

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Randolph F. Keller, :
Petitioner :
v. : No. 840 C.D. 2011
Unemployment Compensation : Submitted: November 10, 2011
Board of Review, :
Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: December 30, 2011

Randolph F. Keller (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (UCBR), dated April 12, 2011, which affirmed a referee's decision that Claimant is ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm.

The UCBR adopted the referee's findings of fact and conclusions of law, incorporating them into its opinion. The UCBR specifically found:

1. The claimant worked for Plum Creek Municipal [Employer] as dump [sic] truck operator and his last day of work was December 29, 2010.^[2]

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 that a claimant shall be ineligible for benefits for any week in which his unemployment is due to his discharge from work for willful misconduct connected with his work. 43 P.S. §802(e).

² The record reflects that Claimant had been employed as a pump truck driver for the water authority. (N.T., 2/18/11, at 1-2.)

2. The claimant was insubordinate towards his supervisor being told specifically not to pump a certain customer that day because of snow and past difficulties with the driveway and even though the claimant was told twice not to do it he did it anyway.

3. The claimant did not have good cause for his conduct.

(Findings of Fact, Nos. 1-3.) The UCBR also determined: “Claimant was told not to pump a precise customer on the day in question. Claimant ignored the instructions and pumped the customer he was specifically told not to. This constitutes insubordination and unjustified willful misconduct.” (UCBR’s Op. at 1) (emphasis in original).

After Claimant’s discharge, he applied for unemployment compensation benefits, which the local job center denied based on section 402(e). Claimant appealed from the job center’s determination, and the referee affirmed. Upon further appeal by Claimant, the UCBR affirmed the referee’s decision. Claimant’s petition for review to this court followed.

On appeal, Claimant argues that he did not engage in willful misconduct.³ In particular, Claimant asserts that Employer merely directed him on the day in question not to get the pump truck stuck, and, in accordance with this directive, Claimant did not get the truck stuck. Claimant also contends that

³ Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Employer's attempt to establish Claimant's insubordination through Employer's witness' testimony that Claimant was told not to pump a certain property on Monday, but to wait until Tuesday, is "spurious." (Cl.'s Br. at 7.) Nonetheless, our review of the record reveals that, while Claimant testified that Employer's witness merely told him not to get the truck stuck, (N.T., 2/18/11, at 4), Employer's witness testified that he told Claimant not to pump the subject lot on that day, but to wait until "the next day" or "Tuesday." (*Id.* at 3.) Employer's witness further testified that he told Claimant twice not to pump it. (*Id.* at 3-4.) Because the UCBR is the ultimate fact-finder in unemployment cases, we will not disturb its credibility findings on appeal. *Maher v. Unemployment Compensation Board of Review*, 983 A.2d 1264, 1268 n.3 (Pa. Cmwlth. 2009), *appeal denied*, 606 Pa. 674, 996 A.2d 493 (2010). Claimant's assertion that he did not disregard Employer's directive therefore lacks merit.

Next, Claimant asserts that, even if we accept Employer's version of its directive, Claimant had good cause for violating that directive.⁴ However, while Claimant raised this issue in his brief, he failed to set it forth in his petition for review. Thus, the issue of whether Claimant had good cause for his actions is waived. *Id.* at 1266; Pa. R.A.P. 1513(d).⁵

⁴ We explained in *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518, 522 (Pa. Cmwlth. 1999) (citation omitted), that "[g]ood cause is established 'where the action of the employee is justified or reasonable under the circumstances.'"

⁵ Even had Claimant not waived the issue, he would not prevail. Employer's witness testified that he told Claimant not to pump the subject lot because it had not been sufficiently plowed and that, because auditors were coming in during this meter-reading period, he could not risk having to pull office employees from their tasks to aid Claimant in the event that Claimant's truck got stuck. (N.T., 2/18/11, at 2-3; *see also* C.R., Item No. 3, Notice of Termination of Employment, dated 12/29/10.) Therefore, Claimant's disregard of Employer's directive was clearly not reasonable under the circumstances.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

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	:	
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ORDER

AND NOW, this 30th day of December, 2011, the order of the Unemployment Compensation Board of Review, dated April 12, 2011, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge