IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lancaster Emergency Medical Services Association, Petitioner	:	
v.	:	No. 1749 C.D. 2014
	:	Submitted: April 10, 2015
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: June 4, 2015**

Lancaster Emergency Medical Services Association (Employer) petitions for review from an order of the Unemployment Compensation Board of Review (Board) that determined Brian Burke (Claimant) was eligible for unemployment compensation (UC) benefits on the ground that he did not commit willful misconduct. See Section 402(e) of the UC Law (Law).[1] Employer argues the Board erred in determining Claimant did not commit willful misconduct because Claimant's conduct violated its policies. Upon review, we affirm.

Claimant served as a full-time paramedic for Employer for seven years until his discharge from employment after an informal investigation.

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

Claimant then applied for UC benefits, which the local service center granted. Employer appealed.

A hearing ensued before a referee at which Claimant, unrepresented by counsel, testified. Employer, represented by counsel, presented the testimony of two employees, Robert Patterson, III, a performance improvement coordinator (Coordinator), and Nathan Shorter, an emergency medical technician (EMT). Employer also presented the testimony of State Trooper Ryan Lawrence (Trooper).

Employer alleged Claimant committed three policy violations over the course of two days. Specifically, Claimant allegedly: (1) celebrated the death of a patient; (2) intentionally violated the Health Insurance Portability and Accountability Act (HIPAA);[2] and, (3) disregarded a directive of Trooper.

> The referee made the following pertinent findings:
>
> 2. [Employer] is in a heavily regulated business, and [Claimant] was aware of both state and federal requirements for [Employer] in addition to [Employer's] rules.
>
> 3. On April 15, 2014, [Claimant] was dispatched to attend to a patient on Manor Street in Lancaster, and when [Claimant] and [EMT] arrived, the patient appeared to be dead.
>
> 4. [Claimant] and [EMT] took the individual into another room, and [EMT] found some slight indication of electrical activity, but [Claimant] noticed that the extremities of the patient were cold, so [Claimant] made the decision not [to] attempt to revive the patient.

[2] Pub. L. 104-191, 110 Stat. 1936, 42 U.S.C. §300gg, §1320d, and 29 U.S.C. §§1181-1183.

> 5. Subsequently, [Claimant] went into Lancaster Regional Medical Center, and [Claimant] had mentioned that he had had a patient who died and that the patient drank Listerine, but [Claimant] did not reveal any other information about the patient.
>
> 6. On the following day, [Claimant] was called to Quarryville to pick up a patient for an involuntary commitment. [Trooper] who brought the patient to the ambulance indicated to [Claimant] that he thought the patient should be restrained, but after [Claimant] spoke to the patient, the patient indicated that he was not injured falling off the roof but rather, that his brother had hit the patient in the face. [Claimant] noticed that the only bleeding that the patient had was on his face.
>
> 7. [Claimant] decided not to restrain the patient, and the patient was taken to Lancaster General Hospital without any restraints.
>
> 8. After [Trooper] complained to [Employer] about [Claimant's] conduct in the incident, [Employer] conducted an extensive investigation of [Claimant's] performance in the last few days prior to the final incident, and [Employer] decided to discharge [Claimant].

Referee's Dec., 6/18/14, Findings of Fact (F.F.) Nos. 2-8.

The referee determined Claimant's behavior did not rise to the level of willful misconduct. Specifically, he reasoned:

> [One] reason advanced by [Employer] for discharging [Claimant] was that [Claimant] supposedly disclosed confidential information about the patient when [Claimant] later came to Lancaster Regional Medical Center. Although [EMT] stated the first name of the patient, [Claimant] indicated in his testimony that he was extremely careful not to do this and that all he said about the patient was that the patient drank Listerine. As [Claimant] noted, a lot of individuals drink Listerine, so the disclosure of this particular fact about one particular unnamed patient did not constitute a HIPAA violation.

> With regard to [Claimant's] treatment of the Quarryville patient, although the Referee has no reason to doubt the veracity of [Trooper's] testimony regarding his actions when he brought the patient to [Claimant], as [Claimant] noted in his testimony, it is often the job of police to restrain individuals through handcuffs, but [Claimant], through his experience, has often found that talking to patients brings other, and often better, results. … [Claimant] then checked [with Employer] to make sure that he should be transporting the patient to Lancaster General, and when he was told that this is what he should do, [Claimant] complied with his instructions. …
>
> Overall, although the Referee can understand [Employer's] position about why [it] discharged [Claimant], [Employer] has not demonstrated through its testimony that [Claimant] deliberately violated [Employer's] rules and policies. Instead, [Claimant] made a couple of judgment calls which were disputed by [Employer], but which did not show any particular neglect by [Claimant] of his duties and obligations to [Employer.]

