IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph S. Sallmen, Petitioner	:	
	:	
v.	:	No. 1293 C.D. 2013
	:	No. 1294 C.D. 2013
Unemployment Compensation Board of Review, Respondent	:	Submitted: February 28, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: June 5, 2014

Joseph S. Sallmen (Claimant), *pro se*, petitions for review of two orders of the Unemployment Compensation Board of Review (Board). In the first order the Board held that Claimant was ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law)[1] by reason of his willful misconduct and found him liable for an at-fault overpayment in the amount of $8,452. In its second order the Board found Claimant liable for a non-fraud overpayment in the amount of $1,332. In both orders, the Board affirmed the Referee. On appeal, Claimant argues that the evidence was conflicting and

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[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). It provides, in relevant part, that "[a]n employe shall be ineligible for compensation for any week … [i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." 43 P.S. §802(e).

inadequate to prove willful misconduct. Discerning no merit to this argument, we affirm the Board.

Claimant was employed full-time by Houston Group (Employer) as a delivery truck driver, earning $18.00 per hour. He began work for Employer on April 2, 2012, and left on June 19, 2012, after a dispute with his manager. Claimant then filed for unemployment benefits. On his application, Claimant stated that his most recent employer was "J.B. Mill" and that he had not been employed since March of 2012. Based on this information, Claimant was awarded unemployment compensation.

In January 2013, Claimant applied for emergency unemployment compensation (EUC) benefits and identified Employer in this application. From January 5, 2013, through February 2, 2013, he received $1,332 in benefits. The Erie UC Service Center denied EUC benefits, after concluding Claimant had been discharged by Employer for willful misconduct. It also assessed a fraud overpayment of $8,452 for claim weeks July 14, 2012, through January 5, 2013, because Claimant had omitted his employment with Employer on his 2012 application. Finally, the UC Service Center assessed a fraud overpayment for the $1,332 in EUC benefits received by Claimant. Claimant appealed the UC Service Center's two decisions, which were consolidated for a hearing before the Referee.

At the hearing, Debbie Reed, Employer's operations manager, testified. She explained that Employer uses two delivery trucks, one with a 16-foot bed and one with a 24-foot bed. The larger truck, a recent purchase, was to be used only where the item being delivered was too large for the smaller truck. Claimant was advised of this rule. On June 19, 2012, she directed Claimant to take the smaller truck for a particular delivery. Claimant asked "what difference does it

make." Notes of Testimony, March 20, 2013, at 7 (N.T. __). Reed responded that it was more economical to use the smaller truck, stating that "if the run will fit in the small truck we need to take the small truck. We can't just drive the big truck because it's brand new." N.T. 7. Claimant responded "well then you take the run." *Id.* Reed then stated, "okay then I don't need you." *Id.* Claimant then collected his belongings and left.

Claimant offered a somewhat different version of the incident. He acknowledged that Reed told him to use the smaller truck. When he asked for an explanation, she yelled, stating that the decision was hers to make. When he tried to respond, she told him to go home. Her exact words were "I don't need you." N.T. 9. Claimant replied "fine" and left. N.T. 10.

Claimant testified that the smaller truck was difficult to use because it was not "dock height," *i.e.*, high enough to use at some of the delivery docks. N.T. 9. In addition, when the truck was tightly packed, there was not enough room to maneuver a forklift within it. He did not explain these problems to Reed. However, it was these problems that prompted him to tell her that she would have to run the load if the smaller truck was to be used.

Regarding his application for benefits, Claimant explained that he had filed a prior unemployment compensation claim after he lost his job with J.B. Mill. When he went back to the unemployment compensation website he discovered that this claim remained open. He concluded that he was required to continue collecting on his first claim before adding a new employer.

Frank Kuberry, an unemployment claims examiner with the UC Service Center, testified. He noted that Claimant filed his claim on the unemployment compensation benefits website on July 4, 2012. The online

questionnaire instructs a claimant to provide his most recent employment, and Claimant did not do so. Instead, Claimant identified his most recent employer as J.B. Mill. The first time Claimant mentioned Employer was when he was interviewed on January 11, 2013, about his claim for EUC benefits. At that point, he informed Kuberry that his separation from Employer was due to lack of work.

Kuberry then explained that Employer described Claimant's separation from employment as "voluntary quit" and "other" on the Employer Questionnaire. Certified Record, Item No. 2 (C.R. ___). Employer did not choose the box for "misconduct." However, a written statement attached to the questionnaire described the work incident that prompted Claimant's discharge. After further investigation, Kuberry concluded that the reason for the discharge was insubordination.

