IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Samia Hadid,	:	
Petitioner	:	
	:	
v.	:	No. 491 C.D. 2014
	:	Submitted: January 2, 2015
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: February 2, 2015

Samia Hadid (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of a Referee that Claimant is ineligible for benefits under Section 402(a) of the Unemployment Compensation Law (Law)[1] because she refused suitable work. We affirm.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937), 2897, *as amended*, 43 P.S. §802(a). That section provides, in relevant part:

> An employe shall be ineligible for compensation for any week –
>
> (a) In which his unemployment is due to failure, without good cause, either to apply for suitable work at such time and in such manner as the department may prescribe, or to accept suitable work

(Footnote continued on next page…)

Claimant last worked for Allied Professional Services (Employer) on September 13, 2013, when she was assigned to a job 14.5 miles from her home at which she earned $10.50 per hour. On September 20, 2013, Employer offered Claimant a job as a document cleaner located 10.4 miles from home at a rate of $10.00 per hour. Claimant had performed similar work in the past and the offer was for an indefinite period of time, but Claimant did not accept the job offered by Employer because it was too far for her to drive and it was only for one to three days. Claimant filed for benefits with the UC Service Center,[2] which determined that she was ineligible under Section 402(a) of the Law because she did not show good cause for refusing the job offer[3] and Claimant appealed.

(continued…)

> when offered to him by the employment officer or by any employer, irrespective of whether or not such work is in "employment" as defined in this act….

In turn, Section 4(t) of the Law defines suitable employment as "all work which the employe is capable of performing" and considers such factors as the claimant's physical fitness, prior training and experience, the distance of the work place from the residence, and the degree of risk that the job possesses to the claimant's health and safety. 43 P.S. §753(t).

[2] In the Claimant Questionnaire, she stated that she refused the job referral because "it was too far for me to drive," and "it was too far for me to drive and it was only for 1-3 days…." (Certified Record (CR) Item 3 at 2).

[3] "When determining whether a claimant is ineligible for benefits under section 402(a), the issues of suitability of work and of good cause must be looked at separately; they are distinct concepts. Suitability of work and good cause are questions of law, and are subject to the review of this Court. The claimant bears the burden of proof on both issues." *Rising v. Unemployment Compensation Board of Review*, 621 A.2d 1152, 1153-54 (Pa. Cmwlth. 1993). A claimant establishes good cause by demonstrating a real and substantial reason for refusing suitable work. *Big Mountain Imaging v. Unemployment Compensation Board of Review*, 48 A.3d 492, 495 (Pa. Cmwlth. 2012). Benefits are properly denied where she refuses to work for a succeeding employer with similar pay, benefits and working hours. *Kobie v. Unemployment Compensation Board of Review*, 525 A.2d 846, 847 (Pa. Cmwlth. 1987). In addition, the fact that a job is temporary does

(Footnote continued on next page…)

Claimant received a Notice of Telephone Hearing (Notice) from the Board indicating that she and Employer's representative were to appear in person at the Referee's office on November 5, 2013, and that the Department of Labor and Industry's (Department) representative would participate by telephone. (Reproduced Record (RR at 2a, 5a)). The Notice instructed that each party scheduled to participate in person "MUST report 15 minutes prior to the designated hearing time to review the file for this appeal. Please bring all documents relevant to this appeal with you." (*Id.* at 2a) (emphasis in original). The Notice also instructed that each party scheduled to participate by telephone "must contact the Referee Office listed above BEFORE THE HEARING if your telephone number listed on this notice is INCORRECT or if no telephone number appears on this notice." (*Id.*) (emphasis in original).

On October 25, 2013, Claimant sent the Referee's Office a note stating, "I am aware that you scheduled a hearing on Nov. 5, 2013 at 12:45[.] Sending this form in case you still need it." (CR Item 8 at 2, 4). Claimant also enclosed copies of her Petitions for Appeal of the Service Center's determination, her statement of reasons for disagreeing with the determination and filing the appeal, an Agreement of Restitution that she executed in August 2013, and an initial payment based on an at fault overpayment of benefits totaling $216.00. (*Id.* at 5-9). On October 31, 2013, Claimant called the Referee's Office to request an Arabic Interpreter for her hearing

(continued…)

not constitute good cause to refuse the offer of work. *Raffaele v. Unemployment Compensation Board of Review*, 465 A.2d 85, 86 (Pa. Cmwlth. 1983). Likewise, a claimant failed to establish good cause that a 40-mile commute to suitable work was excessive where he did not show that he made any reasonable attempt to resolve the transportation problem. *Shaffer v. Unemployment Compensation Board of Review*, 531 A.2d 533, 535-36 (Pa. Cmwlth. 1987).

on Tuesday, November 5, 2013, at 12:45 p.m. and left her telephone number if the Referee had any questions or needed to reach her. (CR Item 9 at 1).

