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ARKANSAS COURT OF APPEALS

DIVISION IV
No. E11-59

SHANNON L. ROUSE APPELLANT V. DIRECTOR OF THE ARKANSAS DEPARTMENT OF WORKFORCE SERVICES and TENNECO AUTOMOTIVE APPELLEES	**Opinion Delivered** February 29, 2012 APPEAL FROM THE ARKANSAS BOARD OF REVIEW [NO. 2009-BR-02672] AFFIRMED

RITA W. GRUBER, Judge

Shannon Rouse, who was employed in various positions by Tenneco Automotive for eight years, appeals from a decision of the Department of Workforce Services Board of Review denying him unemployment compensation benefits. On appeal, Mr. Rouse argues that the Board of Review erred in finding that he was discharged for misconduct connected with work within the meaning of the Arkansas Department of Workforce Services Law. We disagree and hold that substantial evidence supports the Board's finding of misconduct. Therefore, we affirm.

On appeal, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings of fact. *West v. Dir.*, 94 Ark. App. 381, 383, 231 S.W.3d 96, 98 (2006). The findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. Ark. Code Ann. § 11-10-529(c)(1) (Supp.

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2011); *Perry v. Gaddy*, 48 Ark. App. 128, 129, 89 S.W.2d 73, 74 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *West*, 94 Ark. App. at 383, 231 S.W.3d at 98. Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether it could have reasonably reached its decision based upon the evidence before it. *Id.*

Arkansas Code Annotated section 11-10-514(a)(1) (Supp. 2011) provides that a person shall be disqualified from receiving unemployment benefits if the Director of the Department of Workforce Services finds that the person is discharged from his or her last work for misconduct in connection with the work. "Misconduct," for purposes of unemployment compensation, involves (1) disregard of the employer's interest, (2) violation of the employer's rules, (3) disregard of the standards of behavior that the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer. *Fulgham v. Dir.*, 52 Ark. App. 197, 199, 918 S.W.2d 186, 188 (1996). To constitute misconduct for unemployment-insurance purposes, however, more is required than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good-faith errors in judgment or discretion. *Johnson v. Dir.*, 84 Ark. App. 349, 352, 141 S.W.3d 1, 2 (2004). Instead, there is an element of intent associated with a determination of misconduct. *Id.* Mere good-faith errors in judgment or discretion and unsatisfactory conduct are not considered misconduct unless they are of such a degree of recurrence as to manifest

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culpability, wrongful intent, evil design, or intentional disregard of an employer's interest. *Fulgham*, 52 Ark. App. at 200, 918 S.W.2d at 188.

Mr. Rouse worked for Tenneco Automotive as a "welder/operator rotation" from July 23, 2001, until September 3, 2009, when he was terminated. Kathy Lyerly, the human resources coordinator at Tenneco, testified that Mr. Rouse was terminated for repeated failure to maintain his job performance and to follow the guidelines for the procedures on the job. His personnel file was filled with warnings and memoranda from supervisors regarding his continuous inefficiency on the job throughout the years—including, but not limited to, failing to inspect, failing to follow instructions regarding clean-up, using improper language and making improper remarks to co-workers, "putting the wrong head assembly into the base assembly," and failing to wear safety goggles. Ms. Lyerly also testified, and provided documentation to support her testimony, that Mr. Rouse was demoted seven times to easier jobs because of his poor job performance. Two of these demotions were at Mr. Rouse's request. She testified that she believed that Mr. Rouse was able to perform the work and that his failure to do so was a "personal choice."

The proverbial last straw occurred during Mr. Rouse's job placement as an assembler running a robot welder, which he maintained for several weeks before he was terminated. Ms. Lyerly testified that Mr. Rouse "repeatedly refused to attempt to cooperate enough to run the job accurately." Numerous emails and notes in the record from one of Mr. Rouse's supervisors, Edward Isom, to Harold Diggs, a human resources manager, indicated that Mr. Rouse was not performing well in the new job. On August 25, 2009, Mr. Isom said that,

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despite having a trainer, Mr. Rouse seemed to experience difficulty on the easiest welder the plant owned. He said that he talked to Mr. Rouse on August 17, 2009, about the importance of trying his best to make the weld job work but that Mr. Rouse "just kind of looked off like I was not even talking to him." He said that he spoke to him again on August 19 because of his bad welds and that it was like "talking to a brick wall." Several days later, Mr. Isom took Mr. Rouse off of welding and asked him to clean. Mr. Rouse told Mr. Isom that he did not feel like cleaning all night and that he was going home; it was 3:00 a.m., and the shift ended at 7:00 a.m. On August 28, 2009, Mr. Isom indicated that another employee had to reweld twenty-five of Mr. Rouse's welds because "he is still not looking at this [sic] welds. This is the end of week two and if you are still missing twenty-five spring seat welds then you can't be trying." In another email from Mr. Isom to Mr. Diggs on August 31, 2009, Mr. Isom said that he put someone with Mr. Rouse all night to watch and help him and that Mr. Rouse messed up twenty-one welds. An email from September 2, 2009, indicated that Mr. Rouse had thirty-one bad welds from the night before despite having someone watching and helping him and despite his being placed on a machine that required less responsibility and was generally used by summer help and temporaries. In response to the helper's explanation regarding the danger of defective welds, Mr. Rouse said, "You can send me home or demote me, I don't care. That I'm talking to a lawyer." Tenneco discharged Mr. Rouse on September 3, 2009.

Mr. Rouse testified at the hearing that he was discharged because he had trouble moving from the first shift to the third shift. He said that he could not get enough rest and

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was falling asleep on the job. He also said that he could not see very well and needed prescription glasses. He admitted that he should have gone to the doctor for his vision.

The Board of Review found that Mr. Rouse was discharged for misconduct connected with the work. It reasoned that a preponderance of the evidence established substandard performance and that this substandard performance was not the result of inability or incapacity and that it did not occur only in isolated instances. The Board also stated that the employer's evidence outweighed Mr. Rouse's evidence, which the Board found was "hindered for various reasons, including testimony which was unconvincing . . . ."

Mr. Rouse argues on appeal that the evidence was not sufficient to support the Board's decision and that it was clear that his alleged brain damage hindered his case. In his appellate brief, Mr. Rouse alleges that he received trauma to his head outside of his employment, sustaining a brain injury, and that this is the "unspoken reason" the Board found his evidence "hindered" and his testimony "unconvincing." But neither the testimony at the hearing nor the documentary evidence in the record on appeal include any information regarding this alleged brain injury, the extent or cause of the injury, or its relevance to this case. We do not address issues on appeal that were not raised below or consider the merits of an argument when the appellant presents no citation to authority or convincing argument in its support. *Rennels v. Four Seasons HVAC Distribs.*, 2011 Ark. App. 274, at 3; *Ark. Beverage Retailers Ass'n, Inc. v. Langley*, 2011 Ark. App. 259, at 5.

Further, we hold that substantial evidence supports the Board's finding that Mr. Rouse's repeated failure to maintain his job performance and to follow the guidelines for the

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procedures on the job constituted misconduct. We hold that the Board could have reasonably reached its decision based upon the evidence before it and that the evidence supported the Board's conclusion that Mr. Rouse's poor job performance was more than mere inefficiency and involved such a degree of recurrence as to manifest an intentional disregard of his employer's interest.

Finally, Mr. Rouse contends that the hearing officer denied him due process by the manner in which she conducted the hearing for the Arkansas Appeal Tribunal. He contends that it was her duty to develop a full and fair record.[1] We disagree. It was not the hearing officer's duty to present witnesses or introduce evidence for either party. Mr. Rouse had every opportunity to prove his case. Accordingly, we affirm the Board's denial of unemployment benefits.

Affirmed.

VAUGHT, C.J., and GLOVER, J., agree.

Larry J. Steele, for appellant.

Phyllis Edwards, for appellee.

[1]He seems to suggest that the fact that the hearing included only two testifying witnesses, Mr. Rouse and Ms. Lyerly, was the hearing officer's fault and was insufficient to satisfy due process.