

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Margaret M. Kauffman,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 839 C.D. 2011
	:	
Unemployment Compensation	:	Submitted: October 28, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: December 2, 2011

Margaret M. Kauffman (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of a Referee that she 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

(Continued....)

Claimant filed a claim for unemployment compensation benefits upon the termination of her employment as a nightshift nursing supervisor with Berwick Retirement Village (Employer). The Scranton UC Service Center representative concluded that Claimant had been discharged for reasons that constitute willful misconduct under Section 402(e) of the Law based upon her falsification of records in violation of Employer's work rule prohibiting such conduct. As a result, unemployment compensation benefits were denied.

Claimant appealed this determination and a hearing was conducted before a Referee. See N.T. 1/27/1² at 1-33; Reproduced Record (RR) at 83a-114a. On January 28, 2011, the Referee issued a decision disposing of the appeal in which she determined that Claimant had been discharged for reasons that constitute willful misconduct under Section 402(e) of the Law. As a result, the Referee issued an order affirming the Service Center's determination that Claimant was not entitled to benefits.

On February 10, 2011, Claimant filed an appeal of the Referee's decision with the Board. On April 14, 2011, the Board issued a decision in which it made the following relevant findings of fact: (1) on September 9, 2010, Employer's director of nursing reported for work and became aware that a resident did not receive CPR before passing away the previous night; (2) the director spoke to Claimant to learn of the events leading up to the resident not receiving CPR; (3) Claimant stated that when she assessed the resident, the resident was not breathing,

temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in this act.

² "N.T. 1/27/11" refers to the transcript of the hearing conducted before the Referee on January 27, 2011.

had fixed and dilated pupils, and that she did not hear a heartbeat; (4) however, in her nurse's notes, Claimant indicated that at approximately 4:10 a.m., the resident's respiration had ceased but had a rare heartbeat; (5) Claimant alleged that she was pressured into saying that she did not hear a heartbeat during the meeting; (6) Employer's director also discussed with Claimant when the resident's death was pronounced; (7) Claimant informed the director that she wrote the death order pronouncing the death of the resident; (8) Claimant was educated on how to pronounce death and was specifically informed during orientation on the proper procedure to follow after a resident's death; (9) Claimant was aware that she was required to obtain an order from the nursing home's doctor to pronounce the death of a resident; (10) although Claimant tried to contact the nursing home's doctor, she did not speak to the doctor or receive an order from the doctor; (11) Claimant spoke to the doctor's answering service and informed the service that she needed to speak to the doctor because a resident had expired and she needed to obtain an order pronouncing the resident's death; (12) after speaking with the service, Claimant started to prepare her notes and indicated that at 4:10 a.m. she had called the doctor and received orders; (13) Claimant alleged that the doctor's answering service told her that the doctor had received her message and that she could write the order pronouncing the resident's death; (14) Claimant admitted that she was not allowed to take orders from an answering service; (15) according to Claimant's notes, she informed the resident's family of the passing at 4:20 a.m. and notified the funeral home of the resident's passing at 4:40 a.m.; and (16) Employer discharged Claimant for falsifying her notes and for writing an order pronouncing death without the doctor's permission. Board Decision at 1-2.

Based on the foregoing, the Board concluded:

In this case, the claimant was aware of the employer's procedure of pronouncing death. The claimant contends that she was informed by the doctor's answering service that the doctor was aware that she was writing the order. The Board does not find the claimant's testimony credible in this regard. Therefore, the Board finds that the claimant disregarded the employer's procedure without good cause. Likewise, the claimant further showed a disregard to the employer by falsifying her notes that she received orders and that she heard a heartbeat when she told the employer that she had not. The claimant has not credibly established reasons for falsifying information and writing an order without the doctor's permission. Therefore, the claimant's actions constitute willful misconduct under Section 402(e) of the Law.

Board Decision at 3. Accordingly, the Board issued an order affirming the Referee's decision denying Claimant benefits. Id. at 4. Claimant then filed the instant petition for review.³

In this appeal, Claimant contends the Board erred in affirming the Referee's decision denying her benefits. More specifically, Claimant points to evidence in the certified record that she was not aware of Employer's procedure regarding the pronouncement of death, and that she had good cause for violating the procedure, thereby supporting her assertion that she did not commit willful misconduct.

As noted above, pursuant to Section 402(e) of the Law, an employee is ineligible for unemployment compensation benefits when she has been

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).

discharged from work for willful misconduct connected with her 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)).

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 she had good cause for her actions. Id. The employee establishes good cause where her 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.

Claimant contends that there is not sufficient evidence demonstrating that she was aware of the procedure relating to the pronouncement of death, and that she had not violated the procedure because she had good cause for her actions. However, when viewed in a light most favorable to Employer, our review of the certified record in this case demonstrates that there is substantial competent evidence supporting the Board's findings regarding the existence of Employer's procedure regarding the pronouncement of death, the reasonableness of the procedure, Claimant's awareness of the procedure, and the fact of its violation. See N.T. 1/27/11 at 8, 9-11, 12, 13; RR at 90a, 91a-93a, 94a, 95a.⁴ More

⁴ Employer's director of nursing, Odra Litwhiler, testified in pertinent part, as follows:

R All right, would you like to tell me anything about her separation?

EW On the morning of the 9th I come into work and there was a concern with one of our residents who did not receive CPR when he had passed away and so, you know, I called [Claimant] and to try and find out what was [sic] the events that led up to the resident not having CPR. So then we, you know, through our discussion she had talked about that when she assessed the resident that he was not breathing, she did not hear a heartbeat, and his pupils were fixed and dilated; but in her chart she had written that she had heard a faint heartbeat. So we continued to talk some more to go through all the events of that day and we got to the part of

(Continued...)

pronouncing the body and she said that she had put two calls to Dr. John and he did not, Dr. John, did not return the call. When I questioned her about the source of the order [Claimant] replied I wrote it. So Dr. John had not returned the call but she wrote the order that she could pronounce the body. So as a nurse we know that, you know, it's a standard practice that we don't write....

* * *

R In regards to the situation the occurrence that occurred you're saying something about an order being written?

EW You have to write – you have to call the physician and ask for an order to announce the body. RNs are allowed to pronounce death but in order to do that you have to call the doctor and get a verbal order saying, you know, you may pronounce the body in his absence and that's what you're doing.

CL I'm going to object again.

R Your basis?

CL It's hearsay; no evidence to that effect. It's her word.

R Ms. Litwhiler, do you want to respond to that?

EW I do have an orientation packet that [Claimant] has signed off on that she was educated on our policy on how to pronounce death.

CL I'm objecting.

EW Do you want?

CL Sure. Okay and look at that. Did you....

C What is this again?

R And this is?

EW That's our – they're called a (inaudible) but it's our orientation to our nursing position.

R Okay and what, let me see which one.

EW And right at the top there it has.

R Oh, pronouncing death?

EW Yeah, pronouncing death.

R Okay.

(Continued....)

EW That's our....

R Dated 6/25.

C Yeah, she's right.

R Okay, there you go.

CL Are we going to allow that to come in?

R Are you submitting that or you just – are you submitting that into the record?

EW Well I – that's our proof that, you know, she....

R Okay, is that a copy?

EW ...that she understands.

R Is that a copy?

EW Yes.

R Is....

EW It is.

R Okay.

EW It's a copy, right?

R Um-hum.

R Okay.

EW Yes it's a copy.

R Any objections to that?

CL No.

R Okay, that's Claimant Exhibit 1.

EW Okay.

R And that's accepted. I'm sorry, Employer Exhibit 1 and that's accepted.

EW We have a nurse's note, her nurse's note, that says that his respirations had ceased by a rare heartbeat, hands cool to touch. And through our investigation she had – she said that he was not breathing, she did not hear a heartbeat, and his pupils were fixed and dilated.

R Okay, so let me back up. Let me just understand. What's

(Continued....)

the reason why she was discharged? I didn't get that from you.

EW It was falsification of documentation.

R Okay, so you're accusing her of falsification of documentation?

EW Writing a verbal order she did not receive from the doctor.

R Okay and you're saying that.

EW And that....

R Okay.

EW ...that is what our Disciplinary Action Notice states.

R Okay. All right, go ahead. Anything else you wanted to state?

EW No, that's really all that

CL Can I see that please?

EW Um-hum.

CL Are you going to copy that in....

EW Yeah.

CL ...as an exhibit, too?

EW I think we will.

R And what is that that....

EW That's the nurse's note. It's [Claimant]'s nurse's note.

R Okay, any objections?

CL No objections.

R And that's Claimant Exhibit 2 of the....

CL Employer.

R I'm sorry, Employer Exhibit 2 and that's accepted....

* * *

CL So tell me in more specificity....

EW Um-hum.

CL ...the exact falsification that occurred?

EW Writing a verbal order that she did not receive....

(Continued....)

CL Um-hum.

EW ...from the physician and writing that she heard a faint heartbeat.

CL And that is it?

EW Um-hum.

CL Okay, now your Exhibit #2 is it stated on Exhibit 2 that she wrote that she heard a faint heartbeat?

R This is what he's referring to if you need to refer to it.

EW Rare heartbeat heard, um-hum.

CL Rare?

EW Heartbeat heard, um-hum.

CL Heartbeat heard. Okay and solely based upon that, that she wrote rare heartbeat heard, that is one of the two reasons why you fired her?

EW And writing a verbal order....

CL That was - I'm understanding that.