Claimant did not appear at the Referee's hearing, but the documents in her claim file were admitted into evidence. (N.T. 11/5/13[4] at 2). Employer's Personnel Coordinator, Karen Rieker, testified that Claimant last worked for Employer from September 3 through September 13 at $10.50 per hour in a position 14.5 miles from her home. (*Id.* at 3). She stated that on September 20, Employer offered her a job as a document cleaner at $10.00 per hour that was 10.4 miles from Claimant's residence and that Claimant had done similar work in the past. (*Id.*). She testified that it was a project-based position for an ongoing project with no known end date to it, was for an indefinite length of time, and the workers assigned there were still working. (*Id.* at 4).

The Referee affirmed the Service Center's determination stating:

> The employer witness credibly testified that the claimant was offered a job 10.4 miles from her home paying $10.00 an hour and that the job was for an indefinite period of time. The evidence also shows that the claimant had performed similar work in the past and that the offered job was closer to the claimant's home than her previous job. The claimant failed to offer any credible reason for rejecting the job offer. The claimant's documents indicate that the job offered was too far for her to drive, however, the job offer was closer to the claimant's home than the job she had worked in the past. Because the employer has established that the claimant was offered suitable employment, and because the claimant has failed to show a good reason for not accepting

[4] "N.T. 11/5/13" refers to the transcript of the Referee's hearing.

> that employment, the claimant is not eligible for benefits under Section 402(a) of the Law.

(Referee's 11/5/13 Decision at 2).

Claimant appealed the Referee's decision and asked for a remand stating, in relevant part:

> I received a Notice of Telephone [Hearing] on 10/22/2013 and I took it for granted because the of the head line of the letter that it is "A [T]elephone Hearing." So I waited at home for the phone [call] that did not come. I got in touch with the office who told me that I missed the interview in person. I was shocked that the interview was in person since the title of the notice I received was "A Telephone Hearing." I did not by any means miss the meeting intentionally.

(CR Item 12 at 2).

In January 2014, the Board issued an order adopting the Referee's findings and conclusions and affirming his decision denying Claimant benefits under Section 402(a). (CR Item 13). The Board also denied Claimant's request for remand for additional testimony stating, "The hearing notice indicated that [Claimant] was scheduled to appear 'In Person.' The Department representative was the only party scheduled to testify 'By Telephone.'" (*id.*), and Claimant appealed.[5]

[5] Our review is limited to determining whether the Board's findings of fact are supported by substantial evidence in the record, whether errors of law were committed, whether agency procedure was violated, or whether constitutional rights were violated. *Gillins v. Unemployment Compensation Board of Review*, 633 A.2d 1150, 1153 (Pa. 1993).

Claimant first argues that the Notice in this case violates Section 101.130(a)(2) of the Department's regulations, 34 Pa. Code §101.130(a)(2),[6] and her due process rights because it did not clearly inform her that she was required to appear at the Referee's hearing in person and that it would not be conducted with her over the telephone. We do not agree.

Due process rights must be afforded to parties in administrative hearings, including unemployment compensation proceedings. *Hall v. Unemployment Compensation Board of Review*, 584 A.2d 1097, 1101 (Pa. Cmwlth. 1990). The most essential of these rights are reasonable notice, the opportunity to be heard at a full and fair hearing, and the opportunity to cross-examine adverse witnesses. *McFadden v. Unemployment Compensation Board of Review*, 806 A.2d 955, 958 (Pa. Cmwlth. 2002). As this Court has explained, "'Notice is the most basic requirement of due process…. Notice should be reasonably calculated to inform interested parties of the pending action, *and the information necessary to provide an opportunity to present objections*.'" *The Manor at St. Luke Village v. Department of Public Welfare*, 72 A.3d 308, 314 (Pa. Cmwlth. 2013), *appeal denied*, 94 A.3d 1010 (Pa. 2014) (citation omitted and emphasis in original).

Contrary to Claimant's assertion, the Notice provided in the instant case comports with the requirements of both due process and Section 101.130(a)(2) of the Department's regulations. While the Notice initially stated that the hearing on her

[6] Section 101.130(a)(2) states, in relevant part, that "[w]hen testimony by telephone is to be taken, the … hearing notice will indicate … [t]he names of counsel, authorized agent, parties and witnesses, if known, who are scheduled to appear or testify by telephone."

appeal would be a "Telephone Hearing," as outlined above, it specifically stated that Claimant and Employer's representative were to appear "In Person" at the Referee's Office and that the Department's representative, listed by name, title, telephone number and address, would be participating by telephone as required by Section 101.130(a)(2). (RR at 2a, 5a). The Notice also instructed Claimant that "EACH PARTY SCHEDULED to participate IN PERSON … MUST report 15 minutes prior to the designated hearing time to review the file for this appeal." (*Id.* at 2a) (emphasis in original).

