

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian Crouch,	:
	:
Petitioner	:
	:
v.	:
	:
Unemployment Compensation Board	:
of Review,	: No. 747 C.D. 2007
	:
Respondent	: Submitted: August 3, 2007

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
 HONORABLE JAMES GARDNER COLINS, Senior Judge *
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY SENIOR JUDGE COLINS**

FILED: January 18, 2008

Brian Crouch (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board) denying his application 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) 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 connected with his work, irrespective of whether or not such work is “employment” as defined in the act.

*The decision in this case was reached after the date that Judge Colins assumed the status of senior judge.

Claimant was discharged by his Employer, Morando Homes, Inc. when he was unable to perform his work as a truck driver as a result of a charge of driving under the influence of drugs or alcohol. Claimant applied for unemployment compensation benefits and following review by an unemployment compensation service center, the matter went before a referee. The referee denied Claimant's application for benefits. Claimant appealed to the Board arguing that the referee erred in concluding that he was guilty of willful misconduct and that Employer treated him differently than similarly situated employees. Without taking additional evidence, the Board affirmed the referee and adopted the referee's findings.

The Board found that from October 17, 2005 until his last day of work, November 20, 2006, Claimant, who had his commercial driver's license, worked for Employer as a truck driver. In June 2006, Claimant was arrested and charged with driving under the influence of alcohol or drugs (DUI). Claimant informed his Employer of the arrest, and was able to remain employed pending the disposition of the charges. On November 20, 2006, Claimant informed Employer that he was going to lose his driving privileges effective November 24, 2006. Employer discharged Claimant based on its business policy that it did not permit any truck drivers who lost their operating privileges for DUI to perform non-driving work while remaining employed.

The Board found that Employer did permit one driver, who was temporarily unable to drive due to medical reasons, to remain employed for several weeks until he could drive again. The Board found that Claimant was not treated differently than his coworker, as the coworker was unable to drive because of a medical condition. The Board further found that Employer has the prerogative to treat a medical condition differently than a DUI. The Board concluded that Claimant

and his coworker were not similarly situated. The Board concluded that Claimant's conduct rose to the level of willful misconduct as Claimant failed to have a valid driver's license and he was therefore ineligible for benefits pursuant to Section 402(e) of the Law. Claimant now appeals to this Court.²

Whether an employee's conduct constitutes willful misconduct³ is a matter of law subject to this Court's review. *Miller v. Unemployment Compensation Board of Review*, 405 A.2d 1034 (Pa. Cmwlth. 1979). The burden of proving willful misconduct rests with the employer. *Brant v. Unemployment Compensation Board of Review*, 477 A.2d 596 (Pa. Cmwlth. 1984).

Claimant presents two issues. Claimant argues that the Board erred in finding that his conduct rose to the level of willful misconduct. However, this argument ignores well-settled law that where a valid driver's license is a

² This Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. *See Porco v. Unemployment Compensation Board of Review*, 828 A.2d 426 (Pa. Cmwlth. 2003). 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). Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules v. Unemployment Compensation Board of Review*, 604 A.2d 1159 (Pa. Cmwlth. 1992). The Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 501 A.2d 1383 (1985).

³ Willful misconduct has been judicially defined as that misconduct which must evidence the wanton and willful disregard of employer's interest, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from his employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional substantial disregard for the employer's interest, or the employee's duties and obligations. *Frumento v. Unemployment Compensation Board of Review*, 466 Pa. 81, 351 A.2d 631 (1976).

prerequisite of employment, and the loss of that license for a non-work-related incident of DUI has a direct effect on claimant's job, the loss of the driver's license constitutes willful misconduct, rendering the claimant ineligible for unemployment compensation benefits. *Kelly v. Unemployment Compensation Board of Review*, 747 A.2d 436 (Pa. Cmwlth. 2000); *Williams v. Unemployment Compensation Board of Review*, 651 A.2d 708 (Pa. Cmwlth. 1994).

Claimant's second argument that the Board erred in finding no disparate treatment of employees by Employer lacks merit. Employer's business rule stated that it did not permit any truck drivers who lost their operating privileges for DUI to perform non-driving work while remaining employed. In support of his argument that the rule was not applied equally, Claimant points to Employer's treatment of an employee who was unable to drive due to illness. However, the argument is not persuasive, as the evidence is that Claimant was not offered a non-driving position because he was unable to perform his job due to a DUI whereas, the co-worker was unable to perform his job due to a medical condition. Thus, consistent with Employer's business policy, Claimant was not offered a non-driving position because his inability to drive was the result of his DUI and not an illness. We find no error in the decision of the Board.

Accordingly, the Board's order is affirmed.

JAMES GARDNER COLINS, Senior Judge

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ORDER

AND NOW, this 18th day of January 2008, the Order of the Unemployment Compensation Board of review entered in the above-captioned matter is AFFIRMED.

JAMES GARDNER COLINS, Senior Judge