

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kelly Chrysler Jeep Dodge, :
Petitioner :
 :
v. : No. 1421 C.D. 2012
 : Submitted: January 18, 2013
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: May 21, 2013

Kelly Chrysler Jeep Dodge (Employer) petitions this Court, *pro se*, for review of an adjudication of the Unemployment Compensation Board of Review (Board) granting benefits to Leroy F. Walters, Jr. (Claimant). In doing so, the Board reversed the Referee’s decision and held that Claimant’s unsatisfactory performance did not constitute disqualifying willful misconduct under Section 402(e) of the Unemployment Compensation Law (Law).¹ Employer contends that the Board should not have disturbed the Referee’s factual and credibility determinations. We affirm the Board.

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).

Claimant was employed full time as a tow truck driver from January 17, 2011, until Employer discharged him for unsatisfactory work performance on February 2, 2012. The Altoona UC Service Center granted Claimant's application for benefits, finding that Claimant worked to the best of his ability. Employer appealed, and a hearing was conducted by the Referee.

Dyan Siwiecki, Employer's Controller, testified that Claimant was terminated "[f]or failing to perform his duties even after being warned of unacceptable performance." Certified Record Item No. 11; Notes of Testimony, April 4, 2012, at 2 (N.T. __). In the last quarter of 2011, Claimant's response rate to calls for service dropped below 20%. In January 2012, his response rate was eight percent according to documentation submitted by Employer.² On his last day Claimant stated to Siwiecki that he knew he was going to be discharged because his response rate had dropped.

Brian Waltenbaugh, Employer's Body Shop Manager and Claimant's former supervisor, testified that prior to Claimant's discharge, he had spoken to Claimant about his response rates. Claimant was also given a new cell phone to address problems he was experiencing with his cellular signal. Waltenbaugh admitted that the response rates identified by Siwiecki and documented in Employer's exhibit involved only one of Employer's clients, Cross Country, and did not represent Claimant's responses to other clients.

Claimant testified that he believed he "did the best that [he] could" while working for Employer. N.T. 14. During the period of Claimant's

² Siwiecki attempted to offer testimony that the driver who was hired to replace Claimant had a response rate of 31% and 43%, respectively, in his first two months. However, the Referee declined to consider another employee's performance. N.T. 6.

employment, Employer also provided towing services to AAA members. According to Claimant, in late 2011 Employer took over all of the AAA calls in the Dubois area after its competitor went out of business. Claimant testified that he primarily responded to calls from AAA, not Cross Country. Waltenbaugh's warning to Claimant about his low response rates concerned only Cross Country. Claimant believed Employer's evidence at the Referee's hearing was similarly skewed.

Claimant also explained that he sometimes missed calls because he was already responding to a tow call; usually his phone was in the truck and he could not hear it ring if he was not in the truck. Claimant may have missed other calls because he did not hear the phone ringing over his truck's radio. He missed some calls in the middle of the night because his phone's ringer did not awaken him. Finally, Claimant testified that he had experienced technical difficulties with his phone occasionally failing to receive calls.

The Referee found that Claimant's unsatisfactory performance of his job constituted willful misconduct. The Referee credited the testimony of Employer's witnesses that Claimant had demonstrated the ability to perform the duties of his job but had allowed his performance to decline. Claimant appealed.

Following its review, the Board found that Claimant's unsatisfactory performance did not constitute willful misconduct. The Board resolved conflicts in testimony in favor of Claimant and found Claimant's testimony to be credible. The Board found that Claimant worked to the best of his ability. The Board granted benefits because Employer failed to show that Claimant's shortcomings were intentional or deliberate. Employer then petitioned for this Court's review.

On appeal,³ Employer argues that the Board erred in finding that Claimant's unsatisfactory performance did not rise to the level of willful misconduct. Employer further argues that the Board abused its discretion by overturning the Referee's credibility determinations.

Section 402(e) of the Law provides that a claimant shall be ineligible for compensation for any week in 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). Although not defined in the Law, the courts have established that willful misconduct means:

- (1) an act of wanton or willful disregard of the employer's interest;
- (2) a deliberate violation of the employer's rules;
- (3) a disregard of standards of behavior which the employer has a right to expect of an employee; and
- (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). Whether conduct rises to the level of willful misconduct is a question of law to be determined by this Court. *PMA Reinsurance Corp. v. Unemployment Compensation Board of Review*, 558 A.2d 623, 625 (Pa. Cmwlth.

