

THIRD DIVISION
January 20, 2016

No. 1-14-3401

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ADVANCED CRITICAL TRANSPORT, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 14 L 50154
)	
ILLINOIS DEPARTMENT OF EMPLOYMENT)	
SECURITY, DIRECTOR OF THE ILLINOIS)	
DEPARTMENT OF EMPLOYMENT)	
SECURITY, THE BOARD OF REVIEW and)	
DANIEL J. ZWARTZ,)	Honorable
)	Robert Lopez Cepero,
Defendants-Appellees.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held:* Where employee who drove ambulance testified he was not working at time of alleged policy infractions and employer's witnesses did not see violations, Board's determination that employee was eligible for unemployment benefits because misconduct was not established was not clearly erroneous; the decision of the Board is affirmed.

¶ 2 Plaintiff Advanced Critical Transport Inc. (ACT) appeals from the circuit court's order affirming the decision of the Board of Review (the Board) of the Illinois Department of Employment Security (the Department) finding that ACT's former employee, Daniel J. Zwartz, was eligible for unemployment benefits. The Board determined Zwartz was discharged from his job for reasons other than misconduct connected with his employment. On appeal, ACT seeks reversal of that order. We affirm the decision of the Board.

¶ 3 The record establishes that Zwartz worked as an ambulance driver for ACT from March 17, 2010, to September 1, 2010. On September 26, 2010, Zwartz applied for unemployment benefits with the Department. ACT filed a timely protest of Zwartz's claim for benefits, stating his employment was terminated for violating a company policy regarding egress from the ambulance garage facility through an alley adjacent to a residential area.

¶ 4 In August 2011, a Department claims adjudicator determined that Zwartz was ineligible for benefits because he was discharged for misconduct connected with his work under section 602(A) of the Unemployment Insurance Act (the Act) (820 ILCS 405/602(A) (West 2010)). The claims adjudicator found that Zwartz's employment had been terminated for repeatedly failing to follow company policy. Zwartz filed an appeal contesting the finding of ineligibility.

¶ 5 In January 2012, the Department referee found Zwartz's appeal was untimely; however, in April 2012, the Board found Zwartz had filed a timely appeal and remanded to the Department referee for a hearing.

¶ 6 On remand, the Department referee conducted a hearing. Thomas Chase, a witness for ACT, testified he witnessed the conduct that led to Zwartz's discharge but did not say when that

incident occurred. Chase stated Zwartz "drove the wrong way out of the alley and I told him that we're not allowed to go that way" and Zwartz repeated that act another time.

¶ 7 ACT Operations Manager Ryan Purmann testified as to several reasons underlying Zwartz's discharge. Purmann described ACT's facility as being located on an alley and stated that ambulance drivers were not allowed to back up the ambulance without a person walking behind the vehicle to let the driver know if a person or property was in the way. According to Purmann, "one of the reasons" Zwartz was discharged was for backing up an ambulance without a spotter, in violation of the policy and procedure manual, and after receiving several warnings regarding that practice. Purmann said the other reason for Zwartz's discharge was that Zwartz drove out of the east end of the alley to access the street after Chase told him not to do so. Purmann said that after Zwartz's driving errors were recorded on video and shown to other ACT managers, "the decision was made to let him go for insubordination of not listening."

¶ 8 Purmann stated Zwartz was seen exiting the east end of the alley on September 1, 2010, and that he gave Zwartz a letter two days later detailing his violations of company policy on August 10, August 28 and September 1. The letter, which is included in the record, concludes: "[I]t is a known rule by the company employees not to do this and you repeatedly break the rules for this reason you are going to be released from employment at ACT effective immediately."

¶ 9 ACT employee Quentin Boyd testified he was present when Zwartz was discharged. Boyd testified Zwartz said at that time that he was not aware of the policy regarding what end of the alley to use.

¶ 10 Zwartz testified he did not receive any written or verbal warnings prior to Purmann's letter detailing the infractions leading to and including September 1, 2010. He also stated he was

never told not to use the east end of the alley and that no written policy existed on that point. He further said he "always used a spotter" when backing an ambulance and that if his infractions were recorded on video, he would like to see the video.

