

MEMORANDUM DECISION

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APPELLANT PRO SE

D.S.
Fremont, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Natalie F. Weiss
Deputy Attorney General
Indianapolis, Indiana

Jay R.S. Parks
Leah M. Jones
Unemployment Insurance Review
Board
Review Board Staff Attorneys
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

D.S.,
Appellant,

v.

Review Board of the Department
of Workforce Development,
Appellee.

June 14, 2023

Court of Appeals Case No.
22A-EX-3100

Appeal from the Review Board of
the Department of Workforce
Development

Gabriel Paul, Chairman
Larry A. Dailey, Member
Heather D. Cummings, Member

Trial Court Cause No.
22-R-5491

Memorandum Decision by Judge Brown
Judges Robb and Crone concur.

Brown, Judge.

- [1] D.S. (“Employee”) appeals a decision by the Review Board of the Indiana Department of Workforce Development (the “Board”) denying his claim for unemployment benefits following the termination of his employment with C.N.T. (“Employer”). We affirm.

Facts and Procedural History

- [2] Employee worked for Employer from November of 2017 until his employment was terminated on August 22, 2022, and Employee applied for unemployment benefits. On September 30, 2022, a claims investigator issued a determination stating that Employer failed to provide sufficient information to establish the discharge was the result of willful misconduct. On October 12, 2022, Employer appealed the claims investigator’s determination.
- [3] On November 3, 2022, a telephonic hearing was held before an administrative law judge (“ALJ”) at which Employer’s hearing representative, Rebecca Hogle, appeared on its behalf. Administrative Services Director Kathy Lynch, Plant Manager Mike Parrish, Production Manager Charles Lozowski, and Shift Supervisor David Woodring testified on behalf of Employer. Employee did not participate. Employer introduced and the ALJ admitted into evidence employee warning forms dated May 11 and August 12, 2022. The May 11, 2022 warning stated:

On numerous occasions through individual conversation and during group meetings, [Employee] has been told that he is required by company policy to clock out when leaving the premises [sic] for breaks and clocking back in upon returning. He also takes too much time for his breaks, taking well over the :30 min allowed for the meal break, and while it is not as prevalent on the :15 min break he still returns after he should.

Exhibits Volume at 34.¹ The August 12, 2022 warning stated:

[Employee] Refused [sic] to do what was asked of him on 2nd shift he told the Plant Manager that he would not run the twin Belt as instructed to in order to run production. His action caused a loss in production for that night. [Employee] was very disrespectful and insubordinate when asked for a second time to run twin belt. [Employee] is being warned and if his action[s] continue he will be terminated.

Id. at 35.²

[4] The ALJ also admitted a form dated August 22, 2022, which indicated the “Action to be Taken” was “Termination” and stated:

On 8/16/2022 all employees were asked to help with the changeover from fiber glass to hematite. [Employee] did not assist with any of the work needing done after being asked to assist. On 8/18, 8/19, and 8/22 [Employee] took excessive breaks after being talked to about the allotted times on several

¹ The form included signatures for “Manager/Lead,” human resources, and Employee dated May 11, 2022. Exhibits Volume at 34.

² The form included a signature for “Manager/Lead” dated August 12, 2022, and a signature for human resources dated August 24, 2022. Exhibits Volume at 35. It also stated “Employee Refused to Sign.” *Id.*

occasions. On 8/19 [Employee] was also observed on his phone playing games while his co-worker was doing all the work at the openers. On 8/22 Another changeover needed done and [Employee] did not help after being told what needed done.

Id. at 33.³

[5] Administrative Services Director Lynch testified regarding Employer’s disciplinary process including warnings which could lead to termination. Shift Supervisor Woodring indicated he was Employee’s direct supervisor and testified: “On the 16th of August, we had finished running a Fiberglas[s] product,” “[w]e were switching over to another product,” “I had gathered all of the employees on second shift, to tell them what needed to be done,” and Employee “didn’t say anything but just did not do anything,” “didn’t help with the changeover, didn’t help with any of the work, didn’t give any reasons why,” and “basically just stood at the end of our production line and waited for everybody else to get done with everything that needed to be done.” Transcript Volume II at 21. He indicated this occurred for “roughly two hours.” *Id.* He testified changeovers occurred frequently and it was something Employee had done hundreds of times. He indicated the information on the August 22, 2022 form about excessive breaks was correct and the breaks were a “[m]inimum of ten minutes over.” *Id.* at 25.