³ Our review is limited to determining whether constitutional rights were violated, whether errors of law were committed, and whether findings of fact are supported by substantial evidence. *Yost v. Unemployment Compensation Board of Review*, 42 A.3d 1158, 1161 n.2 (Pa. Cmwlth. 2012). We review the case in the light most favorable to the party who prevailed before the Board, drawing all logical and reasonable inferences from the testimony. *Taylor v. Unemployment Compensation Board of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977).

1989). It is the employer's burden to establish that a claimant's conduct constituted willful misconduct. *Department of Corrections v. Unemployment Compensation Board of Review*, 943 A.2d 1011, 1015 (Pa. Cmwlth. 2008). Once an employer meets its burden, the burden then shifts to the claimant to prove that he had good cause for his actions. *Id.*

Unsatisfactory job performance does not necessarily disqualify a claimant for benefits because incompetence, inexperience or inability to do the job is not willful misconduct. *Geslao v. Unemployment Compensation Board of Review*, 519 A.2d 1096, 1097 (Pa. Cmwlth. 1987). In this regard, "a finding that a claimant has worked to the best of his ability negates a conclusion of willful misconduct." *Norman Ashton Klinger & Associates, P.C. v. Unemployment Compensation Board of Review*, 561 A.2d 841, 843 (Pa. Cmwlth. 1989). A claimant's failure to work to the best of his ability can constitute willful misconduct in limited situations. This Court has explained:

When, however an employee's on the job performance is below the level of his or her ability and this conduct continues over a period of time despite the employee being aware of it as such, it is considered a conscious or careless disregard of the employer's interest and constitutes willful misconduct.

Younes v. Unemployment Compensation Board of Review, 467 A.2d 1227, 1228 (Pa. Cmwlth. 1983). Further, "a showing of actual intent to wrong the Employer is not required. Claimant's conscious indifference to his employment duties is enough to support a finding of willful misconduct." *Cullison v. Unemployment Compensation Board of Review*, 444 A.2d 1330, 1331 (Pa. Cmwlth. 1982).

We agree with the Board that Claimant's unsatisfactory performance did not rise to the level of willful misconduct. Although Employer presented

evidence that Claimant's response rate for Cross Country fell below 20 percent in the last quarter of 2011 and fell to eight percent in January 2012, it did not establish Claimant's response rate before that time period. Absent a baseline response rate for comparison, Employer's evidence did not prove that Claimant was capable of better performance. Further, Claimant credibly testified that although his numbers for Cross Country had dropped, he was responding to more calls from AAA. He also credibly testified about other factors that may have negatively impacted his response rates, including problems with his phone. In short, Employer may have been justified in discharging Claimant for unsatisfactory job performance; however, it failed to offer sufficient evidence that Claimant's subpar performance constituted willful misconduct.

Finally, Employer argues that the Board abused its discretion by overturning the Referee's factual and credibility determinations. This argument lacks merit. In unemployment compensation cases, the Board, not the Referee, is the ultimate fact finder. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 276, 501 A.2d 1383, 1388 (1985). Determinations of credibility and resolutions of conflicting evidence are within the Board's discretion. *Duquesne Light Co. v. Unemployment Compensation Board of Review*, 648 A.2d 1318, 1320 (Pa. Cmwlth. 1994).⁴ Such determinations are not subject to judicial review. *Id.* So long as the Board's findings of fact are supported by substantial evidence, they are conclusive on appeal. *Id.* Here, the record contains conflicting testimony

⁴ While the Board is the ultimate fact finder, its discretion is not unfettered. In *Treon v. Unemployment Compensation Board of Review*, 499 Pa. 455, 461, 453 A.2d 960, 962 (1982), the Pennsylvania Supreme Court explained that the Board cannot ignore the findings made by the Referee where they are based on consistent and uncontradicted testimony without providing an explanation for doing so. Here, however, Employer's evidence was not uncontradicted.

concerning Claimant's performance of his duties. The Board found that the testimony of Claimant was more credible than the testimony of Siwiecki and Waltenbaugh on this issue. Because the Board acted within its discretion in making these credibility determinations, we will not disturb them.

For the above stated reasons, the order of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

