

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

David A. Fitzgerald,	:
Petitioner	:
	:
v.	:
	:
Unemployment Compensation	:
Board of Review,	:
Respondent	: No. 885 C.D. 2008
	: Submitted: September 19, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
JUDGE BUTLER**

**FILED: October 23, 2008**

David A. Fitzgerald (Claimant) petitions this Court for review of the April 4, 2008 order of the Unemployment Compensation Board of Review (UCBR) affirming the Referee’s decision to deny benefits under Section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> Claimant essentially presents one issue for this Court’s review: whether the UCBR committed an error of law in affirming the Referee’s decision that Claimant’s employment was terminated for willful misconduct in connection with his work. For reasons that follow, we affirm the UCBR’s order.

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<sup>1</sup> Act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e).

Claimant had been employed with NPC, Inc. (Employer) as an inserter technician for over four years. Claimant was warned in April 2007, and again in May 2007, to notify a supervisor any time an error occurs on the machines on which he worked. Subsequently, in order to address quality assurance issues, Employer installed certain software in its machines that would shut-down the machine when an error occurred, and required employees to notify a supervisor to reset and restart the machine.

On December 29, 2007, Claimant was observed entering a supervisor's code to reset and restart a machine without first notifying a supervisor. On January 2, 2008, Claimant was called into a meeting with Employer regarding the incident and he admitted to using a supervisor's code to reset and restart a machine without first notifying a supervisor. Employer terminated Claimant's employment on January 2, 2008, for failing to alert a supervisor that an error occurred and for entering a supervisor's code to avoid the detection of the error. Thereafter, Claimant applied for unemployment compensation benefits.

The Altoona Unemployment Compensation Center (AUCC) determined that Claimant was ineligible for benefits under Section 402(e) of the Law. On February 4, 2008, Claimant appealed and a hearing was held before a Referee on February 19, 2008. The Referee affirmed the AUCC's determination that Claimant was ineligible for benefits under Section 402(e) of the Law. Claimant appealed to the UCBR and the UCBR adopted and incorporated the Referee's findings and conclusions, affirming the decision of the Referee. Claimant appealed pro se to this Court.<sup>2</sup>

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<sup>2</sup> This Court's review is limited to determining whether the necessary findings of fact were supported by substantial evidence, constitutional rights were violated, or errors of law were

Claimant argues that there was no willful misconduct because his “coaches”<sup>3</sup> gave him the supervisor codes to reset and restart the machines.

Willful misconduct has been defined as a wanton or willful disregard of the employer's interest; a deliberate violation of the employer's rules; disregard of standards of behavior which an employer can rightfully expect from an employee; or negligence indicating an intentional disregard of the employer's interest or the employee's duties or obligations.

*Pettyjohn v. Unemployment Comp. Bd. of Review*, 863 A.2d 162, 164 (Pa. Cmwlth. 2004).

In the instant case Claimant was warned on two prior occasions to notify a supervisor any time an error occurs. In addition, when the new software was installed, employees were required to notify a supervisor if a machine shuts down due to an error, so that they can reset and restart the machine. Notwithstanding the above, Claimant was observed entering a supervisor code and resetting and restarting a machine without notifying a supervisor. Moreover, when questioned about the incident by the Employer, Claimant freely admitted he disregarded the requirement of notifying a supervisor. Clearly, the Referee’s finding that Claimant engaged in willful misconduct is based on substantial evidence. Hence, the UCBR did not commit an error of law in affirming the Referee’s decision.

Concerning Claimant’s contention that his coaches told him he could reset and restart the machines on his own, the Referee specifically found that this assertion was not credible in light of the evidence that Claimant was specifically

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committed. *Pearson v. Unemployment Comp. Bd. of Review*, 954 A.2d 1260 (Pa. Cmwlth. 2008).

<sup>3</sup> “Coaches” are people who worked above Claimant, but below the supervisors, and sometimes acted as supervisors. *See* Claimant’s Br. at 2.

instructed to notify a supervisor when an error occurred. In an unemployment compensation case, the UCBR is the ultimate fact finder and is empowered to make credibility determinations. *Korpics v. Unemployment Comp. Bd. of Review*, 833 A.2d 1217 (Pa. Cmwlth. 2003). In making those determinations, the UCBR may accept or reject the testimony of any witness in whole or in part. *Id.* In the instant case the UCBR adopted the findings of the Referee.

For these reasons, the order of the UCBR is affirmed.

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**JOHNNY J. BUTLER, Judge**

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**ORDER**

AND NOW, this 23<sup>rd</sup> day of October, 2008, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

**JOHNNY J. BUTLER, Judge**