¶ 11 Following that hearing, the Department referee issued a decision finding Zwartz was eligible for unemployment benefits. ACT appealed that decision to the Board. In July 2012, the Board found the record from the Department's hearing was "not adequate" and that the Department referee had "failed to elicit relevant testimony from the parties regarding the dates, times and specific events which led to the claimant's discharge." The Board remanded the case to the Department referee for "a *de novo* hearing for the purpose of obtaining such evidence as may be available regarding the circumstances and events which led to the claimant's discharge."

¶ 12 The Board further stated:

"In addition to any other pertinent testimony, the referee is specifically instructed to elicit evidence with regard to the employer's policies and procedures that are at issue, the relevant date and time of the final incident, whether the claimant received any prior warnings of disciplinary measures, and if so, when and where, and if appropriate, who observed the claimant during any of these alleged prohibited activities. The Referee shall issue a decision based upon all the evidence of record from this hearing."

¶ 13 On remand, the same Department referee held a second telephone hearing on August 21, 2012, at which the main witnesses were Zwartz, Purmann and Chase. Purmann testified Zwartz's employment was terminated for backing an ambulance without a spotter and for exiting the wrong end of the alley on three dates: August 10, August 28 and September 1, 2010. Purmann testified a spotter is used when backing an ambulance to avoid insurance liability and prevent

accidents but acknowledged that no accidents had resulted from Zwartz's conduct. All employees were told in a company meeting in April that they should not use the wrong end of the alley. In addition, Purmann testified that the spotter policy was stated in the company's procedure manual, which was admitted as an exhibit, along with Zwartz's signed acknowledgement that he received the manual.

¶ 14 Purmann testified ACT employed a verbal and written warning system prior to termination. A first offense resulted in a verbal warning, and a second offense triggered a written warning, with a subsequent offense after the written warning resulting in termination. According to Purmann, Zwartz's employment was terminated because he refused to follow ACT rules after multiple verbal and written warnings. Specifically, Zwartz was seen on camera backing up without a spotter on August 10. Zwartz was given a verbal warning a few days after the August 10 incident that Purmann also memorialized in writing for Zwartz's personnel file. Purmann also testified that he offered to show Zwartz the video of the August 10 incident.

¶ 15 As to the September 1 incident, Purmann said Zwartz had initially denied that he had worked but then said he was called into work that day. Purmann said Zwartz drove through the alley in the wrong direction at about 4:30 a.m. that day. Purmann said he arrived at work at 7 a.m. and watched the incident on video.

¶ 16 Chase testified that on August 10, he and Zwartz worked together and he did not act as a spotter for Zwartz. Chase testified he was warned to use the spotter process on August 8, which Zwartz pointed out in the hearing was two days before the alleged incident had occurred. Chase further testified that on another unspecified date, he was with Zwartz and told him not to exit on the east end of the alley.

¶ 17 In response to the timeline attested to by Purmann, Zwartz testified he was called into work on September 1 at 4 p.m., which was almost 12 hours after the alleged infraction. Zwartz testified he did not violate any written or unwritten company policies and was given no warnings prior to his termination; he said he received the two "write-ups" when his employment was terminated on September 1. Zwartz said he knew he was required to use a spotter when backing up and that he followed that procedure. Zwartz denied ACT had a policy about exiting from the alley and said he was never told how to drive through the alley.

¶ 18 After Zwartz's testimony, the referee asked Purmann why the video on which his testimony was based had not been presented as evidence. Purmann replied the video system was new and he did not know how to copy the video.

¶ 19 The referee stated Purmann's written memorialization of the two verbal warnings would not be admitted into evidence because Zwartz denied having that conversation with Purmann. The referee also stated that under the best evidence rule, the contents of the video could not be testified to because the video itself was not submitted into evidence.

¶ 20 The referee issued a decision finding Zwartz was eligible for unemployment benefits because he was discharged for reasons other than misconduct as defined in section 602(A) of the Act. The referee stated Zwartz's actions did not constitute misconduct under the Act because they did not display a deliberate and willful disregard of the employer's interests. ACT appealed the referee's decision to the Board.

