IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TIMI Plastics, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 1387 C.D. 2014
	:	Submitted: February 13, 2015

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: March 30, 2015

TIMI Plastics, Inc. (Employer) petitions for review of the decision of the Unemployment Compensation Board of Review (Board) which reversed the decision of the Referee to deny Donald R. Blumenauer (Claimant) unemployment benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1]

Claimant filed for unemployment benefits and the Unemployment Compensation Service Center found Claimant ineligible due to willful misconduct. Claimant timely appealed that determination, and following a hearing on November 18, 2013, the Referee issued a Decision and Order on December 12, 2013, affirming the Scranton Unemployment Compensation Service Center's (Service Center) determination and denying benefits. Claimant filed an appeal to

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

the Board on December 31, 2013. On July 16, 2014, the Board reversed the Referee's determination and granted benefits.

> The facts, as found by the Board, are as follows:
>
> 1. The claimant worked as a full-time over-the-road[2] commercial driver licensed class A truck driver for Timi Plastics from August 16, 1996 until July 29, 1999.
>
> 2. The employer rehired the claimant effective August 9, 1999 and the claimant worked for the employer until August 27, 2013, at a final rate of pay of $19 per hour.
>
> 3. The claimant was required to drive material for the employer to customers within New York, New Jersey and Pennsylvania.
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> 4. During the course of the claimant's employment, the claimant would primarily be allowed to commence work early at approximately 3 or 4:00 a.m.
>
> 5. The claimant would commence work early in order to make deliveries in New Jersey so that the claimant could return by approximately 5:00 p.m. to the employer's worksite in Towanda, PA.
>
> 6. The claimant desired to start his work day early and come home in order to be able to assist with his wife, who suffers from multiple sclerosis.
>
> 7. Approximately one month prior to the claimant's separation, the employer informed the claimant that he was not allowed to start work prior to 6:00 a.m.
>
> 8. The claimant continued to work for the employer despite his concerns about his assistance with his wife

[2] An over-the-road truck driver makes deliveries in state and out-of-state.

and his desire to be home from work approximately 5:00 p.m.

9. The claimant was also concerned because the employer was no longer paying the claimant for his meal periods.

10. On August 27, 2013, the claimant informed the employer he would no longer accept the assignment that day and that he would not be able to go to New Jersey.

11. The employer informed the claimant he had no other work currently available for him and that he was discharged if he would not accept the driving assignment to New Jersey.

12. The employer discharged the claimant as a result of his refusal to drive to New Jersey on that day.

13. The employer asked another driver to accept the driving assignment for the employer.

14. The employer's driver declined the offer due to his unfamiliarity with driving in New Jersey and due to his wife's pregnancy.

15. The employer did not discharge the other driver who works for the sister company, BC Transportation.

Board's Decision, July 16, 2014, at 1-2.

The Board determined:

In this case, the employer discharged the claimant due to the claimant's refusal to perform his job duties on his final date of employment. The employer informed claimant that he was expecting the claimant to drive to New Jersey and make a delivery as the claimant had customarily done for approximately two to six times per month. The claimant made a request to the employer to find another driver for that day. The claimant was also upset about having to start work at a later time, which

> prevented the claimant from being home early to assist with his wife's care. Additionally, the claimant was upset with the employer's decision to not pay him for his meal periods. Furthermore, the employer's owner did not discharge the other driver because the other driver had ongoing issues involving the other driver's wife's pregnancy and due to the fact that the other driver informed the claimant (sic) that he was unfamiliar with the territory in New Jersey for which the delivery had to be made.
>
> After a careful review of the testimony and documentary evidence in the record, the Board finds the claimant is the more persuasive party in this case. The Board notes that there was disparate treatment by the employer due to the fact that his other driver did decline the assignment and was not discharged. The claimant was similarly situated to the other driver. The Board also finds the claimant credible that he had to be home at an earlier time due to his wife's ongoing medical issues. The Board finds that the claimant's actions do not rise to the level of willful misconduct.

Board's Decision, July 16, 2014, at 3.

On appeal[3], the Employer raises two issues: (1) whether the Board erred when it considered Claimant's appeal because his Petition for Appeal to the Board lacked specificity and did not set forth a valid reason to appeal the Referee's decision; and (2) whether the Board's conclusion that Claimant did not commit willful misconduct was supported by substantial evidence?

[3] This Court's review in an unemployment case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or essential findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994)

I.

