

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RAME INC - Rush Architectural	:	
Metal Erectors, Inc.,	:	
Petitioner	:	
	:	
v.	:	No. 621 C.D. 2013
	:	Submitted: August 2, 2013
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: September 6, 2013

RAME INC - Rush Architectural Metal Erectors, Inc. (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) that granted Robert J. Smith (Claimant) unemployment compensation (UC) benefits after finding him not ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law).¹ Employer contends the Board erred or abused its discretion in determining that Claimant could not purchase his own automobile and that Claimant made reasonable efforts to obtain transportation. For the reasons that follow, we affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. 2897 (1937), as amended, 43 P.S. §802(b). Section 402(b) provides “[a]n employe shall be ineligible for compensation for any week ... [i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature” Id.

I. Background

The Board found the following facts. Claimant worked for Employer as a full-time laborer and sheet metal worker from August 2012 until his last day of work on November 9, 2012.

Claimant lives in Washington, Pennsylvania. He worked at Employer's worksite in Cleveland, Ohio, which is approximately 150 miles from his home. Employer does not provide transportation for its employees. Claimant had an accident about a week before he began working for Employer. The accident rendered Claimant's vehicle inoperable. Claimant could not afford to purchase an additional vehicle. However, Claimant received rides to work and shared a hotel room with a coworker.

On Tuesday, November 6, 2012, Claimant's coworker abruptly left the worksite due to his mother's illness. Claimant managed to find another ride from the hotel to the worksite for the rest of the week. On Saturday, Claimant informed his foreman that he could not work that day due to illness. Employer sent its employees home later that Saturday. Claimant also learned his coworker would not be returning to work.

The following Monday, November 12, Claimant informed Employer that he lost his ride and had no way to commute between his home and the Cleveland worksite. Employer told Claimant that if he could find another employee from his home area, Employer would hire him. Claimant's attempts to find another person willing to travel for work were unsuccessful. Employer also

had a worksite in Morgantown, West Virginia. However, Employer needed Claimant's skills at the Cleveland worksite.

On Friday, November 16, 2012, Claimant voluntarily quit his employment due to lack of transportation. Continuing work remained available.

Claimant applied for UC benefits, which the local UC service center denied under Section 402(b) on the ground that he voluntarily quit due to transportation problems. The service center found that after Claimant's coworker quit, Claimant did not attempt to secure alternate transportation to and from work.

On appeal, the referee affirmed the UC service center and denied benefits under Section 402(b) of the Law. In so doing, the referee reasoned that Claimant failed to take appropriate steps to resolve his transportation issues and preserve an employment relationship. Claimant appealed further to the Board.

In reversing, the Board found Claimant's testimony credible and resolved the conflicts in the testimony in favor of Claimant. In granting Claimant benefits, the Board reasoned:

Here, it is undisputed that [Claimant] carpooled to work 150 miles, then stayed in a hotel room he shared with his coworker. When his coworker abruptly quit, [Claimant] was left without transportation. [Claimant] credibly testified that he informed [Employer] of the problem on November 12, 2012, but the only solution that was offered was for [Claimant] to find another individual from his home area to work for [Employer]. [Claimant] credibly testified that he tried, but was unsuccessful. [Claimant] also credibly testified that he could not afford

to purchase his own vehicle, and that there were no other coworkers from his area at the worksite. The Board finds that without transportation, such a commute was insurmountable. Further, the claimant made reasonable efforts to obtain transportation, but was unsuccessful. Therefore, he had no other choice but to quit. [Claimant] has proven that he had a necessitous and compelling reason to quit his employment.

Bd. Dec., 2/28/13, at 3. Accordingly, the Board ruled Claimant not ineligible for UC benefits under Section 402(b) of the Law. Employer petitions for review.²

II. Discussion

A. Argument

Employer contends the Board erred in determining (a) Claimant could not afford to purchase his own vehicle, and (b) Claimant made reasonable efforts to obtain transportation. In a voluntary quit case, a UC claimant bears the burden of proving necessitous and compelling reasons for leaving employment. Pollard v. Unemployment Comp. Bd. of Review, 798 A.2d 815 (Pa. Cmwlth. 2002). “Such reasons must result from ‘circumstances which produce pressure to terminate employment that is both real and substantial, and which would compel a reasonable person under the circumstances to act in the same manner.’” Id. at 816 (citation omitted).

² Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Doyle v. Unemployment Comp. Bd. of Review, 58 A.3d 1288 (Pa. Cmwlth. 2013).

Here, Employer argues that Claimant had the burden of proving his transportation problem was virtually insurmountable. Schachte v. Unemployment Comp. Bd. of Review, 484 A.2d 426 (Pa. Cmwlth. 1984). Claimant must further show that he took reasonable steps to overcome those problems before leaving his employment. Wagman v. Unemployment Comp. Bd. of Review, 430 A.2d 383 (Pa. Cmwlth. 1981). These steps should include an investigation of other transportation possibilities. Schachte.

Regarding Claimant's inability to purchase a vehicle, Employer asserts Claimant presented no testimony as to any attempts to secure a vehicle, which would have preserved his employment relationship. Further, Employer asserts Claimant's passive attitude in addressing his transportation problem was not indicative of a genuine willingness or sincere desire to overcome his transportation obstacles. See Zupancic v. Unemployment Comp. Bd. of Review, 142 A.2d 395 (Pa. Super. 1958) (Board ruled claimant ineligible for UC benefits where his lack of transportation was not an insurmountable problem and his passive attitude did not indicate a sincere desire to overcome a surmountable obstacle).

As to reasonable steps to overcome Claimant's transportation problem, Employer's witnesses testified a coworker lives in Steubenville, Ohio. Employer submits that this Court could take judicial notice of the close proximity of Steubenville to Claimant's home in Washington, Pennsylvania. Despite the existence of this coworker, Claimant never testified he made any effort to secure a ride to work with this coworker. Thus, Employer posits, whether this coworker

could have provided Claimant with transportation to work will never be known. As such, Employer argues this fact demonstrates that Claimant failed to meet his burden of proving that he took reasonable steps to overcome his transportation problem. Wagman.

As a final issue, Employer asserts Claimant's contention that he has no public or private transportation to get to work, coupled with the fact Claimant presented no other evidence of available work, indicates his unavailability for work under Section 401(d)(1) of the Law.³ Zupancic.

B. Analysis

As an initial note, we agree with Employer that for transportation inconvenience to constitute necessitous and compelling cause "a claimant must establish that the inconvenience presented an insurmountable problem and that he took reasonable steps to remedy or overcome the problem prior to terminating employment." Pollard, 798 A.2d at 817. However, where a claimant makes a laudable effort to maintain employment and is thereafter forced to terminate his employment due to stressful circumstances and insurmountable commuting problems, "the decision to terminate employment rises above mere personal whim or choice and instead represents a reasonable response to causes of a necessitous and compelling nature." Speck v. Unemployment Comp. Bd. of Review, 680 A.2d 27, 31 (Pa. Cmwlth. 1996).

³ Section 401(d)(1) of the Law provides, "Compensation shall be payable to any employe who ... [is] able to work and available for suitable work" 43 P.S. §801(d)(1).

Here, the Board found Claimant had an accident a week before he began work for Employer. Bd. Dec., Finding of Fact (F.F.) No. 2. As a result of the accident, Claimant's vehicle was inoperable. Id. In addition, Claimant could not afford to purchase additional transportation. Id.

The Board's Finding of Fact No. 2 is supported by substantial evidence.⁴ Claimant testified he could not replace his wrecked vehicle. Notes of Testimony (N.T.),⁵ 1/8/13, at 5. Claimant explained he could not afford to buy another car, in part, because of the expenses he incurred staying in a hotel at the worksite. Id. at 5-6. As the final fact-finder in UC cases, the Board is empowered to resolve all issues of witness credibility, conflicting evidence and evidentiary weight. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008). Moreover, as the prevailing party below, Claimant is entitled to the benefit of all reasonable inferences drawn from the evidence. Id.

Also, although Employer asserts Claimant offered no testimony regarding his attempts to secure an automobile, Employer did not cross-examine Claimant on this issue. Regardless, it is irrelevant whether the record includes evidence that would support findings other than those made by the Board; the proper inquiry is whether the evidence supports the findings actually made. Id.