Referee's Dec. at 2-3. Employer appealed.

Adopting the referee's findings and conclusions, the Board affirmed. Employer now petitions for review.

On appeal,[3] Employer argues the Board erred in failing to determine that Claimant committed willful misconduct. Based on Claimant's admissions, Employer contends there is no legal basis to find Claimant eligible for UC benefits.

Section 402(e) of the Law provides, "[a]n employe shall be ineligible for compensation for any week ... [i]n which his unemployment is due to his

[3] Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Doyle v. Unemployment Comp. Bd. of Review, 58 A.3d 1288 (Pa. Cmwlth. 2013).

discharge ... from work for willful misconduct connected with his work ...." 43 P.S. §802(e). Willful misconduct is defined by the courts as: (1) wanton and willful disregard of an employer's interests; (2) deliberate violation of rules; (3) disregard of the standards of behavior which an employer can rightfully expect from an employee; or, (4) negligence showing an intentional disregard of the employer's interests or the employee's duties and obligations. Johnson v. Unemployment Comp. Bd. of Review, 87 A.3d 1006 (Pa. Cmwlth. 2014) (citing Grieb v. Unemployment Comp. Bd. of Review, 827 A.2d 422 (Pa. 2002)). The employer bears the burden of establishing a claimant engaged in willful misconduct. Id.

The issue of whether a claimant's conduct constitutes willful misconduct is a question of law fully reviewable by this Court. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008). Where, as here, the allegation of willful misconduct is based on a policy violation, an employer must establish the existence of the policy, the reasonableness of the policy, the claimant's knowledge of the policy, and its violation. Id. Once an employer proves a policy violation, "the burden then shifts to the claimant to demonstrate that there was good cause for the violation by demonstrating that uneven enforcement has rendered a policy unreasonable or that the particular circumstances at issue justified the violation." Chapman v. Unemployment Comp. Bd. of Review, 20 A.3d 603, 607 (Pa. Cmwlth. 2011).

Employer alleges Claimant's willful misconduct is evident from his behavior in three incidents. We review each alleged incident in turn.

First Incident[4] (Gloating)

First, Employer contends Claimant violated its policy by "gloating" over the death of a patient. In support, it emphasizes Claimant's failure to dispute EMT's testimony that Claimant was raising his arm in a celebratory gesture when speaking with nursing staff after the patient's death. Employer argues Claimant's refusal to specifically deny that allegation constitutes an admission by silence.

Our review of the record does not reveal any admission by Claimant about "gloating" over a patient's death. Claimant did not deny raising his arm when asked on cross-examination; however, he did not admit he raised his arm in a celebratory manner, or that he did so in relation to the patient's death.

"Silence is considered an admission, only when the circumstances are such that one ought to speak and does not." McIntyre v. Unemployment Comp. Bd. of Review, 687 A.2d 416, 418 (Pa. Cmwlth. 1997). We define these circumstances in the context of the events surrounding discharge, such as when the person presenting the information is a supervisor with an ability to terminate an employee, and the employee refused to deny the accusation. Id. We declined to find an admission by silence when a claimant is testifying at a UC hearing. See Carson v. Unemployment Comp. Bd. of Review, 711 A.2d 582 (Pa. Cmwlth. 1998).

This Court holds the law on implied admissions does not lessen an employer's burden of proof in a willful misconduct case. Id.; see also Snyder v.

[4] The referee refers to the "first incident" as Claimant's judgment call against reviving the patient when his extremities were cold and he had no pulse. See Referee's Dec., 6/18/14, at 2. However, Employer did not challenge Claimant's response to this emergency on appeal.

Unemployment Comp. Bd. of Review (Pa. Cmwlth., No. 104 C.D. 2013, filed August 27, 2013) (unreported), 2013 WL 4530950, *5 (distinguishing claimant's statement in UC hearing with statement to employer at the time she was confronted with misconduct). We reasoned "it is not appropriate to require a claimant to deny uncorroborated, hearsay allegations raised by an employer at a hearing, particularly when the burden of proof lies with [the] employer." Carson, 711 A.2d at 584; Snyder 2013 WL 4530950, *5 (holding employer is required to "present independent, competent testimony corroborating an accusation of misconduct before the Court may make an adverse inference from a claimant's silence.").

