IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kingsbury, Inc.,	:	
Petitioner	:	
v.	:	No. 596 C.D. 2010
	:	Submitted: September 17, 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 JUDGE BROBSON **FILED:** December 30, 2010

Petitioner Kingsbury, Inc. (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board). The Board reversed the Referee's decision and determined Steven Landis (Claimant) to be eligible for benefits. For the reasons set forth below, we affirm.

Claimant[1] applied for unemployment compensation benefits after being discharged from his employment as a maintenance mechanic with Employer. The Philadelphia UC Service Center (Service Center) issued a determination, finding Claimant ineligible for unemployment compensation benefits under

[1] Claimant is an Intervenor in this matter.

Section 402(e) of the Unemployment Compensation Law (Law)[2] based on willful misconduct. Claimant appealed the Service Center's determination, and a hearing was held before the Referee. During the hearing, Employer presented the testimony of Hugo Mercoli (Mercoli) and Eric Shields (Shields) in support of its position.

Shields, a shipper/receiver for the Repair & Service Division of Employer, testified that on September 17, 2009, he went to the Philadelphia facility of Employer to pickup tooling and fixture material for the Hatboro facility of Employer. (Reproduced Record (R.R.) at 77a.) Once at the Philadelphia facility, Shields got an electric pallet jack and started to move the material from the floor. (*Id.*) Shields heard Claimant's voice in the distance. (*Id.* at 78a.) Shields could not hear exactly what Claimant said to him but did make out that Claimant told him he could not be doing the work he was performing. (*Id.*)

Mercoli, a manufacturing manager for Employer, testified that on September 7, 2009, he was having a meeting in his office when he heard a page for his name. (*Id.* at 48a.) A few minutes later, Claimant approached Mercoli in the meeting and informed him that he was not going to let someone come in from the other plant and move the skids. (*Id.* at 49a.) Mercoli went to investigate further

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

when Claimant approached him and stated that he did not tell Shields to stop working. (*Id.* at 50a.) Mercoli testified that when he asked Shields about the incident, Shields replied he was not sure what Claimant exactly said, but more or less told him to stop. (*Id.*)

Claimant testified as to the circumstances surrounding his separation from employment. Claimant testified that on September 17, 2009, he observed Shields moving the pallets around with an electric pallet jack in the fluid film assembly area. (*Id.* at 66a.) Claimant wanted to find out what Shields was doing. (*Id.*) Because Shields was walking away, Claimant said "yo, stop, what are you doing?" (*Id.*) Shields informed Claimant of what he was doing, and Claimant told him he should not be doing that work because only a union worker can do that task. (*Id.*) Claimant testified that he continued walking and went to page Mercoli. (*Id.*) Claimant went to Mercoli's office and informed him of what occurred, stating specifically that he did not tell Shields to stop working. (*Id.* at 67a.)

Following the hearing, the Referee issued a decision, affirming the Service Center's determination denying Claimant unemployment compensation benefits under the Law. (*Id.* at 93a-94a). The Referee concluded that by asking a non-union employee to stop work, Claimant violated Employer's rules of conduct and interfered with work production. (*Id.*) The Referee found that Claimant's conduct rose to the level of willful misconduct because his actions were a

deliberate disregard of Employer's interests and of the standards of behavior that Employer has the right to expect of Claimant. (*Id.*) Claimant appealed the Referee's order to the Board, which reversed the Referee's decision. (R.R. at 152a-154a.)

On appeal, the Board resolved any conflict in testimony, in relevant part, in favor of Claimant and found Claimant's testimony to be credible. (*Id.*) The Board found, in relevant part:

> 1. The claimant was last employed as a full-time maintenance mechanic by Kingsbury Inc. in its Philadelphia plant work division from 2004 at a final rate of $30.88 per hour and his last day of work was September 18, 2009.
>
> 2. The employer manufactures roller bearings and fluid film bearings for all types of industries.
>
> 3. On September 17, 2009, the claimant noticed that a worker who works for Employer's Repair and Service Division was moving a pallet with an electric pallet jack.
>
> 4. The claimant did not inform the worker to "stop working". Rather, the claimant merely questioned the worker, saying, "Yo, stop, what are you doing?"
>
> 5. The claimant believed that union workers should have been doing this task and, as a result, went to see the employer's manufacturing manager.
>
> 6. The claimant informed the manufacturing manager that the employer was not allowed to use non-union employees to do union work in the plant because four union workers had recently been laid off.

> 7. The employer's Repair and Service Division workers are not unionized and they work at a separate location in Hatboro, Pennsylvania.
>
> 8. The claimant is the president of the in-house union for the past two years
>
> 9. The employer has a rule that prohibits the participation in work stoppage, causing a production slowdown, or interfering with the rest of production. Violation of this rule can result in discharge for the first offense
>
> 10. The claimant was aware or should been aware of the employer's rule.
>
> 11. The employer discharged the claimant on September 18, 2009, for interfering with work production.

(*Id*.)