¶ 21 On February 4, 2013, the Board affirmed the referee's decision, stating that ACT "did not present credible evidence to prove the claimant violated its rules concerning using a spotter and going down the alley the wrong way." The Board noted no video had been presented of Zwartz's

alleged errors and found the testimony of the ACT representatives violated the best evidence rule, citing *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 526 (2008).

¶ 22 ACT filed a complaint in the circuit court for administrative review of the Board's decision. Following a hearing, the circuit court remanded the case to the Board, instructing the Board to "make credibility determinations for each of the witnesses involved in the proceeding and a new decision to issue containing those determinations."

¶ 23 On January 23, 2014, the Board issued a decision again finding Zwartz eligible for unemployment benefits. The Board stated it had reviewed the evidence and testimony from the August 21, 2012, hearing and that no further evidentiary proceedings were necessary.

¶ 24 The Board made the following factual findings: Zwartz was employed as an emergency medical technician from March 17, 2010, to September 1, 2010, and was discharged on the latter date for alleged violations of ACT policies regarding the use of a spotter when backing an ambulance out of the garage into the alley and for "going down the alley the wrong way." Two incidents preceded Zwartz's termination; those occurred on August 8 or August 10, 2010, and August 28, 2010. ACT informed all drivers in April 2010 not to drive down the alley the wrong way following a complaint from a nearby residence. Zwartz denied backing up without a spotter or exiting the alley in the wrong direction.

¶ 25 The Board noted the case was previously remanded to allow ACT to present evidence of the video, which was not submitted. The Board reviewed Purmann's testimony and noted it was based "entirely on his observations" of the video. Purmann testified the video from August 10, 2012, showed Zwartz backing up an ambulance without a spotter and driving the wrong way

down the alley. The Board stated Zwartz's testimony should be given greater weight than that of Purmann because Purmann did not observe the alleged infractions.

¶ 26 The Board further found the testimony of Chase, Zwartz's ambulance partner, to be "weak" and "contradictory." Chase testified he was warned on August 8, 2010, about an incident that occurred on August 10, 2010. The Board noted Chase offered contradictory accounts of the alleged August 10 incident because Chase first stated he was at the meeting at which Zwartz was warned of his violation but then said he did not know the date on which a warning was issued.

¶ 27 The Board found Zwartz's testimony to be more credible than that of Purmann and Chase and found ACT failed to present "sufficient credible evidence" of Zwartz's alleged policy violations. The Board again cited the case of *Village Discount Outlet*, 384 Ill. App. 3d at 526, in which this court affirmed an award of unemployment benefits, finding a witness's description of a video recording that was not introduced into evidence violated the best evidence rule, which requires the original documentary evidence when attempting to prove its contents. The Board concluded Zwartz was eligible for unemployment benefits because he was discharged for reasons other than misconduct connected with his work.

¶ 28 On October 16, 2014, the circuit court affirmed the Board's January 23, 2014, decision, stating it was not "clearly erroneous." ACT now appeals that ruling.

¶ 29 As a threshold matter, the Department contends on appeal¹ that ACT's brief lacks an accurate statement of the facts with appropriate citations to authority and citations to the record, in violation of Illinois Supreme Court Rules 341(h)(6) and 341(h)(7) (eff. Feb. 6, 2013). The

¹ The defendants-appellees in this case are the Department, the director of the Department, the Board and Zwartz. We refer to those defendants collectively as "the Department."

Department contends ACT has only included in its brief the facts that favor its position, and the Department argues the deficiencies in ACT's brief warrant a finding that ACT has waived any challenges to the Board's decision. This court has the discretion to strike a brief and dismiss an appeal based on the failure to comply with the mandatory applicable rules of appellate procedure. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 80. Still, we do not consider ACT's claims forfeited on appeal because its violations of Rule 341 do not hinder this court's ability to review the case. We thus proceed to the merits of this appeal.

¶ 30 The Act's main purpose is to alleviate the economic insecurity and burden caused by involuntary unemployment, and the Act "is intended to benefit only those persons who become unemployed through no fault of their own." 820 ILCS 405/100 (West 2010); *Jones v. Department of Employment Security*, 276 Ill. App. 3d 281, 284 (1995). The individual claiming unemployment insurance benefits has the burden of establishing his eligibility, and an employee who is discharged for misconduct is ineligible to receive those benefits. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 327 (2009).