The circumstances for invoking admission by silence are not present here. There is no accusation by a supervisor of the type that Claimant should have denied at the time. EMT did not confront Claimant, and he is junior to Claimant. The alleged admission here occurred during the UC hearing when Employer's counsel cross-examined Claimant about the alleged gloating. In response, Claimant was not silent; rather, he testified he did not recall. More particularly, he did not deny EMT's testimony that he raised his hand simply because he had no recollection of it. Referee's Hr'g, Notes of Testimony (N.T.), 6/13/14, at 28. That does not constitute an admission to the alleged misconduct.

In addition, Claimant directly disputed EMT's testimony that when he allegedly raised his arm, he used the patient's name. Id. at 27. The Board credited Claimant's testimony over that of EMT regarding the events at the nurse's station. See Referee's Dec. at 2. That is the Board's prerogative, and we will not question such credibility determinations on appeal. Peak v. Unemployment Comp. Bd. of

Review, 501 A.2d 1383 (Pa. 1985). The Board, as the ultimate fact-finder, is entitled to make its own determinations as to witness credibility and evidentiary weight, and to resolve conflicts in the evidence. Peak; Matthews v. Unemployment Comp. Bd. of Review, 86 A.3d 322 (Pa. Cmwlth. 2014).

As there is no credible evidence supporting Employer's allegations regarding the alleged gloating, Employer did not prove Claimant committed willful misconduct based on the first incident.

Second Incident (HIPAA Violation)

Next, Employer asserts Claimant violated HIPAA by revealing the first name of a patient and facts about the patient that are sufficiently unique to identify the patient to hospital personnel familiar with his history. There is no dispute that Employer is subject to HIPAA, and Claimant was required to comply with the law. Because the Board credited Claimant's testimony that he did not use the patient's first name, see Referee's Dec. at 2, we consider whether disclosing other unique facts about a patient constitutes a HIPAA violation.

The HIPAA privacy rule prohibits disclosure of a patient's personal health information. HIPAA regulations define "health information" as information that "relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual." 45 C.F.R. §160.103.

There is no evidence here that EMT heard Claimant's alleged disclosure. The only statement EMT allegedly heard Claimant say was "Jan is

dead." N.T. at 9. Rather, EMT *assumed* Claimant disclosed the circumstances of the patient's death based on the nursing staff's inquiries seeking confirmation that the patient died. Id. at 8-9. Thus, EMT lacked knowledge as to whether the substance of the disclosure contained any health information protected by HIPAA.

Employer's argument that Claimant admitted to violating HIPAA also lacks merit. Claimant denied disclosing the patient's name, and the Board credited this denial. Referee's Dec. at 2. Claimant recognized that HIPAA did not preclude non-medical disclosures to other health care staff. To the extent Claimant admitted to referring to the patient in conjunction with Listerine, that does not admit a knowing violation of HIPAA. He specifically disputed that referring to an individual as "us[ing] Listerine a lot" revealed any "personally identifying information." N.T. at 28.

The fact that a patient drank Listerine does not qualify as "health information." Employer cites no authority for construing HIPAA so broadly. Although the reference to Listerine in conjunction with a patient may indicate his identity to other health care personnel, it did not reveal health-related information, which is the core of a HIPAA privacy violation.

Based on this record, we agree with the Board that Employer did not establish a disclosure of personal health information. First, there is no evidence regarding the substance of the specific disclosure. Second, there is no credited evidence that Claimant disclosed the first name or other identifiers of the patient. Lastly, referring to an unnamed patient in conjunction with Listerine does not

disclose identifiable health information. That the patient was a "frequent flyer" who may have been known to hospital staff by reference to Listerine does not render the disclosure "personal" in nature. N.T. at 28. Because Employer did not show a violation occurred, it did not establish the second incident constituted willful misconduct.

Third Incident (Insubordination)

Finally, Employer contends Claimant's alleged refusal to follow Trooper's directive to transport a patient using restraints constituted insubordination. In support, it analogizes the facts here to the facts in ATM Corporation of America v. Unemployment Compensation Board of Review, 892 A.2d 859 (Pa. Cmwlth. 2005).

In ATM Corporation, the claimant refused to comply with her employer's policy regarding mandatory background checks. The employer advised the claimant that refusal to comply with the mandate would be treated as terminable insubordinate conduct. Despite this warning, the claimant refused to comply. Based on those circumstances, this Court agreed the claimant's refusal to subject herself to a background check amounted to insubordination. We reasoned an employee had a duty to cooperate with her employer's reasonable demands such that a refusal to cooperate disregards a standard of behavior an employer has a right to expect. Id. Therefore, we concluded the employer established willful misconduct.