In Appeal 13-09-C-2148, the Referee found that Claimant had made insubordinate remarks to Reed, which constituted willful misconduct. The Referee also found that Claimant made a false statement on his application by identifying J.B. Mill as his most recent employer, which made him liable for an at-fault overpayment in the amount of $8,452 for the weeks ending July 14, 2012, through January 5, 2013. In Appeal EUC-13-09-C-2146, the Referee held that Claimant was not entitled to EUC benefits because of his willful misconduct. Because there was no evidence that Claimant withheld employment information when applying for EUC benefits, his overpayment of $1,332 was held to be a non-fraud overpayment.

Claimant appealed to the Board, and it affirmed both decisions by adopting the Referee's findings and conclusions as its own. Claimant then petitioned for this Court's review.[2]

Claimant argues that Reed made conflicting statements about the reason for his separation from employment. Therefore, the record does not support the conclusion that he committed willful misconduct.

We begin with a review of the law on willful misconduct. Although not defined in the Law, the courts have established that it means the following:

> (1) an act of wanton or willful disregard of the employer's interest;
>
> (2) a deliberate violation of the employer's rules;
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> (3) a disregard of standards of behavior which the employer has a right to expect of an employee; or
>
> (4) negligence indicating an intentional disregard of the employer's interest or of the employee's duties and obligations to the employer.

Altemus v. Unemployment Compensation Board of Review, 681 A.2d 866, 869 (Pa. Cmwlth. 1996). It is the employer's burden to establish that a claimant's conduct constitutes willful misconduct. *Conemaugh Memorial Medical Center v. Unemployment Compensation Board of Review*, 814 A.2d 1286, 1288 (Pa. Cmwlth. 2003). "[R]efusing or failing to follow an employer's [reasonable] directive" constitutes willful misconduct. *Dougherty v. Unemployment Compensation Board of Review*, 686 A.2d 53, 54 (Pa. Cmwlth. 1996). Debate with

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[2] Our review is limited to determining whether constitutional rights were violated, errors of law were committed or whether the findings of fact are supported by the evidence. *Kirkwood v. Unemployment Compensation Board of Review*, 525 A.2d 841, 843 (Pa. Cmwlth. 1987).

a supervisor over a reasonable directive may constitute insubordination. *Strong v. Unemployment Compensation Board of Review*, 459 A.2d 57, 59 (Pa. Cmwlth. 1983).

Claimant argues that Reed made conflicting statements regarding the reason for Claimant's separation from work. Specifically, on the Employer Questionnaire, which Reed signed, she stated that Claimant had voluntarily quit. However, in the statement she attached to the questionnaire, she stated that she told Claimant "[o]kay, then you can go home because I don't need you." C.R. Item No. 2. At the hearing, Reed offered yet another version of the incident. The Board counters that Reed's statements are not contradictory.

It is well-settled that the Board is the finder of fact in unemployment compensation proceedings. *Spence v. Unemployment Compensation Board of Review*, 29 A.3d 117, 118 (Pa. Cmwlth. 2011). Further, issues of credibility are for the Board and it may accept or reject testimony regardless of whether it is corroborated by other evidence of record. *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, 610 (Pa. Cmwlth. 2011). On the other hand, testimony can be so contradictory that the Board's findings are no more than "mere conjectures," which does not constitute substantial evidence. *Feinberg v. Unemployment Compensation Board of Review*, 635 A.2d 682, 684 (Pa. Cmwlth. 1993).

Reed's statements are not conflicting. Reed's statement on the Employer Questionnaire and her hearing testimony told the same story: Reed told Claimant to use the smaller truck, and he balked, telling her to do the job herself. Reed replied "okay" and told Claimant to go home, which he did. It is irrelevant that Reed called Claimant's separation a voluntary quit, as opposed to a discharge

for willful misconduct. Her recitals of the facts were consistent. Indeed, Claimant admits that he "told her then she could drive the truck." N.T. 9. We reject Claimant's argument that Reed's testimony was too contradictory to constitute substantial evidence.

Next, Claimant asserts that Reed lied at the oral interview before Kuberry by stating that Claimant "refused to drive the truck I told him to drive." C.R. Item No. 5. Claimant argues that he never refused to drive the smaller truck. It is the Board that determines the credibility of the witnesses as long as substantial evidence supports the finding. *Chapman*, 20 A.3d at 610. It decided to credit Reed's testimony that Claimant effectively refused Reed's directive by telling her to do the run.

For these reasons, we affirm the Board's two orders.[3]

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MARY HANNAH LEAVITT, Judge

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[3] Because we reject Claimant's allegations of error to the willful misconduct conclusion, we need not address the two overpayment awards.

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O R D E R

AND NOW, this 5th day of June, 2014, the orders of the Unemployment Compensation Board of Review, dated June 21, 2013, in the above-captioned matters are AFFIRMED.

MARY HANNAH LEAVITT, Judge