Waiver

First, Employer asserts that the Board erred when it considered Claimant's appeal because his Petition for Appeal to the Board lacked specificity and did not set forth a valid reason for appealing the Referee's decision. Employer contends that when appealing a decision, a party must state the grounds for appeal with specificity. Merida v. Unemployment Compensation Board of Review, 543 A.2d 593 (Pa. Cmwlth. 1998), appeal dismissed as improvidently granted, 570 A.2d 1320 (Pa. 1990). Employer asserts that Claimant waived all factual and legal issues concerning the Referee's decision.[4]

[4] After he filed his Petition for Appeal to the Board, Claimant requested a copy of the transcript of the proceedings. Subsequently, in communications with the Board, Claimant alleged that the testimony was not transcribed accurately and that he was denied the opportunity to cross-examine Employer's witnesses even though he asked to do so at the end of the hearing. Claimant's Correspondence to Board, April 11, 2014, at 1; R.R. at 90a. On March 14, 2014, the Board remanded the matter to the Referee for the limited purpose of rectifying the alleged errors in the transcript. At the remand hearing, Claimant voiced concern particularly with a line of cross-examination at the original hearing which he believed unfairly cast him and his wife in a bad light. Specifically, during cross-examination at the original hearing, Claimant testified that Employer no longer let Claimant's wife ride along on the days he drove out-of-state. Claimant explained that his wife enjoyed these trips because "she's a get up and go person. She doesn't like to be tied down." H.T. at 58; R.R. at 70a. Employer's counsel then asked Claimant "But she's tied down in your tractor though, right?" Id. Although it is clear that counsel's question was in reference to Claimant's wife's inability to move about freely in the truck, Claimant apparently interpreted the question literally and wished to clarify on the record that he does not "abuse" his wife, and that they "get along great." Remand Hearing Transcript, April 17, 2014, at 18; R.R. at 111a; Claimant's Correspondence to Board, April 11, 2014, at 1; R.R. at 90a.

In its Brief (Part 2 of Issue 1), Employer argues that Claimant waived any legal or factual challenges to the original hearing transcript because he never raised that in his Petition for Appeal. Employer argues that the Board erred when it remanded the matter. Employer argues that Claimant's *ex parte* communications with the Board and the remand testimony "should never have been considered" by the Board because "they were waived by the Claimant." Employer's Brief at 16.

This Court does not agree that the Board committed reversible error. Obviously, there was some confusion on the part of Claimant. However, the Board did not err when it remanded

(Footnote continued on next page…)

Claimant timely filed his Petition for Appeal to the Board, *pro se*, on December 31, 2013. Section 4 of the Petition for Appeal to the Board, Form UC 46A, asks for the individual's "reasons for disagreement with the determination/decision." Here, Claimant wrote: "Layer (sic) didn't do his job. Need to cross-examine ex-employer – Brad Aronson and Joe Benjeman (sic) to prove their statements are wrong and misleading." Petition for Appeal, December 31, 2013, at 1.

This Court does not agree that Claimant waived all factual and legal issues. Regardless of whether Claimant was specific in his issue on appeal to the Board, the Board was required, in any event, to consider the issues decided by the referee, which included whether Claimant was discharged for willful misconduct when he did not drive to New Jersey on August 27, 2013.

Appeals from a referee's decision to the Board are governed by the Board's regulations. Board regulation 101.81 (governing appeals from the Department) and 101.102 (governing appeals from referee to the Board) 34 Pa.Code §§101.81 and 101.102, indicate only that a party must set forth its "reasons for appeal," without further elaboration as to the detail required to satisfy this condition.

(continued…)

and allowed the hearing to ensure that the record was adequate and allow Claimant to explain why he believed the transcript was incorrect. Claimant was not permitted on remand to discuss the merits of his case or introduce any additional exhibits. Further, there is no indication that the Board even considered or based its Decision on either the *ex parte* communications or the transcript of the remand hearing. The remand hearing had no bearing whatsoever on the Board's Decision.

Further, Board regulation 101.87, 34 Pa.Code §101.87, states, in part:

> When an appeal is taken from a decision of the Department [job center], the Department [job center] shall be deemed to have ruled upon all matters and questions pertaining to the claim. In hearing the appeals the tribunal [referee] shall consider the issues expressly ruled upon the decision form which the appeal was filed. However, any issue in the case may, with the approval of the parties, be heard.

Board regulation 101.107(b), 35 Pa.Code §101.107(b), provides in part:

> The Board shall consider the issues expressly ruled upon in the decision [of the referee] from which the appeal was filed.

This Court has interpreted these sections to mean that whatever issues the job center addressed, the referee should likewise address, and the Board, in turn, should decide all of the issues the referee considered, regardless of whether a party specifically raised the issue on appeal to the Board. See Jordan v. Unemployment Compensation Board of Review, 547 A.2d 811 (Pa. Cmwlth. 1988).