Employer maintains Claimant's alleged unwillingness to cooperate with Trooper likewise amounted to willful misconduct. We disagree.

The facts of this case are wholly dissimilar to those in ATM Corporation. First, Claimant did not refuse to comply with a directive of Employer. Employer presumes the crucial predicate that Trooper had the authority to issue directives. There is no admission by Claimant on this record that Trooper had supervisory authority at the scene.[5] Employer did not show that Trooper acted in its interests as Employer's agent at the time he issued the alleged directive. Refusal to comply with a request does not qualify as insubordination unless the request is made by an employer, not a third party. See Vann v. Unemployment Comp. Bd. of Review, 494 A.2d 1081, 1087 (Pa. 1985) (evidence must show individual who issued request was claimant's superior "to sustain the burden of showing that the *employer's* interests had been disregarded or rules violated when the [claimant] refused to immediately honor [the individual's] request.") (emphasis in original).

Second, this case is distinguishable from ATM Corporation because it is not clear Trooper issued a directive in the first place. As Employer's counsel described the circumstances during cross-examination, Trooper made a "recommendation" about restraining the patient. N.T. at 29. Trooper did not testify he issued a directive to Claimant, and he did not allege he acted on

[5] The record does not support the Board's statement in its brief that "Claimant understood [Trooper] had the authority to direct that the patient be restrained." Board Br. at 9. Instead of citing Claimant's testimony or submissions in support, the Board cites to a statewide protocol. The protocol does not subordinate paramedics to law enforcement. The protocol refers to law enforcement when the patient is violent, or "*if* patient is a potential threat to [himself] or others." Reproduced Record at 85a (emphasis added). Claimant made the judgment that patient did not pose a threat, so that condition precedent for triggering restraints was not met here.

Employer's behalf when he recommended the use of restraints. In contrast to ATM Corporation, there was no clear directive issued, and no clear refusal to follow a directive.

In addition to the question of whether Trooper had authority to issue directives to Claimant, there is the issue of whether Trooper was a superior who was capable of directing Claimant at the scene of the emergency call. In fact, both Trooper and Coordinator acknowledged it was "[Claimant's] call because he [was] the highest level trained EMS professional on scene." Reproduced Record (R.R.) at 30a; see also R.R. at 20a (Trooper testified "at that point, it was [Claimant's] call as he's the paramedic on scene, it's his ambulance."). Trooper did not perceive the difference of opinion regarding the necessity of transporting the patient by ambulance or using restraints as violating a directive, noting he was "content with it" if that was Claimant's decision. R.R. at 20a. The record directly contradicts Employer's claim that "the [r]ecord is clear that Claimant was in a subordinate position with regard to the Trooper on the scene." Employer's Reply Br. at 12; see R.R. at 20a, 23a (Trooper's testimony that "I'm not out to say who was more in charge of the scene …").

From our review of the record, which supports the Board's findings, Claimant did not refuse to follow a directive. His response was more akin to questioning the soundness of Trooper's request because he disagreed about the most appropriate level of restraint for transporting a patient. N.T. at 29. Even assuming for argument's sake that Trooper was in a position to issue a directive to Claimant, Claimant's response in questioning that course of action did not rise to

the level of insubordination. Lowe v. Unemployment Comp. Bd. of Review, 460 A.2d 870 (Pa. Cmwlth. 1983) (distinguishing outright refusal from criticism or questioning of directive).

Further, Employer did not dispute the Board's findings. The Board found Trooper indicated his opinion to Claimant, and Claimant made the ultimate decision regarding transport of the patient. F.F. Nos. 6-7. Unchallenged findings are conclusive on appeal. Campbell v. Unemployment Comp. Bd. of Review, 694 A.2d 1167 (Pa. Cmwlth. 2007). Moreover, in determining whether substantial evidence supports a finding, this Court "must view the record evidence as a whole in a light most favorable to the party which prevailed before the Board, giving that party the benefit of all logical and reasonable inferences deducible from the evidence." Stringent v. Unemployment Comp. Bd. of Review, 703 A.2d 1084, 1087 (Pa. Cmwlth. 1997). Claimant prevailed here.

In sum, Employer did not meet its burden of proving Claimant committed insubordination. There is no evidence that Claimant had a duty to comply with a directive issued by Trooper, and reviewing the record in Claimant's favor, we agree with the Board that Claimant did not commit insubordination here.

Because Employer did not prove the factual predicates for a policy violation or insubordination as to any of the three incidents that it alleged constituted willful misconduct, we affirm.

ROBERT SIMPSON, Judge

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O R D E R

AND NOW, this 4th day of June, 2015, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge