

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Jonathan A. Dale,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 963 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: September 24, 2010
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: November 5, 2010**

Representing himself, Jonathan A. Dale (Claimant), petitions for review from an order of the Unemployment Compensation Board of Review (Board) that affirmed a referee’s denial of benefits under Section 402(e) of the Unemployment Compensation Law (Law) (relating to willful misconduct).<sup>1</sup> The Board determined Claimant intentionally violated Susquehanna Bank’s (Employer) policy of storing no more than \$10,000 cash in a customer service representative (CSR) vault. The Board found Claimant stored \$52,000 cash in a CSR vault. Claimant asserts factual and legal error in the Board’s decision. Because substantial evidence supports the Board’s determination and it is in accordance with the Law, we affirm.

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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).

The Board found as follows. Claimant worked for Employer as a senior CSR. As a senior CSR, Claimant served as the head teller in his branch, and he supervised other tellers. Claimant also enforced Employer's procedures with regard to the handling of bank transactions.

“[E]mployer [had] detailed policies and procedures of which [Claimant] was aware, or should have been aware, related to the handling of transactions at the branch.” Board Op., Finding of Fact (F.F.) No. 3. In June and July 2009, Employer gave Claimant oral warnings, “leading up to a written warning [in September 2009] for failing to perform certain cash handling procedures properly, in addition to some other issues.” F.F. No. 5.

Later that month, Employer discovered Claimant stored \$52,000 in a CSR vault. Employer's policy authorized employees to store no more than \$10,000 in a CSR vault. F.F. Nos. 5, 6; Certified Record (C.R.) at Item No. 13, Ex. No. 7B (1101.2 Branch and CSR Cash Limits Policy and Guidelines). Claimant's failure to observe this policy posed a security risk to Employer and its customers. F.F. No. 7. Employer issued Claimant a notice of termination “related to his having stored \$52,000 in a CSR[] vault.” F.F. No. 6.

Claimant applied for benefits, which were initially denied. Claimant appealed. A hearing ensued before a referee.

At hearing, Employer presented two witnesses: the branch manager under whom Claimant worked at the time he was terminated and a human

resources representative. Employer's witnesses stated they fully informed Claimant of Employer's policies. They testified Employer terminated Claimant for exceeding the CSR cash limits policy. However, Employer's witnesses testified that other bases supported Employer's termination decision, especially Claimant's repeated failures to comply with Employer's cash handling policies.

Claimant testified on his own behalf, and his testimony may be summarized as follows. Employer did not properly train him in the procedures for which he was terminated. The procedure he used he learned from his prior supervisor. Claimant used similar procedures with his prior employer. Claimant also testified he was a conscientious worker.

The referee found Employer's witnesses' testimony credible and Claimant's testimony not "entirely credible." Ref. Dec. at 2. The referee determined Employer met its burden of establishing Claimant committed willful misconduct under Section 402(e) of the Law. The referee also concluded Claimant did not establish good cause for his actions. Thus, the referee denied benefits.

Claimant appealed to the Board, which affirmed the referee's decision. The Board concluded the record supported the referee's findings, and it largely adopted the findings as its own. The Board made one additional finding: "[C]laimant alleges that his actions ... were in conformity with the training he had received from his previous supervisor." F.F. No. 8. The Board explained it did not find sufficient credible evidence to support Claimant's contention. Board Op. at 2.

On appeal,<sup>2</sup> Claimant asserts the record does not support the Board's necessary findings. He also argues the Board erred in concluding he committed disqualifying willful misconduct.<sup>3</sup>

Willful misconduct within the meaning of Section 402(e) of the Law includes behavior evincing a willful disregard of an employer's interests, a deliberate violation of an employer's work rules, or a disregard of the standards of behavior that an employer can rightfully expect from its employees. Frazier v. Unemployment Comp. Bd. of Review, 833 A.2d 1181 (Pa. Cmwlth. 2003). An employer bears the initial burden of proving a claimant engaged in willful misconduct for purposes of determining a claimant's eligibility for unemployment benefits. Burger v. Unemployment Comp. Bd. of Review, 569 Pa. 139, 801 A.2d

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<sup>2</sup> There are numerous procedural defects that inhibit our ability to review Claimant's arguments. Claimant prepared his appellate brief. In it he seeks to incorporate, by reference, sections of his counseled brief filed with the Board. However, the issues raised in his petition for review filed with this Court are not consistent with the arguments in the brief filed with the Board.

An unemployment compensation claimant waives review of an issue by neglecting to raise and preserve it before the referee. Johnson v. Unemployment Comp. Bd. of Review, 869 A.2d 1095 (Pa. Cmwlth. 2005). This Court will not consider issues that were not raised in the petition for review. McCall v. Unemployment Comp. Bd. of Review, 717 A.2d 623 (Pa. Cmwlth. 1998).

