IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gerald F. Strubinger, Petitioner	:	
v.	:	No. 2025 C.D. 2008
	:	SUBMITTED: March 20, 2009
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** May 15, 2009

Pro se claimant Gerald F. Strubinger petitions for review of the August 25, 2008 order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of the referee to deny his unemployment benefits pursuant to the willful misconduct provision found in Section 402(e) of the Unemployment Compensation Law (Law).[1] The Board, however, modified the referee's decision to impose a non-fault rather than a fault overpayment and to remove penalty weeks. We affirm.

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

The facts as found by the Board are as follows.[2] In 2005, Strubinger began working as a bus driver for Kuhn Transportation (Employer). In November 2007, he was driving four bus runs per day at a rate of $18.50 per run. On November 5, 2007, Employer implemented a policy specifying start times and requiring drivers to sign in at work. Claimant knew or should have known about this policy. On November 15, 2007, Claimant failed to sign in at work for return runs involving high school and elementary school students. Because Employer's corporate principal, Mr. Robert Kuhn, Jr., was in Florida at the time, Employer learned of Strubinger's failure to comply with the policy at a later date. On November 21, 2007, a planned early dismissal, Strubinger also failed to sign in at work for his runs. Additionally, he was late picking up students at the high school.

The Board found that Strubinger "had been previously warned concerning his tardiness and lateness in picking up the students on the bus run." Finding of Fact (F.F.) No. 6. In addition, it found that although Strubinger had advance knowledge from both Employer and the school district as to when to pick up students for early dismissals, he "did not have good cause for his tardiness on November 21, 2007 or for his failure to sign in at work for the early dismissal runs." F.F. No. 13. With regard to Strubinger's subsequent separation from employment, the Board found that "[a]t the time of discharge, the employer told [Strubinger] not to come to work and to check back with the employer in a few

[2] As the ultimate finder of fact, it is within the Board's purview to resolve all conflicts in evidence and to determine witness credibility and evidentiary weight. *Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review*, 949 A.2d 338 (Pa. Cmwlth. 2008). Further, "[i]t is irrelevant whether the record contains evidence to support findings other than those made by the fact-finder; the critical inquiry is whether there is evidence to support the findings actually made." *Id*. at 342.

weeks." F.F. 15. Employer did not tell Strubinger that it was discharging him for not signing in at work and for being late for work.

Strubinger filed a claim for unemployment compensation benefits, which the Scranton Unemployment Compensation Service Center denied pursuant to the willful misconduct provision of the Law. In addition, the service center determined that there was a *fault* overpayment of $2981 in benefits that Strubinger was required to repay under Section 804(a) of the Law, 43 P.S. § 874(a). Finally, the service center imposed a penalty of eighteen weeks of benefits pursuant to Section 801(b) of the Law, 43 P.S. § 871(b).

Strubinger appealed from the service center's determination and, following a hearing at which Strubinger and three witnesses for employer testified, the referee affirmed the service center's decision in all respects. Strubinger appealed to the Board and it affirmed the referee's denial of benefits under the willful misconduct provision, as modified. The Board rejected the fault overpayment and imposed a *non-fault* overpayment pursuant to Section 804(b) of the Law, 43 P.S. § 874(b). It also removed the penalty weeks. Strubinger's timely petition for review to this Court followed.

Strubinger essentially presents two issues on appeal: 1) whether Strubinger's right to due process was violated by the referee's failure to continue the hearing so as to allow him to discover the evidence against him; and 2) whether the Board's Finding of Fact No. 15 was in error. That finding provides that "[a]t the time of discharge, the employer told the claimant not to come to work and to check back with the employer in a few weeks." F.F. 15.

As an initial matter, we note that Strubinger failed to develop in his brief the issue of whether his right to due process was violated by the referee's

failure to continue the hearing. In addition, we note that at no point during the hearing did Strubinger even request a continuance. Strubinger's primary concern was that he merely had time to review the pertinent documents before the hearing, but that no one provided him with a copy of them. Expression of that concern is not the same as a request to continue a case. Given the fact, therefore, that Strubinger failed to request a continuance of the hearing, we conclude that he waived his right to pursue a due process argument on appeal. *See Schaal v. Unemployment Comp. Bd. of Review*, 870 A.2d 952 (Pa. Cmwlth. 2005) (claimant waives review of issue where she had an opportunity to raise it before the referee, but failed to do so.) In any event, we find no deprivation of due process in this matter. The transcript is replete with instances where the referee attempted to assist Strubinger without stepping over the line and acting as his advocate.

Strubinger next argues that the Board's Finding of Fact No. 15 is in error because there is no record evidence that his discharge was permanent. To reiterate, the finding was that "[a]t the time of discharge, the employer told the claimant not to come to work and to check back with the employer in a few weeks." F.F. 15.

In response, the Board contends that the permanency of a discharge is not relevant to a willful misconduct determination. It maintains that the only relevant issue is whether the claimant was unemployed as a result of willful misconduct during the week in which he filed for unemployment compensation benefits.

We note that Section 402(e) of the Law provides that an employee is ineligible for unemployment compensation in any week, "[i]n which his unemployment is due to his discharge or temporary suspension from work for

willful misconduct connected with his work. . . ." 42 P.S. § 802(e). By virtue of the language of the statutory provision, therefore, a permanent discharge is not required for a finding of willful misconduct. *See Lower Gwynedd Twp. v. Unemployment Comp. Bd. of Review*, 404 A.2d 770 (Pa. Cmwlth. 1979) (police officer denied unemployment compensation benefits for period in which he was suspended without pay for conduct unbecoming an officer.) What the legislature in Section 402(e) does require, however, is that an employer have temporarily suspended or discharged an employee for willful misconduct connected with his work.

Accordingly, we affirm the Board's order.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 15th day of May, 2009, the order of the Unemployment Compensation Board of Review in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge