

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alan M. Bier,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1908 C.D. 2012
	:	
Unemployment Compensation	:	Submitted: March 1, 2013
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER¹**

FILED: April 26, 2013

Alan M. Bier (Claimant), pro se, petitions for review of the Order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of an Unemployment Compensation Referee (Referee) finding Claimant ineligible for Unemployment Compensation (UC) benefits pursuant to Section 402(b) of the Unemployment Compensation Law² (Law). On appeal, Claimant argues that the

¹ This matter was reassigned to the authoring judge on April 2, 2013.

² Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(b). Section 402(b) of the Law provides that an employee is ineligible for compensation for
(Continued...)

Board erred by: not crediting his testimony that he did not voluntarily quit; not considering certain documents Claimant presented at the hearing; and finding him ineligible for UC benefits where he made reasonable attempts at maintaining his employment relationship with Smooth Line, Inc. (Employer). Because we discern no error in the Board's determination, we affirm.

Claimant worked for Employer as a full-time plant supervisor from March 12, 2008, through May 8, 2012. Claimant applied for UC benefits, and the Indiana UC Service Center (Local Service Center) found Claimant not ineligible under Sections 402(b) and 401(d)(1)³ of the Law. Employer appealed, and the Referee held a hearing at which Claimant and Employer's owner (Owner) testified. Based on that testimony, the Referee found the following:

1. The claimant was employed by [Employer] as a full time Plant Supervisor, at the rate of \$12.25 per hour, from March 12, 2008, with a last day of work of May 8, 2012.
2. On May 7, 2012, the claimant had a work related accident resulting in a chemical burn to his face. The claimant faxed a doctor's excuse to his employer, informing the employer he would be off work until May 14, 2012.
3. The claimant was advised by the employer not to report to work on May 14, 2012, but to come into the employer's workplace for a meeting.

any week "[i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature" Id.

³ 43 P.S. § 801(d)(1). Pursuant to Section 401(d)(1) of the Law, UC benefits are payable to those who are or become unemployed and, *inter alia*, are able and available for suitable work. Id.

4. During the meeting with the employer, the employer asked the claimant if there was a problem with his employment. The claimant advised the employer that he was finding it increasingly more difficult to report to work since the overtime had been eliminated.

5. The claimant also advised the employer that he was having difficulty reporting to work due to the reduction of hours.

6. The employer asserts he asked the claimant if he was voluntarily quitting his job and the claimant responded “[Y]es, I guess so” and ended the meeting.

7. The claimant did not report to work following the meeting held on May 14, 2012.

8. The claimant asserts he was able and available for suitable work as of May 14, 2012.

(Referee Decision, Findings of Fact (FOF) ¶¶ 1-8.) Recognizing that, during the hearing, Claimant asserted that he had been discharged from his employment, the Referee first considered whether Claimant voluntarily ended his employment or Employer discharged him. (Referee Decision at 2.) The Referee credited Claimant’s testimony that he informed Employer that he was dissatisfied with the elimination of his overtime and that he was finding it increasingly difficult due to his financial situation to report to work with his reduced hours. (Referee Decision at 2.) However, crediting Owner’s testimony that when he asked Claimant if he was voluntarily quitting his employment, Claimant responded “[Y]es, I guess so,” ended the meeting, and left, the Referee concluded that Claimant voluntarily quit his employment due to “[E]mployer’s inability to offer overtime.” (Referee Decision at 2.) Thus, the Referee held, based on Owner’s testimony that during the May 14, 2012 meeting Claimant indicated that he was voluntarily quitting, that Claimant caused his own unemployment and Claimant’s eligibility would be determined under Section 402(b) of the Law. (Referee Decision at 2.) The

Referee further concluded that Claimant did not demonstrate a necessitous and compelling reason for voluntarily quitting his position and, therefore, Claimant was ineligible for UC benefits under Section 402(b) of the Law.⁴ Claimant appealed to the Board. Concluding that the Referee's decision was proper under the Law, the Board adopted and incorporated the Referee's findings of fact and conclusions of law and affirmed the Referee's decision. (Board Order.) Claimant now petitions this Court for review.⁵