From Claimant's petition for review, we discern challenges to the Board's findings of fact and to the Board's conclusion that he committed willful misconduct. As these are issues Claimant properly brought before the Board, we will rely on Claimant's counseled brief to address these issues.

All other issues identified in the petition for review but not discussed in Claimant's brief before the Board are waived. See Wing v. Unemployment Comp. Bd. of Review, 496 Pa. 113, 436 A.2d 179 (1981) (an issue first advanced in Commonwealth Court is waived).

<sup>3</sup> Our review is limited to determining whether the findings of fact were supported by substantial evidence and whether there was a violation of the constitution or agency procedure of law. Caterpillar, Inc. v. Unemployment Comp. Bd. of Review, 550 Pa. 115, 703 A.2d 452 (1997).

487 (2002). Once an employer establishes a *prima facie* case of willful misconduct, the burden shifts to the claimant to prove his actions were justified or reasonable under the circumstances. Kelly v. Unemployment Comp. Bd. of Review, 747 A.2d 436 (Pa. Cmwlth. 2002).

### **Factual Errors**

Claimant asserts several of the Board's findings are not supported by substantial evidence. We disagree.

The Board is the ultimate fact finder in unemployment compensation cases. Kelly. As fact finder, the Board determines the weight assigned to the evidence. Tapco, Inc. v. Unemployment Comp. Bd. of Review, 650 A.2d 1106 (Pa. Cmwlth. 1994). Credibility determinations are exclusively within the Board's province. Melomed v. Unemployment Comp. Bd. of Review, 972 A.2d 593 (Pa. Cmwlth. 2009).

Claimant challenges the Board's finding that he was aware of the CSR cash limits policy. See F.F. Nos. 6, 7. Contrary to Claimant's assertions, substantial evidence supports the Board's finding. Specifically, Employer introduced the CSR cash limits policy into evidence without objection. C.R. at Item No. 13, Ex. No. 7B (1101.2 Branch and CSR Cash Limits Policy and Guidelines). Employer's branch manager testified she specifically discussed this policy with Claimant following an incident in August. Notes of Testimony, 1/6/10, (N.T.) at 24. In particular, Employer cited Claimant for not properly maintaining CSR cash limits. Employer's branch manager testified she subsequently met with

Claimant to address the violation. She testified she emphatically discussed Employer's policies with him, "includ[ing] what our cash limits were." Id. Therefore, the challenged finding is adequately supported.

Claimant also argues the Board's finding that he was aware or should have been aware of Employer's "detailed policies and procedures ... related to the handling of transactions at the branch" is not supported by substantial evidence. See F.F. No. 3. We disagree; this finding is adequately supported by the record. Employer provided Claimant a Performance Improvement Plan (PIP) in March, six months prior to discharging Claimant. C.R. at Item No. 13, Employer's Ex. No. 3 (PIP for Claimant, 3/19/09). In the PIP, Employer identified Claimant's responsibility to inform CSRs of Employer's policies. Id. The PIP also directed Claimant to enforce those policies with CSRs. From this, the Board could reasonably infer Claimant was required to apprise himself of Employer's policies.

Additionally, in subsequent months, Employer repeatedly disciplined Claimant for cash handling infractions. Employer used these opportunities to review policies with Claimant. For instance, in July, Employer disciplined Claimant for multiple "offages" and instructed Claimant to balance drawers prior to leaving the branch. C.R. at Item No. 13, Employer's Ex. No. 6 (Disciplinary Notice, 7/8/09). Additionally, just days prior to the incident leading to Claimant's termination, Employer disciplined him for a shortage in a bank vault. C.R. at Item No. 13, Employer's Ex. No. 7 (e-mail from Esther Keyser, Branch Manager to Heather Reedy, Human Resources Representative, 9/16/09). Claimant acknowledged he caused the shortage by rushing the task. Id. Employer counseled

Claimant to better manage his time so that he left sufficient time to comply with Employer's cash handling policies. Thus, Employer established it worked with Claimant to address repeated violations of Employer's cash handling policies. Therefore, the challenged finding is adequately supported.

Additionally, Claimant challenges the Board's finding that he was not credible. See F.F. No. 8; Bd. Op. at 2; Ref. Dec. at 2. The Board did not credit Claimant's testimony that his prior supervisor instructed him on the objectionable procedures. Clearly, the Board was free to accept detailed evidence produced by Employer over Claimant's uncorroborated testimony regarding his prior instruction. No error is evident. Daniels v. Unemployment Comp. Bd. of Review, 755 A.2d 729 (Pa. Cmwlth. 2000) (fact that one party to a proceeding views testimony differently than the Board is not grounds for reversal, if findings are supported by substantial evidence).