³ The form included signatures for “Manager/Lead” and human resources dated August 23, 2022, and indicated Employee “Refused to Sign.” Exhibits Volume at 33.

[6] With respect to the August 22, 2022 changeover, Woodring testified “we had finished running a product for a customer,” “I did . . . what we always do . . . brought the . . . entire shift together, went over step by step, everything that needed to be done, what was expected of all the employees,” and “once again, he just ignored everything I asked of him and did not help whatsoever on the changeover.” *Id.* at 30-31. When asked the length of time Employee “just stood around,” he answered “I don’t remember what product we switched to. But generally it’s a minimum of an hour.” *Id.* at 31. When asked about the impact of Employee not “carrying his share of the load,” he testified “[i]t causes excessive downtime,” “I ended up having to do the work myself,” “the biggest thing is that . . . it took twice as long to get changed over and started up to the next product,” and “because we have such a small crew, . . . every person . . . makes a big difference.” *Id.* at 32. When asked if he had a discussion with Employee regarding the August 16, 2022 changeover problem, he stated “I believe so, but I don’t remember for sure.” *Id.* Woodring further testified Employee did not help with a changeover on August 19, 2022. He testified “he was actually training a new employee and was supposed to be helping with that” and “when I went back to the area where he was at, he was actually sitting in a chair playing video games on his phone, and the new employee was basically doing the changeover by himself.” *Id.* at 34.

[7] Plant Manager Parrish testified: “I had one specific incidence with him and I did write the statement, and I do believe you have it. . . . [I]t’s the 8/12/22 . . .

[w]here [Employee] refused to run a piece of equipment that he was asked to run on a specific day.” *Id.* at 37. Parrish testified:

The shift just started and . . . I said, [Employee], we need you to run twin belt today. We need production on that line in order to make some customer requirements. The lead operator for that piece of equipment is not here today so . . . I need you to go over there and jump on that line and get it up and running for us and fulfill these orders. And he specifically told me, he’s like, I am not going to do that. He’s like, I am not going to go back there and run that piece of equipment with those people. And at that time, we had some Hispanics that was working for us and he told me that he was not going to work with those people because he thought that it was a form of human trafficking. And I said, [Employee], are . . . you telling me that you’re not going to work on that piece of equipment because you don’t want to work with those people? And he said, yes. I was like, look, [Employee], I need you to go back there. I need you to start up that line and we need to get production out and . . . I need you to be a team player and . . . get this done.

So I walked off . . . totally expecting that he would . . . do what I asked of him. Which by the way, he is paid at a higher rate than most of the employees here to run that specific piece of equipment. So I came back maybe 10, 15 minutes later back to the twin belt, noticed that there was nobody back there except for the rest of the crew waiting on him.

And I went back again. I said, [Employee], I was like, look, I need you to go back there and run this piece of equipment. I need you to do this. We got customer orders that need to be fulfilled. He was like, Mike, I told you once, I’m not effing doing it. . . . I was like, so you’re refusing to do it? Is that what you’re telling me? He said, yes. So I went back to my office, and the next day sat him down, gave him the warning and you can see what it says on there. And I let him know that, hey, [Employee], if this incidence happens again, you will be terminated. So insubordination will not be tolerated. Not

only that, but you know, insubordination plus the fact that . . . you're refusing to work with a certain group of people

[H]e was a little heated, . . . went onto a rant and rave and I was like, . . . I'm not going to discuss other matters. This is what we're talking about right here. I was like, I need you to sign this. And he refused to sign it and walked out and went back to work.