On appeal, Claimant first argues that the Board erred in not finding his testimony credible and in not considering certain documents he presented at the hearing to which Employer did not object.⁶ According to Claimant, he credibly testified that he did not quit his job and the Board should have considered: his written summary of the May 14, 2012 meeting indicating that he did not quit, but that Employer essentially discharged him for filing for partial UC benefits,

⁴ The Referee also concluded that Claimant was able and available for work and, thus, not ineligible for UC benefits pursuant to Section 401(d)(1) of the Law. (Referee Decision at 2.) This determination has not been appealed.

⁵ "The Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record." Western and Southern Life Insurance Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006). The Board's findings of fact are conclusive on appeal as long as they are supported by substantial evidence in the record. Grieb v. Unemployment Compensation Board of Review, 573 Pa. 594, 599, 827 A.2d 422, 425 (2003). "Substantial evidence is defined as such relevant evidence which a reasonable mind might accept as adequate to support a conclusion." Philadelphia Gas Works v. Unemployment Compensation Board of Review, 654 A.2d 153, 157 (Pa. Cmwlth. 1995.)

⁶ Claimant does not argue that he had cause of a necessitous and compelling reason for quitting his employment; rather, he maintains that he did not quit.

(Summary, May 14, 2012, Ex. C-2); and a certified letter Claimant sent to Employer, but was returned to Claimant unclaimed, (Certified Letter from Claimant to Employer (May 16, 2012), Ex. C-1). In the certified letter, Claimant stated, *inter alia*, that Employer may have considered him to have quit but that he had not quit and was willing to return to work. (Certified Letter from Claimant to Employer (May 16, 2012), Ex. C-1.) Claimant argues that Employer agreed at the hearing that the summary and the certified letter were legitimate and valid and did not object to their submission. Therefore, Claimant asserts, the Board should have considered those documents in making its determination.

The Referee credited Claimant's testimony that he informed Employer that he was dissatisfied with his loss of overtime and found it difficult to come to work due to the reduction of his hours, (Hr'g Tr. at 13-14, 16); however, the Referee rejected Claimant's testimony that he did not quit during the May 14, 2012 meeting, (Hr'g Tr. at 16, 21). Rather, the Referee credited Owner's testimony that, when asked whether he was voluntarily quitting, Claimant said "Yes, I guess so," got up, said the meeting was over, left the room, and did not report to work thereafter. (Hr'g Tr. at 18.) The Board adopted these credibility determinations as its own. The Board is the ultimate fact-finder and the weight to be given to the evidence and the credibility to be afforded the witnesses are within the province of the Board as the finder of fact. First Federal Savings Bank v. Unemployment Compensation Board of Review, 957 A.2d 811, 815 (Pa. Cmwlth. 2008).

Moreover, Claimant testified about his recollection of the May 14, 2012 meeting, including that Employer indicated that Claimant was no longer employed

because he had filed for partial UC benefits. (Hr’g Tr. at 5-6, 16, 21.) This is the same information that is contained in the meeting summary Claimant maintains the Referee and the Board disregarded. (Summary, May 14, 2012, Ex. C-2.) However, in concluding that Claimant was not discharged, but voluntarily quit, and rejecting Claimant’s testimony that he did not quit during the May 14, 2012 meeting, the Referee necessarily rejected Claimant’s evidence that Employer discharged him for filing for partial UC benefits.⁷ Similarly, although Claimant stated in his certified letter to Employer that he had not quit his employment during the May 14, 2012 meeting, (Certified Letter from Claimant to Employer (May 16, 2012), Ex. C-1), that position was rejected as not credible.

Finally, the record does not support Claimant’s contention that these documents should have been dispositive because Employer did not object to their legitimacy or validity. Employer did not object to the admission of these documents as evidence that Claimant had written them and had sent the certified letter to Employer, but it did object to the contents of those documents being admitted for the truth of the information contained therein. (Hr’g Tr. at 7-8.) Thus, we will not reverse the Board’s determination on these grounds.

⁷ Even if the Board did not reject that evidence as not credible, when this Court reviews a determination under the substantial evidence standard, it is irrelevant that the record may contain evidence that would support findings other than those made by the Board so long as the Board’s findings are supported by substantial evidence. Ductmate Industries v. Unemployment Compensation Board of Review, 949 A.2d 338, 342 (Pa. Cmwlth. 2008). That a claimant might believe a different version of the events took place does not create grounds for reversal if the Board’s findings are supported by substantial evidence. Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994). Owner’s credited testimony supports the Board’s findings of fact and determination that Claimant voluntarily quit his employment without cause of a necessitous and compelling nature.

Claimant next argues that the Board erred in finding him ineligible for UC benefits because he made reasonable efforts to maintain his employment relationship with Employer. Claimant asserts that he should receive UC benefits because he took the following steps to maintain his employment relationship with Employer: (1) faxed a doctor's excuse stating that he could return to work on May 14, 2012 following his work-related chemical burn; (2) filed for partial UC benefits; (3) called Employer on May 15, 2012 and left a voicemail explaining that he wished to continue to work for Employer;⁸ and (4) sent the certified letter on May 16, 2012 indicating that he had not quit and wanted to continue to work for Employer. Having not received a response to his voicemail and the certified letter, Claimant asserts that Employer made it clear that it did not want to continue Claimant's employment and, therefore, he filed for total UC benefits.

Section 402(b) provides that a claimant is ineligible for compensation if his unemployment is due to his voluntarily leaving employment without cause of a necessitous and compelling nature. 43 P.S. § 802(b). Whether or not a claimant's unemployment was the result of voluntarily leaving work is ultimately a question of law, reviewable by this Court. Middletown Township v. Unemployment Compensation Board of Review, 40 A.3d 217, 224 (Pa. Cmwlth. 2012). The claimant bears the burden of showing that he had cause of a necessitous and compelling nature to voluntarily terminate his employment. Latzy v. Unemployment Compensation Board of Review, 487 A.2d 121, 123 (Pa. Cmwlth.

⁸ We note that Claimant did not testify that he called and left Employer a voicemail about returning to work; thus, that evidence was not presented before the Board and we cannot consider it on appeal. Adamski v. Unemployment Compensation Board of Review, 441 A.2d 502, 504 n.1 (Pa. Cmwlth. 1982).

1985). To satisfy this burden, the claimant must demonstrate that: “(1) circumstances existed which produced real and substantial pressure to terminate employment; (2) such circumstances would compel a reasonable person to act in the same manner; (3) the claimant acted with ordinary common sense; and (4) the claimant made a reasonable effort to preserve [his] employment.” Brunswick Hotel & Conference Center v. Unemployment Compensation Board of Review, 906 A.2d 657, 660 (Pa. Cmwlth. 2006). In making this determination, we review the totality of the circumstances to determine whether the claimant voluntarily quit. Spadaro v. Unemployment Compensation Board of Review, 850 A.2d 855, 859 (Pa. Cmwlth. 2004).

Here, Claimant credibly testified that, during the May 14, 2012 meeting with Employer he expressed his dissatisfaction over the reduction in his hours and that he found it increasingly difficult to come to work because of that reduction. (Hr’g Tr. at 13-14, 16.) Owner credibly testified that he asked Claimant whether that meant Claimant was voluntarily quitting and that Claimant responded “Yes, I guess so.” (Hr’g Tr. at 18.) Owner stated that Claimant then stood up, said the meeting was over, left the meeting, and did not report to work the next day or any day thereafter. (Hr’g Tr. at 18.) This Court has held that “[a] claimant who stated that he quit and walked off the job is not considered an employee thereafter.” Spadaro, 850 A.2d at 859. We conclude, based on the totality of the circumstances as described above, that Claimant voluntarily quit his employment effective on May 14, 2012 and was no longer an employee thereafter. Id.