### **Error of Law**

Claimant also assigns error in the Board's conclusion that he acted willfully. Claimant argues it is not willful misconduct when an employee makes a good faith, albeit fruitless effort to perform his assigned work. In support, he cites Radio Station WVCH v. Unemployment Compensation Board of Review, 430 A.2d 737 (Pa. Cmwlth. 1981), F. R. Schreiber Company v. Unemployment Compensation Board of Review, 419 A.2d 808 (Pa. Cmwlth. 1980), and Howard v. Unemployment Compensation Board of Review, 379 A.2d 1085 (Pa. Cmwlth. 1977). He argues he was a conscientious employee who acted in good faith and

who followed the directions of his prior supervisor to the best of his ability.<sup>4</sup>

We consistently hold a bank employee's repeated failure to follow an employer's procedure may constitute willful misconduct so as to disqualify the employee from receiving unemployment benefits. Adolphus v. Unemployment Comp. Bd. of Review, 471 A.2d 152 (Pa. Cmwlth. 1984); Schmutz v. Unemployment Comp. Bd. of Review, 459 A.2d 1378 (Pa. Cmwlth. 1983).

In Adolphus, a bank discharged a teller for repeatedly failing to follow check cashing, money order, and cash counting procedures. The claimant averred her repeated violations were not intentional but were the result of her inexperience or inability. Id. at 153-54. The Board rejected claimant's arguments, holding the claimant's repeated violations of the employer's rules must be construed as conduct showing an intentional disregard of the employer's interest. We affirmed, holding that conscious indifference to the duty owed to the employer is sufficient to establish willful misconduct. Id. at 154.

Similarly, in Schmutz, a bank discharged a teller for failing to enter all money transactions into employer's computerized accounting system. We held the

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<sup>4</sup> Claimant contends he also showed good faith by calling Employer's central office to try to address some problems that arose during the time he was preparing to leave for vacation. N.T. at 18. He discusses how he came into work the next day to try to address these problems. Id.

We note that the problems Claimant attempted to resolve did not relate to his storing an improper amount of money in a CSR vault. Employer referenced these problems in its termination letter but based its decision to terminate him on the CSR cash limits policy violation. The referee and Board similarly based their decisions on the CSR cash limits policy violation. Claimant's actions in addressing other problems do not compel reversal.



teller's failure to use the employer's computerized accounting system, when he knew the employer required him to use it, constituted willful misconduct.

Here, Employer informed Claimant of the CSR cash limits policy, but he failed to abide by it. Employer informed Claimant of these limits several months after he reported receiving different instructions from his prior supervisor. The Board concluded Claimant was aware of the CSR cash limits policy when he stored money in excess of those limits in a CSR vault. Claimant's failure to abide by this policy constitutes willful misconduct. Schmutz. Additionally, Claimant's ongoing violations of Employer's cash handling policies show a deliberate indifference to Employer's interest. Adolphus. Thus, the Board did not err in determining Claimant committed willful misconduct by violating Employer's CSR cash limits policy.

Moreover, the authority cited by Claimant does not support his position. In Radio Station WVCH, the employer asserted the claimant deliberately refused to follow instructions. The claimant testified she followed directions to the best of her ability. The Board credited the claimant's testimony, rejected the employer's testimony and awarded her benefits. This Court affirmed, concluding the claimant did not commit willful misconduct because she acted to the best of her ability. See also F. R. Schreiber (no willful misconduct based on claimant's credited testimony he did his job to the best of his ability).

Here, unlike Radio Station WVCH and F. R. Schreiber, the Board rejected Claimant's testimony, and did not find the Claimant worked to the best of his ability. As such, these cases are factually distinguishable.

In addition, Howard, also relied on by Claimant, actually supports the Board's decision. There, the Board found the claimant deliberately refused a task unless he was paid more. The Board recounted the claimant's lengthy tenure of good service with the employer, but concluded the claimant committed willful misconduct. This Court affirmed, stating "we are constrained by the rule that even given a long history of loyal service, a single act, if sufficiently serious, may constitute willful misconduct." Howard, 379 A.2d at 1087.

Here, Claimant's conduct shows an indifference to Employer's interests. Given the security concerns attached to this violation, this single act is sufficiently serious, by itself, to constitute willful misconduct. Howard.

For all these reasons, we affirm the Board's order.

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ROBERT SIMPSON, Judge

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	:	
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**ORDER**

**AND NOW**, this 5<sup>th</sup> day of November, 2010, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

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ROBERT SIMPSON, Judge