

**ARKANSAS COURT OF APPEALS**

DIVISION IV

No. E12-806

JOHNNY WARREN

APPELLANT

V.

DIRECTOR, DEPARTMENT OF  
WORKFORCE SERVICES and  
MOORE'S RETREAD & TIRE CO.  
INC.

APPELLEES

**Opinion Delivered** March 13, 2013

APPEAL FROM THE BOARD OF  
REVIEW  
[NO. 2012-BR-01565]

REVERSED AND REMANDED

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**BRANDON J. HARRISON, Judge**

Johnny Warren asks us to reverse the Board of Review's decision to deny him unemployment benefits. Warren contends that the Board's conclusion that he was fired from his job for misconduct is not supported by substantial evidence. Warren is right, so we reverse and remand for an award of benefits.

Finding that he was discharged for misconduct connected with his work as a tire salesman at Moore's Retread & Tire Co., the Department of Workforce Services denied Warren unemployment benefits. Warren appealed to the Appeal Tribunal. A hearing officer conducted a telephone hearing, and the Tribunal reversed the Department's denial. Moore's appealed that decision to the Board of Review. The Board, in turn, reversed the Appeal Tribunal, concluding that under Ark. Code Ann. § 11-10-514(a)'s general misconduct standard Warren's job performance amounted to a willful disregard of Moore's best interest.



Warren appealed to this court. We reverse the Board of Review.

For approximately seven months, Warren worked as an outside commercial tire salesman for Moore's. The company's general manager, Kelly Pickett, testified during the telephone hearing before the Appeal Tribunal that Warren was fired because he repeatedly failed to meet sales quotas. Pickett told Warren when he was hired that his position was salary and commission based. Warren understood the importance of meeting the sales objectives. Each month that Warren failed to make enough money for Moore's, Pickett advised him that he needed to increase sales. At the end of January 2012, Pickett told Warren that he would be fired if he did not increase his sales by the end of February 2012. Warren fell short again, and Moore's terminated his employment. As Pickett put it to the Department of Workforce Services in a March 2012 letter: "I explained to Johnny that the company could not continue his employment when his performance did not cover his expenses."

Here is the crux of the Board's decision that overturned the Appeal Tribunal's decision

[Warren] was advised monthly of his performance deficiencies when he was placed on notice that if his sales did not increase he would be subject to discharge. [His] continued failure to meet performance expectations despite being continually advised of such constituted a willful disregard of the employer's best interest, as there is insufficient evidence to support a finding that [Warren] had an inability to perform the work.

We review the Board of Review's factual findings in the light most favorable to it and will not reverse a Board's determination if it is supported by substantial evidence. *McKissick v. Dir.*, 61 Ark. App. 266, 966 S.W.2d 921 (1998). This means we essentially ask whether the Board could have reasonably reached its decision; if it could have done so, then we will not disturb the decision. *Id.* But "we are not limited to a 'rubber stamp' review of decisions



arising from the Board of Review.” *Clark v. Dir.*, 83 Ark. App. 308, 311, 126 S.W.3d 728, 730 (2003).

The Board’s decision to reverse the Tribunal’s award was unreasonable. The Board missed the legal mark when it equated Warren’s poor job performance with misconduct. The governing law separates the two—an employee’s poor performance is not necessarily misconduct. *See* Ark. Code Ann. § 11-10-514(a)(3)(C) (Repl. 2012). Misconduct means that Warren had to disregard Moore’s business interests, violate its rules, disregard standards of behavior that Moore’s has a right to expect from Warren, or disregard duties and obligations to his employer. *Beck v. Dir.*, 65 Ark. App. 8, 987 S.W.2d 733 (1999). And Warren must have acted with intent. *Id.* Mere inefficiency, unsatisfactory conduct, poor performances due to inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not misconduct for purposes of the statute—unless they are of such a degree in the first instance, or recur often enough, to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer’s interest or an employee’s duties. *Id.*

During the hearing before the Appeal Tribunal, general manager Pickett said that Warren was “discharge[d] for failure to meet the sales objectives, which was lack of performance. . . . He was told that the amount of sales and gross profits that he was producing was not covering the expenses that were involved in his employment.” Warren, who had eight years’ experience in tire sales with a different company, explained to the hearing officer why he believed that he had failed to meet Moore’s sales goals. He testified, among other



Cite as 2013 Ark. App. 178

things, that his failure to meet sales goals resulted from problems with the tires, that he started without a book of business for the products Moore's sold, and that competitors undercut him on price. Pickett disputed that Moore's had problems with tires that would cause sales problems for the company.

Even if the Board credited Moore's testimony over Warren's, the record shows that Warren was discharged for purely economic reasons. Failing to be a productive salesman is not itself misconduct. An element of intent is required, and the Board erred in concluding that Warren had intentionally or willfully underperformed. We therefore reverse and remand for an award of benefits.

Reversed and remanded.

VAUGHT and WOOD, JJ., agree.

*Johnny Warren*, pro se appellant.

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