We recognize that Claimant obtained a doctor's excuse for being out of work due to his work-related chemical burn and that he sought partial UC benefits based on the reduction of his overtime hours; however, we do not see the relevance of these assertions to Claimant's contention that he is entitled to UC benefits. Moreover, while there may be some circumstances where an employee may rescind a resignation after the fact, those circumstances are not present here. In Spadaro, we noted that "[a]n employee who revokes his resignation before the 'effective date' of his resignation and before the employer took steps to replace him is entitled to benefits." Id. at 859. Claimant did not resign with an "effective date"; he quit, effective immediately, when he essentially told Employer that he was quitting, got up, left the room, and did not report to work thereafter. Accordingly, Claimant's actions after May 14, 2012 do not alter his ineligibility for UC benefits under these circumstances.

Accordingly, for the foregoing reasons, we affirm the Board's Order.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alan M. Bier,

Petitioner

v.

Unemployment Compensation
Board of Review,

Respondent

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No. 1908 C.D. 2012

ORDER

NOW, April 26, 2013, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Petitioner	:	Submitted: March 1, 2013
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BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: April 26, 2013

I respectfully dissent. I cannot agree with the majority's conclusion that Alan M. Bier (Claimant) is ineligible for unemployment compensation (UC) benefits pursuant to section 402(b) of the Unemployment Compensation Law.¹

At the hearing, Claimant testified that he did not quit and attempted to return to work following the May 14, 2012, meeting with Smooth Line, Inc. (Employer). Claimant submitted a letter he had sent to Employer, dated May 16, 2012, informing Employer that he did not quit. Claimant further testified that he was dismissed because he had filed for partial unemployment after his overtime was cut.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(b).

The Unemployment Compensation Board of Review (UCBR), however, did not make any findings addressing whether Claimant attempted to preserve his employment relationship or whether he was terminated due to retaliation. Because we must review the totality of the circumstances to determine whether Claimant voluntarily quit, I believe this matter should be remanded for additional findings of fact and conclusions of law. *See Spadaro v. Unemployment Compensation Board of Review*, 850 A.2d 855, 859 (Pa. Cmwlth. 2004).

Whether or not a claimant's unemployment was the result of voluntarily leaving work is ultimately a question of law reviewable by this court. *Middletown Township v. Unemployment Compensation Board of Review*, 40 A.3d 217, 224 (Pa. Cmwlth. 2012). Claimant bears the burden of proving that his termination was not voluntary. *Spadaro*, 850 A.2d at 859.

However, “[a] finding of voluntary termination is essentially precluded unless the claimant has a conscious intention to leave his employment. In determining the intent of the employee, the totality of the circumstances surrounding the incident must be considered.” *Id.* (citing *Fekos Enterprises v. Unemployment Compensation Board of Review*, 776 A.2d 1018, 1021 (Pa. Cmwlth. 2001)) (holding that there was no evidence of the claimant's conscious intent to voluntarily leave his job because he attempted to contact employer). Here, the UCBR failed to make any findings regarding Claimant's attempts to return to the workplace or his allegation of retaliation by Employer for filing an unemployment compensation claim. When we examine the totality of the circumstances, including the nature of Claimant's meeting with Employer, Claimant's immediate attempts to continue working, and Claimant's

dissatisfaction with his wage cuts, Claimant's response to Employer, "yes, I guess so," is inconclusive as to whether Claimant had a conscious intention to leave his employment.

We must remain mindful of the humanitarian purpose of the Law. *See Diehl v. Unemployment Compensation Board of Review (ESAB Group, Inc.)*, ___ Pa. ___, ___, 57 A.3d 1209, 1217 (2012). "[T]he eligibility sections of the law must be liberally interpreted to provide the maximum amount of benefits allowable under the statute to a claimant who has experienced involuntary unemployment." *Id.* at ___, 57 A.3d at 1217 (citation omitted). "[D]isqualification provisions . . . should be narrowly construed." *Id.*

Accordingly, I would vacate and remand this matter to the UCBR for further findings of fact and conclusions of law regarding the circumstances surrounding Claimant's separation from work.

ROCHELLE S. FRIEDMAN, Senior Judge