

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ashley Fetrow,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 2338 C.D. 2012
	:	
Respondent	:	Submitted: July 5, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY

FILED: July 29, 2013

Ashley Fetrow (Claimant) petitions this Court for review of the Unemployment Compensation Board of Review's (UCBR) November 26, 2012 order affirming the Referee's decision finding Claimant eligible for unemployment compensation (UC) benefits under Section 402(e) of the Unemployment Compensation Law (Law),¹ but ineligible for UC benefits under Section 401(d)(1) of the Law.² The issues for this Court's review are: (1) whether Claimant had good cause for her failure to appear at the Referee hearing, and (2) whether Claimant met her burden of proving she was able and available for work. We affirm.

Claimant was employed as a full-time warehouse associate with Amazon.com, LLC (Employer) from April 24, 2011 until July 11, 2012, when she

¹ Act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e) (relating to an employee's ineligibility for benefits for any week in which her unemployment is due to discharge for willful misconduct).

² 43 P.S. § 801(d)(1) (relating to benefits payable to the unemployed who are able to work and are available for suitable work).

was discharged for absenteeism and/or tardiness. On July 22, 2012, Claimant applied for UC benefits. On August 20, 2012, the Altoona UC Service Center determined that although Claimant was eligible under Section 402(e) of the Law for UC benefits, Claimant had not sustained her burden of proving that she was able and available for suitable work and, thus, was ineligible for UC benefits under Section 401(d)(1) of the Law. Claimant appealed, and on September 20, 2012, a Referee held a hearing. Neither Claimant nor Employer appeared at the hearing. On September 24, 2012, the Referee affirmed the UC Service Center's determination, finding that Claimant was eligible for UC benefits under Section 402(e) of the Law, but ineligible for benefits under Section 401(d)(1) of the Law. Claimant appealed to the UCBR. On November 26, 2012, the UCBR affirmed the Referee's decision, adopted and incorporated the Referee's findings and conclusions, and ruled that Claimant did not establish good cause for her non-appearance at the Referee's hearing. Claimant appealed to this Court.³

Claimant argues that she missed the Referee's hearing because she mistakenly thought it was on September 28, 2012. This Court has held that where a party fails to appear at a hearing and, thereafter, asserts good cause for her nonappearance, the matter must be remanded to the Referee to allow the party to submit evidence. *Volk v. Unemployment Comp. Bd. of Review*, 49 A.3d 38 (Pa. Cmwlth. 2012). If, however, "the reasons proffered are clearly legally insufficient to support the finding of proper cause . . . a hearing would be unnecessary." *Id.* at 47 n.12. This Court has also long held that a claimant's negligence in failing to observe the date on the hearing notice "is insufficient 'proper cause,' as a matter of law, to justify h[er] failure to appear at a referee's hearing" *Savage v. Unemployment*

³ This Court's review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Johnson v. Unemployment Comp. Bd. of Review*, 869 A.2d 1095 (Pa. Cmwlth. 2005).

Comp. Bd. of Review, 491 A.2d 947, 950 (Pa. Cmwlth. 1985). Moreover, Section 101.51 of the UCBR's Regulations provides, in pertinent part: "If a party notified of the date, hour and place of a hearing fails to attend a hearing without proper cause, the hearing may be held in his absence. In the absence of all parties, the decision may be based upon the pertinent available records." 34 Pa. Code § 101.51. Thus, the UCBR properly determined that Claimant did not have good cause to miss the Referee hearing.

Claimant also argues that, had she attended the hearing, she could have proved that she was able and available to work. However, because Claimant was not present at the hearing, the Referee and the UCBR were constrained to rely on the UC Service Center's record and find otherwise.

In *Rohde v. Unemployment Compensation Board of Review*, 28 A.3d 237 (Pa. Cmwlth. 2011), this Court clearly described the analysis necessary to determine whether a claimant is eligible for benefits under Section 401(d)(1) of the Law:

Section 401(d)(1) of the Law provides, in part, that [c]ompensation shall be payable to any employee who is or becomes unemployed and who [i]s able to work and available for suitable work. The burden of proving availability for suitable work is on the claimant. An unemployed worker who registers for unemployment is presumed to be able and available for work. This presumption is rebuttable by evidence that a claimant's physical condition limits the type of work he is available to accept or that he has voluntarily placed other restrictions on the type of job he is willing to accept. If the presumption of availability is rebutted, the burden shifts to the claimant to produce evidence that he is able to do some type of work and that there is a reasonable opportunity for securing such work. The real question is whether Claimant has imposed conditions on his employment which so limit his availability as to effectively remove him from the labor market.

Id. at 242-43 (citations and quotation marks omitted).

In the instant case, Claimant established a presumption of availability for employment by registering for UC benefits. *Id.* This presumption, however, is rebuttable, and, therefore, we must next consider whether Claimant's presumption of availability was effectively rebutted when she submitted an Internet Initial Claims Form on July 22, 2012 that included the following responses:

Are you able to work? Y
If no, please explain.

Are you available for work? N
If no, please explain. I'm trying to get my life normal again.
(Depression)

Certified Record Item 2 at 2. Such an admission by Claimant, as a party-opponent, constitutes an exception to the hearsay rule and is admissible as substantive evidence to prove the truth of the matter asserted. Pa.R.E. 803(25); *Allesandro v. Workers' Comp. Appeal Bd. (Precision Metal Crafters, LLC)*, 972 A.2d 1245 (Pa. Cmwlth. 2009).

Once a presumption has been rebutted, it disappears and has no further effect upon the outcome of the case. Thus, claimant cannot rely upon the presumption of availability to discharge [her] burden. Rather, [she] had an affirmative obligation to produce evidence that [she] was able to do some type of work and that there was a reasonable opportunity for securing such work.

Molnar v. Unemployment Comp. Bd. of Review, 397 A.2d 869, 870 (Pa. Cmwlth. 1979) (citation omitted). Because Claimant failed to appear at the hearing and present evidence to the contrary, the Referee had only Claimant's Internet Initial Claims Form upon which to rely. Based upon Claimant's response on that form, she did not meet her burden of proving that she was able and available for work. Thus, the UCBR properly affirmed the Referee's decision.

For the above reasons, the UCBR's order is affirmed.

ANNE E. COVEY, Judge

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ORDER

AND NOW, this 29th day of July, 2013, the Unemployment Compensation Board of Review's November 26, 2012 order is affirmed.

ANNE E. COVEY, Judge