Id. at 37-39. Parrish also indicated that Employer had discharged other employees in the past for excessive tardiness and insubordination. Further, Production Manager Lozowski testified that he issued a written warning for Employee on May 11, 2022, discussing his extended break times. He also testified: "I had spoken to him several times individually. We had had group meetings discussing . . . what break times consisted of and what is expected of the employee to be back on time from their breaks." *Id.* at 51.

[8] On November 4, 2022, the ALJ issued a decision which reversed the determination of the claims investigator and found that Employee was discharged for just cause. The ALJ's decision provided:

FINDINGS OF FACT: [Employee] worked for Employer from November 27, 2017 to August 22, 2022. [Employee] was a full time utility operator.

[Employee] often took excessive breaks. [Employee] often took up to 45 minutes for breaks that should last only 30. Employer gave [Employee] a written warning regarding his excessive breaks. . . . The warning stated that continued excessive breaks might lead to termination.

[Employee] repeatedly failed to follow instructions. On August 12, 2022, Plant Manager Mike Parrish asked [Employee] to start up an

assembly. [Employee] refused. [Employee] stated that the Hispanics working in that area were part of a human trafficking scheme. Parrish understood [Employee] would follow instruction, but when he returned 10 minutes late[r] the staff in the area of that line were waiting to begin work. Parrish asked [Employee] again to start the line. [Employee] said, “Mike, I’m not f----- doing it.” Parrish gave [Employee] a written warning for his “insubordination.” . . .

On August 16, 2022, Shift Supervisor David Woodring directed [Employee] and the rest of the crew to assist with changeover. [Employee] did nothing to assist. [Employee] stood around while work was ongoing for about 2 hours.

On August 22, 2022, Woodring again directed [Employee] to assist with changeover. [Employee] again did nothing. [Employee] stood around for about 1 hour.

Because of [Employee’s] insubordination and failure to follow instructions, Employer discharged [Employee] on August 22, 2022.

Exhibits Volume at 37-38. The ALJ concluded:

Here, [Employee] was discharged for just cause. Employer discharged [Employee] for his repeated refusal to follow instructions. [Employee’s] refusal to follow Parrish’s instruction on August 12, 2022, coupled with his foul language toward the Plant Manager, would likely have justified discharge in itself. But [Employee’s] repeated refusal to follow instruction surely provides just cause for discharge.

Id. at 38. Employee appealed to the Board. On December 2, 2022, the Board issued a decision affirming the decision of the ALJ and adopting and incorporating the findings of fact and conclusions of law of the ALJ. Employee now appeals the Board’s decision.

Discussion

[9] Employee, *pro se*, filed an appellant’s brief. In his statement of issues, Employee states that Employer’s appeal of the claims investigator’s determination was late, Employer submitted a fraudulent document concerning the events of August 12, 2022, and the actual sequence of events is not the same as Employer’s assertions. In his statement of facts,⁴ Employee states that Employer “selectively enforced the rules depending on how good a worker was,” “I was allowed to slide on the rule concerning punching out and back in when leaving for lunch for over four years until I was written up for it [on] May 11, 2022,” and “[f]rom that point forward I was careful to punch out and in.” Appellant’s Brief at 3. He states “Aug 8, 2022 third shift was cancelled,” “in [Employer’s] language ‘Hispanic Work Crew’ was brought in on second shift to get their hours,” “[t]hey were to run Twin Belt and I was asked to . . . fill in as lead of Twin Belt,” “I explained to Mike Parrish that this conflicted with my belief it was Racist of [Employer] to take advantage of lower economic people and that it was akin to Human Trafficking,” and “I told him I was not comfortable in being a part of it.” *Id.* He further states “I was unable to participate [in the hearing] due to service interruption [sic] of my telephone,” “I later reviewed the Decision dated Nov 4, 2022 and found [Employer] gave

⁴ The statement of facts and argument sections of Employee’s brief do not include citations to the record. *See* Ind. Appellate Rule 46(A)(6) (“*Statement of Facts*. . . . The facts shall be supported by page references to the Record on Appeal or Appendix in accordance with Rule 22(C).”); Ind. Appellate Rule 46(A)(8) (“*Argument*. . . . Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.”).

misleading [sic] testimony by saying I used profanity, and they also gave the wrong date saying Aug 12, 2022 was the day I was asked to lead Twin Belt when it was actually Aug 8, 2022.” *Id.* In his summary of argument section, he asserts the paperwork dated August 12, 2022, is a fabrication.

[10] In his argument section, Employee asserts he was one of the longest-serving employees, he took his work seriously, and he never refused to obey instructions as alleged during the hearing. He argues that, “[a]fter new management [sic] took over, they decided to combat their high turn over rate with an employment service,” “[i]nstead of hiring workers [at] the same pay as local full time workers, it seemed they felt taking advantage of lower socioeconomic migrants was the way to proceed,” and “[w]hen I voiced my opinion that it was like human trafficking, my days were numbered.” *Id.* at 4. He also asserts that Employer “decided to build a paper trail and exaggerate [sic] my behaviour that was no different than that of my co-workers,” “[r]ather than just fire me, [Employer] submitted a false document to a Government Agency,” “[t]hat gives me no other choice than to bring this perjury [sic] to the attention of the Court,” and “[i]t is very odd that HR did not sign this Aug 12, 2022 paperwork until the 24th of Aug, the day after my termination.” *Id.*

[11] Ind. Code § 22-4-17-2(f) provides “unless the claimant or the employer, within ten (10) days after the notification required by subsection (e), was sent by the department to the claimant or the employer, asks for a hearing before an administrative law judge, the decision shall be final,” and Ind. Code § 22-4-17-14(c) provides, “[i]f a notice is served through the United States mail, three (3)

days must be added to a period that commences upon service of that notice.” The Board argues that, as Employer received notice by mail, it was permitted thirteen days to file its appeal. The claims investigator’s determination was dated September 30, 2022, and Employer’s appeal, dated October 12, 2022, stated: “The employer disagrees with the determination mailed on 09/30/2022 and is requesting an appeal hearing.” Exhibits Volume at 6. Reversal is not warranted on this basis.

[12] The standard of review on appeal of a decision of the Board is threefold: (1) findings of basic fact are reviewed for substantial evidence; (2) findings of mixed questions of law and fact—ultimate facts—are reviewed for reasonableness; and (3) legal propositions are reviewed for correctness. *Recker v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 958 N.E.2d 1136, 1139 (Ind. 2011). Ultimate facts are facts that involve an inference or deduction based on the findings of basic fact. *Id.* Where such facts are within the special competence of the Board, the Court will give greater deference to the Board’s conclusions, broadening the scope of what can be considered reasonable. *Id.*

[13] An employee is ineligible for unemployment benefits if the employee is discharged for just cause. Ind. Code § 22-4-15-1. Ind. Code § 22-4-15-1(d) provides that “[d]ischarge for just cause” includes “refusing to obey instructions.” Ind. Code § 22-4-15-1(d)(5). “When the authority of those in whom the employer has confided responsibility for day-to-day operations is flouted by an employee’s willful disregard of reasonable directives, just cause

for discharge of that employee exists.” *Graham v. Review Bd. of Ind. Employment Sec. Div.*, 179 Ind. App. 497, 501, 386 N.E.2d 699, 702 (1979).

[14] The record reveals that Employee did not participate in the November 3, 2022 hearing before the ALJ. At the hearing, the ALJ admitted the employee warning forms dated May 11 and August 12, 2022, and the discharge form dated August 22, 2022. The ALJ heard testimony from Production Manager Lozowski regarding his communication with Employee regarding his extended break times, Shift Supervisor Woodring regarding Employee’s late return to work after breaks and his conduct during the changeover processes on August 16, 19, and 22, 2022, and Plant Manager Parrish regarding Employee’s conduct and responses when he asked him to operate certain equipment. The ALJ and Board found that Employee repeatedly failed to follow instructions and was discharged for just cause. Based on the record, we conclude the findings are supported by substantial evidence and the Board’s determination that Employee was terminated for just cause was reasonable.

[15] For the foregoing reasons, we affirm the decision of the Board.

[16] Affirmed.

Robb, J., and Crone, J., concur.