⁴ Substantial evidence is defined as evidence that a reasonable mind might accept as sufficient to support the conclusion reached. Bruce v. Unemployment Comp. Bd. of Review, 2 A.3d 667 (Pa. Cmwlth. 2010). Where substantial evidence supports the Board's findings, they are conclusive on appeal. Id. Further, it is irrelevant whether the record contains evidence supporting findings other than those made. Id.

⁵ Certified Record at Item #8.

Here, the Board resolved all conflicts in the testimony in Claimant's favor. Bd. Dec. at 3.

In addition, the Board found that after Claimant's coworker left the worksite, Claimant informed Employer the following Monday that he lost his ride to Cleveland and that he had no way to commute to the worksite. F.F. Nos. 11, 12. These findings are supported by Claimant's testimony. See N.T. at 6-7.

Claimant also testified Employer gave him permission to find another individual from his home area that Employer could hire to enable Claimant to get to work. F.F. No. 13; N.T. at 4, 10. Claimant tried to find someone, but was unsuccessful. F.F. No. 14; N.T. at 4, 10.

Nonetheless, Employer presented testimony that a coworker at the Cleveland worksite lived in Steubenville, Ohio. See N.T. at 9. Claimant, however, testified Steubenville was not near Washington, Pennsylvania.⁶ Id. Ultimately, the Board found there were no other employees at the Cleveland worksite from Claimant's home area. F.F. No. 15. Again, we note the Board credited Claimant's testimony over that of Employer's witnesses. Thus, the record supports the Board's finding that there were no other employees with whom Claimant could commute to the Cleveland worksite. See Ductmate.

⁶ We decline Employer's request to take judicial notice of the "close proximity" of Steubenville, Ohio to Claimant's home. See Employer's Br. at 13. Nevertheless, www.distancebetweencities.net/steubenville_oh_and_washington_pa/ (last visited 8/19/13) indicates Steubenville is approximately 35 miles from Washington, Pennsylvania, with an estimated commuting time of 55 minutes. This would support Claimant's position that Steubenville was not part of his home area.

In light of the Claimant's circumstances, we discern no error in the Board's determination that Claimant faced an insurmountable commuting problem. The distance of Claimant's 150-mile commute to the Cleveland worksite, the decision of his coworker to quit, Claimant's inability to afford to replace his wrecked vehicle (due in part to expenses incurred living near the Cleveland worksite during the week), and his unsuccessful attempts at recruiting a coworker from his home area to travel to the worksite left Claimant no other choice but to quit his employment. Given Claimant's efforts to overcome these obstacles, the Board properly determined Claimant established necessitous and compelling reasons for his voluntary quit. See Speck; Pollard (for transportation problems to constitute necessitous and compelling cause for a voluntary quit, the problems must be insurmountable and the claimant must show he took reasonable steps to remedy or overcome the problem); Wagman (same).

Finally, we reject Employer's contention that Claimant's transportation problems rendered him unavailable for work and thus ineligible for UC benefits under Section 401(d)(1) of the Law. First and foremost, as the Board points out, Employer waived this issue by failing to raise it in its petition for review. Pa. R.A.P. 1513(a); Tyler v. Unemployment Comp. Bd. of Review, 591 A.2d 1164 (Pa. Cmwlth. 1991).

Further, regardless of waiver, there is a presumption that an unemployed worker who registers for UC benefits is able and available for work. Penn Hills Sch. Dist. v. Unemployment Comp. Bd. of Review, 496 Pa. 620, 437 A.2d 1213 (1981). Here, Employer offered no evidence that Claimant was

unavailable for work in his home area. Consequently, Employer failed to rebut the presumption of Claimant's availability for work.

III. Conclusion

For the above reasons, we discern no error or abuse of discretion by the Board in ruling Claimant not ineligible for UC benefits under Section 402(b) of the Law based on voluntarily quit due to insurmountable transportation problems in commuting 150 miles from his home to Employer's worksite. Accordingly, we affirm.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RAME INC - Rush Architectural	:	
Metal Erectors, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 621 C.D. 2013
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 6th day of September, 2013, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge