

ARKANSAS COURT OF APPEALS

DIVISION II

No. E12-836

JOHN PRESTON

APPELLANT

V.

DIRECTOR, DEPARTMENT OF
WORKFORCE SERVICES, AND
PROGRESS RAIL SERVICES

APPELLEES

Opinion Delivered March 13, 2013

APPEAL FROM THE ARKANSAS
BOARD OF REVIEW
[NO. 2012-BR-02035]

REVERSED AND REMANDED

WAYMOND M. BROWN, Judge

John Preston, former machine operator for Progress Rail Services, appeals from a decision of the Arkansas Board of Review denying him unemployment benefits. The Board found that Preston was discharged for misconduct in connection with the work due to excessive absenteeism. We reverse and remand.

Preston was employed by Progress Rail Services from August 24, 2000, to April 24, 2012, when he was discharged for points. He applied for unemployment benefits, but was denied due to a determination that he was fired for excessive absenteeism/tardiness. He timely appealed that determination to the Arkansas Appeal Tribunal. A telephone hearing was conducted on July 24, 2012. Testimony at the hearing revealed that Progress Rail Services had a progressive warning policy whereby an employee would receive a first warning at six



points, a second warning at seven points, a final warning at eight points, and finally be discharged upon receiving nine points. The points would accumulate over a year and would drop off the first day of the month following the passage of the year. Evidence showed that Preston received his first and second warnings on June 6, 2011; he received a final warning on August 22, 2011, and another final warning on April 4, 2012; he was discharged when he arrived over forty minutes late for work on April 24, 2012. During the hearing, it became apparent that Preston was given a point for an approved vacation day. Following the hearing, the appeal tribunal made the following findings of fact:

During his last year of employment, the claimant was absent from work seven times, tardy three times, and he left early once. The claimant left early that one time because he was ill. He was absent and tardy mostly because of transportation problems, but also because he had to get his air conditioner fixed and because his start time at work kept changing. The employer had a written attendance policy and had given the claimant first and second written warnings and two final written warnings because of his absences. The employer had inadvertently counted a vacation day on April 12, 2011 against the claimant, but the claimant did not bring the matter to the employer's attention during his employment. The claimant was aware that he would be discharged for any further absences or tardiness. The claimant was then forty-three minutes late for work because of a problem with his transportation. The claimant was discharged.

The appeal tribunal denied Preston benefits, even though it found that Ark. Code Ann. § 11-10-514(a)(2)(A), which states that in "all cases of discharge for absenteeism, the individual will be disqualified if the discharge was pursuant to the terms of a bona fide written attendance policy with progressive warnings, regardless of whether the policy is a fault or no-fault policy," did not control this matter. The appeal tribunal concluded:

[T]he claimant was absent frequently, so the question must be addressed as to whether the claimant's absenteeism otherwise constituted misconduct. The evidence indicated that most of the claimant's absences, and his final tardiness, were not shown to be



unavoidable, as having reliable transportation was a matter within the claimant's control. Further, the claimant could have gotten the vacation day that was counted against him taken off his point total had he taken the time to examine his attendance record, to which the evidence showed he had ample access. Thus, the claimant's absenteeism was in willful disregard for the employer's best interests. Therefore, the claimant was discharged from last work for misconduct in connection with the work.

Preston timely appealed to the Board. The Board affirmed and adopted the opinion of the appeal tribunal. This appeal followed.

On appeal from the Board of Review, we do not conduct a *de novo* review; instead, we review the evidence and all reasonable inferences deductible therefrom in the light most favorable to the Board's findings of fact.¹ We will affirm the Board's findings if they are supported by substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² 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.³

"Misconduct" includes disregard of the employer's interests, violation of the employer's rules, disregard of the standards of behavior that the employer has the right to expect of his employees, and disregard of the employee's duties and obligations to his employer.⁴ It requires more than mere inefficiency, unsatisfactory conduct, failure in good

¹*West v. Director*, 94 Ark. App. 381, 231 S.W.3d 96 (2006).

²*Id.*

³*Id.*

⁴*West, supra.*



performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good-faith error in judgment or discretion.⁵ There must be an intentional deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design.⁶

Here, Progress Rail Services allowed its employees to accumulate up to nine points without the risk of losing their jobs. Preston was discharged when a vacation day was “inadvertently” counted against him, resulting in an accumulation of nine points in a year. The evidence shows that Preston’s actual absentee/tardiness points fell within the range allowed by the employer. Therefore, the Board’s finding that Preston’s absences constituted a willful disregard of the employer’s best interests is not supported by substantial evidence. Accordingly, we reverse and remand for a determination of benefits.

Reversed and remanded.

WALMSLEY and GLOVER, JJ., agree.

John Preston, pro se appellant.

Phyllis Edwards, Associate General Counsel for Artee Williams, Director, Department of Workforce Services.

⁵*Id.*

⁶*Id.*