¶ 31 Employers have a right to expect a certain standard of conduct from employees in matters that directly concern their employment. *Selch v. Columbia Management*, 2012 IL App (1st) 111434, ¶ 43. Misconduct under the Act has been defined as the deliberate and willful violation of a reasonable rule or policy governing the individual's behavior in the performance of his work. 820 ILCS 405/602(A) (West 2010). To establish misconduct under the Act, three elements must be proven: (1) that there was a "deliberate and willful violation" of a rule or policy; (2) that the rule or policy of the employing unit was reasonable; and (3) that the violation either has harmed

the employer or was repeated by the employee despite previous warnings. *Id.* Here, the first element is at issue: whether Zwartz violated a rule or policy.

¶ 32 ACT asserts the "facts in this matter are in dispute" and frames its legal arguments as a challenge to the judgment of the circuit court, which upheld the Board's decision that Zwartz was eligible for benefits. The Board is the trier of fact in cases involving claims for unemployment compensation and that this court reviews the findings of the Board, rather than the findings of the Department's referee or of the circuit court. *Village Discount Outlet*, 384 Ill. App. 3d at 524-25. When reviewing the Board's factual findings, we deem those findings *prima facie* correct and will reverse only if those findings are against the manifest weight of the evidence. *Abbott Industries, Inc. v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 15.

¶ 33 On appeal, ACT first challenges the Board's determination that it violated the best evidence rule by having Purmann testify as to the video's contents without introducing the video into evidence. Purmann testified the video depicted Zwartz backing up without a spotter on August 10 and driving through the alley in the wrong direction on September 1 at 4:30 a.m. We may review *de novo* the legal question of whether the best evidence rule was violated. *Village Discount Outlet*, 384 Ill. App. 3d at 525, citing *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204-05 (1998).

¶ 34 The best evidence rule expresses a preference for the original version of documentary evidence when the contents of the documentary evidence is sought to be proved. *Village Discount Outlet*, 384 Ill. App. 3d at 526. In support of its argument that the best evidence rule was not violated by Purmann's testimony, ACT asserts by example that an individual who hears a criminal defendant's confession may testify to its contents even though the confession may

have been recorded, citing *People v. Spencer*, 264 Ill. 124, 137-38 (1914). However, ACT's analogy is misplaced because Purmann did not claim to have witnessed the alleged backing and driving violations by Zwartz purportedly captured on the video. Rather, Purmann testified as to what the video depicted without asserting he had personally seen the alleged violations and without the video itself being introduced into evidence. Therefore, Purmann's testimony violated the best evidence rule.

¶ 35 ACT spends the balance of its brief asserting that it proved "by a preponderance of the evidence" that Zwartz deliberately violated a known policy. However, ACT states an incorrect standard of review. Whether Zwartz was properly terminated for misconduct in connection with his work involves a mixed question of law and fact, to which we apply the clearly erroneous standard of review. See *Hurst*, 393 Ill. App. 3d at 327. An agency decision, such as that of the Board in this case, is clearly erroneous where a review of the entire record leaves the court with the definite and firm conviction that a mistake has been committed. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010).

¶ 36 Here, the Board concluded that ACT failed to present "sufficient credible evidence" to show that Zwartz backed up the ambulance without a spotter on September 1, 2010, or drove down the alley the wrong way. Although Purmann and Chase testified that Zwartz committed the policy violations, neither of them witnessed any of those occurrences. Purmann testified he saw a video at 7 a.m. on September 1, 2010, of a violation; however, Zwartz testified he did not report to work on September 1 until 4 p.m. It is the responsibility of the administrative agency to weigh evidence, determine the credibility of witnesses and resolve conflicting testimony. *Hurst*, 393 Ill. App. 3d at 329. Having reviewed the record and deferring to the Board's credibility

determinations, we cannot conclude the facts of this case leave us with the definite and firm conviction that a mistake has been made.

¶ 37 In conclusion, the Board's determination that Zwartz did not commit misconduct as defined by section 602(A) and is therefore eligible for unemployment benefits was not clearly erroneous. Accordingly, the judgment of the Board is affirmed.

¶ 38 Affirmed.