In Black Lick Trucking, Inc. v. Unemployment Compensation Board of Review, 667 A.2d 454 (Pa. Cmwlth. 1995), eleven truck drivers employed by Black Lick Trucking reported to work but refused to cross a picket line established by coal miners at striking mines. The drivers were discharged. The drivers' applications for benefits were denied by the Indiana Job Center and the referee affirmed. The drivers then appealed to the Board. In their appeals from the referee to the Board, the drivers stated that the reason for appealing was "because of errors

of law and fact." Black Lick Trucking, 667 A.2d at 456. The Board reversed the referee and granted benefits holding that the truck drivers refused to cross the picket line because of fear for their safety. On appeal to this Court, Black Lick Trucking argued, *inter alia*, that the appeal from the referee to the Board should have been dismissed because the truck drivers did not specify the reason for appeal. Black Lick Trucking, 667 A.2d at 456.

This Court disagreed. Although the truck drivers' petitions for appeal from the job center did not raise any issue specifically, the issues which were decided by the job center were the same issues addressed by the referee and subsequently by the Board. So, pursuant to Board regulations 101.87 and 101.107, the referee and Board correctly considered the truck drivers' appeals.

Merida, the case relied upon by Employer, involved whether a party waived a specific issue which was not raised before or addressed by the referee. There, the job center found that the claimant was ineligible for benefits due to willful misconduct. A hearing was held before a referee. The employer's witnesses were outside the hearing room but did not participate. Over objection of the claimant's attorney, a second hearing was conducted at which the employer's witnesses testified. The referee affirmed the job center but did not address the objection to the second hearing in his decision.

On appeal to the Board, the claimant merely stated that his reason for the appeal was that "he didn't agree with the decision." Merida, 543 A.2d at 594. The claimant did not argue that the referee erred by conducting the second hearing. The Board upheld the referee's decision on the merits. The Board did not address the propriety of the second hearing.

On appeal to this Court, the claimant argued that the referee erred when he conducted the second hearing. This Court concluded that claimant waived the issue because he did not specifically raise it before the Board. This Court held that the Board could not be charged with scouring the record to determine every possible basis for the claimant's appeal.

Merida does not apply here. That case is limited to its factual scenario where the claimant did not specifically raise before the Board an issue that was not discussed by the referee in his decision.

Here, as in Black Lick, the issue before the Service Center was whether Claimant was discharged for willful misconduct because he did not agree to drive to New Jersey on August 27, 2013. The referee considered this very issue and determined that Claimant's conduct amounted to willful misconduct. Pursuant to Board regulation 101.107(b), 35 Pa.Code §101.107(b), the Board was required to consider whether Claimant was discharged for willful misconduct for his failure to drive to New Jersey on August 27, 2013, regardless of whether Claimant's Petition for Appeal to the Board specified this issue. The Board did precisely what it was required to do. There was no waiver.

II.

Willful Misconduct

Next, Employer argues that the Board erred when it found that Claimant's actions did not amount to willful misconduct. Employer contends that its demand that Claimant make a delivery to a New Jersey customer was reasonable, and Claimant's response was not reasonable. Referencing Claimant's verbal Interview with the Unemployment Compensation Service Center, Employer

contends that Claimant had no legitimate reason to refuse the New Jersey run other than the fact that he did not enjoy it and that it was stressful. Employer also asserts that the Board's findings that (1) there was "disparate treatment" of Claimant; and (2) Claimant had to be home at an earlier time due to his wife's ongoing medical issues, were not supported by substantial evidence.

Whether a Claimant's conduct rises to the level of willful misconduct is a question of law subject to this Court's review. Lee Hospital v. Unemployment Compensation Board of Review, 589 A.2d 297 (Pa. Cmwlth. 1991). Willful misconduct is defined as conduct that represents a wanton and willful disregard of an employer's interest, deliberate violation of rules, disregard of standards of behavior which an employer can rightfully expect from the employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interest or employee's duties and obligations. Frick v. Unemployment Compensation Board of Review, 375 A.2d 879 (Pa. Cmwlth. 1977). The employer bears the burden of proving that it discharged an employee for willful misconduct. City of Beaver Falls v. Unemployment Compensation Board of Review, 441 A.2d 510 (Pa. Cmwlth. 1982). The employer bears the burden of proving the existence of the work rule and its violation. Once the employer establishes that, the burden then shifts to the Claimant to prove that the violation was for good cause. Peak v. Unemployment Compensation Board of Review, 501 A.2d 1383 (Pa. 1985)

Good cause is established where the claimant's actions are justified or reasonable under the circumstances. As the Pennsylvania Supreme Court has noted:

> [I]n order to fall within the definition of 'willful misconduct' the actions must represent 'a disregard of standards of behavior which the employer has a right to expect of an employe(e).' Thus, not only must we look to the employee's reason for noncompliance we must also evaluate the reasonableness of the request in light of all of the circumstances. To accommodate this end the Superior Court developed a concept of good cause. The rationale upon which this concept of good cause was developed was that where the action of the employee is justifiable or reasonable under the circumstances it cannot be considered willful misconduct since it cannot properly be charged as a willful disregard of the employer's intents or rules or the standard of conduct the employer has a right to expect.

