent :

**BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge**

OPINION NOT REPORTED

**DISSENTING OPINION
BY JUDGE BROBSON**

FILED: January 4, 2013

Because I would vacate the Board's decision and remand for further factual finding(s) on the question of whether Claimant acted willfully and deliberately or, as he contends, acted based on a misunderstanding of the law, I respectfully dissent.

P. KEVIN BROBSON, Judge