Based on these facts, the Board concluded that the record evidence did not sufficiently establish that Claimant ever intentionally instructed the non-union employee to actually "stop working." (*Id*.) Instead the Board found the evidence of record only established that Claimant questioned Shields regarding him moving the skid. (*Id.*)

The Board explained as follows:

> In this case, the record and evidence does not sufficiently establish that the claimant ever intentionally instructed the non-union employee who was employed at the Hatboro plant to actually "stop working." Rather, the evidence of record only establishes that the claimant questioned the non-union employee regarding him

> moving the skid. The employer's manufacturing director even testified that the non-union employee informed him that he wasn't sure what the claimant had exactly said to him. Therefore, there is insufficient evidence in the record that the claimant caused work production to be interrupted at the Philadelphia plant. Accordingly, the claimant cannot be denied benefits under Section 402(e) of the Law.

(*Id.*) Employer now petitions this Court for review of the Board's order.

On appeal,[3] Employer argues only that substantial evidence does not exist in the record to support the Board's finding that in using the word "stop," Claimant was merely questioning Shields. Instead, Employer argues that in using the phrase "yo stop, what are you doing," Claimant intended to stop Shields from performing the task at hand, and the evidence of record supports only this conclusion.[4]

Substantial evidence is defined as relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp. Bd. of Review*, 502 A.2d 738, 740 (Pa. Cmwlth. 1986). In determining whether there is

[3] This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704.

[4] As an Intervenor, Claimant made several arguments in support of the proposition that there was not a work rule in place prohibiting the participation in work stoppage or work interruption because of an expired collective bargaining agreement. We will not address these arguments because Claimant is not the aggrieved party in this matter, and, therefore, these issues are irrelevant to the specific issue brought before this Court by the aggrieved party on appeal.

substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn 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 Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The Board's findings of fact are conclusive on appeal only so long as 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). "The fact that [the employer] may have produced witnesses who gave a different version of the events, or that [the employer] might view the testimony differently than the Board is not grounds for reversal if substantial evidence supports the Board's findings." *Tapco, Inc. v. Unemployment Comp. Bd. of Review*, 650 A.2d 1106 (Pa. Cmwlth. 1994). Similarly, even if evidence exists in the record that could support a contrary conclusion, it does not follow that the findings of fact are not supported by substantial evidence. *Johnson v. Unemployment Comp. Bd. of Review*, 504 A.2d 989, 990 (Pa. Cmwlth. 1986).

Here, the Board found credible the testimony of Claimant.[5] Contrary to Employer's argument that Claimant did not testify as to why he told Shields to stop, Claimant testified that he used the phrase, "yo, stop, what are you doing" because Shields was walking away from him with the electric pallet jack. (R.R. at 26a.) He used that phrase to merely question what Shields was doing, because union employees were the only ones that could do that particular job. Claimant testified that he never told Shields to stop working. After Shields told him what he was doing, Claimant said he was going to see Mercoli and continued walking. The Board concluded that this statement, based on Claimant's testimony, only established that Claimant had questioned the non-union employee regarding moving the skid.

The Board also relied on the testimony of Mercoli. Specifically, Mercoli testified that Shields informed him that he was not even sure exactly what Claimant said to him. (*Id*. at 50a.) Employer argues that this assertion is misleading because it leaves out a critical portion of the record in which Mercoli further testified that Shields also stated Claimant "more or less" told him to stop.

[5] Employer argues that the Board did not see the demeanor of the witnesses and complains that the Board resolved the testimony in favor of Claimant without providing an explanation. In unemployment compensation proceedings, the Board is the ultimate fact finding body empowered to resolve conflicts in evidence, to determine credibility of witnesses, and to determine the weight to be accorded evidence. *Unemployment Comp. Bd. of Review v. Wright*, 347 A.2d 328 (Pa. Cmwlth. 1975). Here, the Board was free to accept the testimony of Claimant regarding the meaning and reasoning behind his statement to his fellow employee. The fact that the Board did not physically see the demeanor of witness is irrelevant to its fact-finding power.

(*Id*.) However, the Board took Mercoli's testimony as a whole to conclude that he testified Shields was not exactly sure what Claimant said to him. The Board relied on what it concluded was the relevant and credible part of Mercoli's testimony. Even if we were to accept the full statement as Employer asks us to do, there is still sufficient evidence upon which a reasonable mind could conclude that Shields was not exactly sure what Claimant said to him because Shields prefaced his "more or less" testimony with the fact that he was not sure what was said to him. Based on this inconsistency, the Board found that Shields was not sure what Claimant said to him. (*Id*. at 152a-154a.) Further, the Board concluded that the record evidence did not sufficiently establish that Claimant intentionally instructed the non-union employee to actually "stop working," and, therefore, there was insufficient evidence in the record that Claimant caused work production to be interrupted or stopped. (*Id*.)

Based on our review of the record, we are convinced that substantial evidence of record exists to support the Board's finding that Claimant did not inform Shields to stop working. Therefore, Claimant cannot be denied benefits under Section 402(e) of the Law.

Accordingly, we affirm the decision of the Board.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kingsbury, Inc.,	:	
Petitioner	:	
v.	:	No. 596 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	
Respondent	:	

O R D E R

AND NOW, this 30th day of December, 2010, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

P. KEVIN BROBSON, Judge