EW ...(inaudible), yes.

CL The first one is rare heartbeat heard.

EW Um-hum.

CL Okay, that's one of the two reasons. And the second reason was because she wrote a verbal order that she did not receive from the physician and is that correct?

EW Yes.

CL Thank you. Okay, now may I see Exhibit #1 again please? And thank you so much. Okay, now I'll ask you some questions about this....

CL So you don't know whether or not [Claimant] has limited experience or considerable experience from one to three in filling this out, do you?

EW No, I don't.

CL Okay.

EW She signed it though however, that she was educated.

specifically, the testimony of Employer's director of nursing supports the Board's findings in this regard. Id. See also Employer's Exhibits 1 and 2, Certified Record Item No. 11 at 44, 45; RR at 124a, 125a.

As noted above, the Board was free to credit the foregoing evidence regarding the violation of Employer's procedure and to discredit Claimant's 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 her actions were justified or reasonable under the circumstances. Guthrie.

In support of her burden, Claimant cites to evidence supporting her assertions that she was not aware of the procedure and that she had good cause for her actions. See Brief for Appellant at 13-17. However, as noted above, the Board specifically stated the following in its opinion:

In this case, the claimant was aware of the employer's procedure of pronouncing death. The claimant contends that she was informed by the doctor's answering service that the doctor was aware that she was writing the order. The Board does not find the claimant's testimony credible in this regard. Therefore, the Board finds that the claimant disregarded the employer's procedure without good cause. Likewise, the claimant further showed a disregard to the employer by falsifying her notes that she received orders and that she heard a heartbeat when she told the employer that she had not. The claimant has not credibly established reasons for falsifying information and writing an order without the doctor's permission....

Board Opinion at 3.

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's testimony whether or not it is corroborated by other evidence of record. Id. Thus, the fact that there is evidence cited by Claimant in her appellate brief which contradicts the Board's determinations with respect to the violation of Employer's procedure, and Claimant's purported good cause for the violation, does not compel the conclusion that the Board's determinations 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 competent evidence demonstrating the existence of Employer's procedure of pronouncing death, the reasonableness of the procedure, Claimant's awareness of the procedure, and the fact of its violation. In short, we will not accede to Claimant's request to revisit the Board's credibility determinations in this regard, and the Board did not err as a matter of law in determining that Claimant was ineligible for benefits pursuant to Section 402(e) of the Law by violating Employer's policy. See, e.g., LaFramboise v. Unemployment Compensation Board of Review, 543 A.2d 627, 630 (Pa. Cmwlth. 1988) (“Claimant admits that pursuant to the Employer's policy she was to notify the patient's doctor of any change in a patient's condition. When in doubt as to whether the doctor should be notified, Claimant clearly knew she was to contact the registered nurse on call. There was testimony before the Board that an L.P.N. charge nurse is to observe the patient but is not permitted to make assessments of a patient's condition. Such assessments must be made by a registered nurse. On

October 7, 1986, Claimant charted symptoms exhibited by Edna Fullem. Claimant admitted that the patient had not experienced some of these symptoms before. However, Claimant failed to report these changes to the patient's doctor. Rather than contacting the registered nurse on call and expressing her uncertainty as to the patient's condition, Claimant asked two other L.P.N.s their opinion as to whether the doctor should be contacted. Claimant's failure to notify Edna Fullem's doctor or to contact the registered nurse on call was not simply a judgment call but a violation of the Employer's rule of which she was clearly aware. The L.P.N. charge nurse who came on duty after Claimant did report Edna Fullem's symptoms to the registered nurse and the patient was hospitalized that day. Claimant's actions on October 7, 1986, were in direct violation of the Employer's rule of which she was aware. Further, the Board's determination that she lacked good cause for her actions is supported by the record. Accordingly, the order of the Board denying benefits is affirmed.") (citations omitted).⁵

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

⁵ Moreover, Claimant's deliberate falsification of her work records constitutes an independent basis upon which benefits could be denied pursuant to Section 402(e) of the Law. See, e.g., Seton Company v. Unemployment Compensation Board of Review, 663 A.2d 296 (Pa. Cmwlth. 1995) (holding that a deliberate falsification of an employer's records constitutes a disregard of the standards of behavior which an employer has the right to expect); Anderson v. Unemployment Compensation Board of Review, 485 A.2d 900 (Pa. Cmwlth. 1985) (holding that where a claimant is discharged due to multiple claims of willful misconduct, establishing sufficient evidence of only one of the reasons cited for discharge is adequate to sustain a finding of willful misconduct).

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Margaret M. Kauffman,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 839 C.D. 2011
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 2nd day of December, 2011, the order of the Unemployment Compensation Board of Review, dated April 14, 2011 at No. B-516237, is AFFIRMED.

JAMES R. KELLEY, Senior Judge