Frumento v. Unemployment Compensation Board of Review, 351 A.2d 631, 634 (Pa. 1976). *See also* McLean v. Unemployment Compensation Board of Review, 383 A.2d 533, 535 (Pa. 1978) ("[W]e must evaluate both the reasonableness of the employer's request in light of all the circumstances, and the employee's reason for noncompliance. The employee's behavior does not fall within 'willful misconduct' if it was justifiable or reasonable under the circumstances, since it cannot then be considered to be in willful disregard of conduct the employer 'has a right to expect.' In other words, if there was 'good cause' for the employee's action, it cannot be charged as willful misconduct.") (citations omitted).

The question of whether or not a claimant has proved the requisite good cause is also a question of law subject to this Court's review. Gwin v. Unemployment Compensation Board of Review, 427 A.2d 295 (Pa. Cmwlth. 1981).

Here, Claimant testified that he drove a tractor trailer for Employer for seventeen years. On the days he was required to drive out-of-state, Claimant was

permitted to start work early at 3:00 or 4:00 a.m. This allowed him to get home by 5:00 p.m. so that he could help his wife who had multiple sclerosis. Approximately one and a half months before he was terminated, Claimant was told that he could no longer start work before 6:00 a.m., even if he was required to drive out-of-state. Claimant followed this new rule. H.T. at 44; R.R. at 56a. On the days Claimant started work at 6:00 a.m., he did not get home to his ailing wife until 8:00 p.m., which meant that he "can't be home with my wife and help her." H.T. at 38-39, 42; R.R. at 49a-50a, 54a.

Claimant testified that, at approximately 10:00 a.m., on August 27, 2013, Employer told him that he had to make a delivery that day in New Jersey. H.T. at 47; R.R. at 59a. Claimant then asked Employer "if he could find someone else to do the New Jersey runs." H.T. at 38, 47; R.R. at 50a, 59a. The record reveals that Claimant felt that his inability to start at 6:00 a.m. on the days he was required to drive out of state was detrimental to his wife's well-being. He testified that "My wife has MS. I like to get home to help her out. Her legs are very weak at the end of the day." H.T. at 38; R.R. at 50a. Claimant testified that Employer knew his wife had MS and that she needed help at the end of the day "because her legs give out" and that she started "getting sicker." H.T. at 52-53; R.R. at 64a-65a.

In its order, the Board specifically found Claimant credible that he had to be at home at an earlier time due to his wife's medical issue. In unemployment compensation proceedings, the Board is the ultimate fact-finding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence. Unemployment Compensation Board of Review v. Wright, 347 A.2d 328 (Pa. Cmwlth. 1975). Findings of fact are conclusive upon review provided that the record, taken as a whole, provides

substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 378 A.2d 829 (Pa. 1977).

Finally, Employer contends that the Board erred when it found that there was disparate treatment by Employer due to the fact that another truck driver declined the assignment and was not discharged. Employer argues that the other truck driver worked for the sister company, and did not drive the same type of truck as Claimant.

Disparate treatment is an affirmative defense by which a claimant who has engaged in willful misconduct may still receive benefits if the employer discharged the claimant but not another employer who engaged in similar conduct, the claimant was similarly situated to the other employee who was not discharged, and the employer discharged the claimant based on improper criteria. Geisinger Health Plan v. Unemployment Compensation Board of Review, 964 A.2d 970 (Pa. Cmwlth. 2009).

Here, the Board properly concluded that there was disparate treatment by Employer due to the fact that the other driver declined assignment due to his wife's medical condition and his desire not to drive to New Jersey and was not discharged. The record reflects that Claimant was similarly situated to the other driver in that he declined the assignment due to his wife's medical condition and his desire not to drive to New Jersey. Accordingly, the Board did not err when it concluded that Employer treated Claimant disparately.

The decision of the Board is affirmed.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TIMI Plastics,	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 1387 C.D. 2014
Respondent	:	

O R D E R

AND NOW, this 30th day of March, 2015, the Decision of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

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BERNARD L. McGINLEY, Judge