The Notice also instructed "ALL PARTIES" that "If you have documents to be entered or testified from at this hearing, you must submit them to the Referee Office listed above at leave five (5) days BEFORE THE HEARING." (RR at 2a) (emphasis in original). Claimant clearly understood this portion of the Notice because, as noted above, she sent the Referee's Office a note acknowledging the date of the hearing and included a number of documents relating to her appeal more than five days before it was scheduled to occur. (CR Item 8 at 2, 4, 5-9).

The Notice further alerted Claimant, "If you require assistance because … you need an interpreter for your own language other than English, ***contact the Referee's Office listed on this notice as soon as possible***…." (RR at 3a) (emphasis in original). Claimant clearly understood this portion of the Notice because, as noted above, she called the Referee's Office to request an Arabic Interpreter prior to the hearing and left her telephone number in case the Referee needed to reach her. (CR Item 9 at 1).

In addition, the Referee properly held the hearing in Claimant's absence pursuant to Section 101.51 of the Department's regulations, 34 Pa. Code §101.51,[7] and the Board properly denied Claimant's request to reopen the hearing under Section 101.24(a), 34 Pa. Code §101.24(a),[8] because Claimant's purported misreading of the Notice is insufficient "proper cause" as a matter of law to justify her failure to appear at the Referee's hearing. *See, e.g., Savage v. Unemployment Compensation Board of Review*, 491 A.2d 947, 950 (Pa. Cmwlth. 1985) ("Claimant's own negligence was the sole cause of his not appearing at the … referee's hearing. We hold that a claimant's own negligence is insufficient 'proper cause,' as a matter of law, to justify his failure to appear at a referee's hearing and warrant a new hearing…."); *Ortiz v. Unemployment Compensation Board of Review*, 481 A.2d 1383, 1386 (Pa. Cmwlth. 1984) ("If the Board determines … that Claimant did not have proper cause for failing to attend the referee's hearing, then it must issue a decision on the merits with findings of fact based upon the record before the referee including any testimony that the employer may wish to offer in support of its burden of proof and, additionally, attach to the record its reasons why proper cause was not found in the claimant's case.").

Finally, Claimant contends that she had good cause under Section 402(a) to decline Employer's offer of employment. However, the reasons that Claimant asserted in her application for benefits for rejecting the offered employment, *i.e.*, that

[7] Section 101.51 states, 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 h[er] absence…"

[8] Section 101.24(a) states, in relevant part, "If a party who did not attend a scheduled hearing subsequently gives written notice … and it is determined by the tribunal that h[er] failure to attend the hearing was for reasons which constitute 'proper cause,' the case shall be reopened."

"it was too far for me to drive and it was only for 1-3 days…,"[9] are contradicted by the testimony of Employer's witness at the hearing that it involved a shorter commute and was of indefinite duration. As we have stated time and time again, the Board has sole discretion over questions of credibility and evidentiary weight. *See Eduardo v. Unemployment Compensation Board of Review*, 434 A.2d 215, 217 (Pa. Cmwlth. 1981) ("Questions of credibility and evidentiary weight are properly left to the Board which is free to reject even uncontradicted testimony.") (citation omitted). The Board's findings in this regard are clearly supported by substantial evidence.[10] Moreover, Claimant did not have good cause for rejecting this suitable employment involving similar work at a similar rate of pay and a shorter commute, even if it was only a temporary position. *Shaffer*; *Kobie*; *Raffaele*.

Accordingly, the Board's order is affirmed.

DAN PELLEGRINI, President Judge

[9] (CR Item 3 at 2). *See also* Claimant's Petition for Appeal (CR Item 5 at 4; CR Item 8 at 7) ("My employer, Allied Personnel, who place[s] me at vacancies that they have in different places, called asking me to go to a job for one day only. The place was 45 minutes away. They asked me to work the night shift. I said one day is too short of a period for me and it is not worth it, since the training is going to be more than half the time but I requested that [if] they give [me the] morning shift that I will be more than happy to work even for one day only….").

[10] The fact that Claimant presents a version of the facts different from that accepted by the Board is not a basis for reversal if substantial evidence supports the Board's findings. *Tapco, Inc. v. Unemployment Compensation Board of Review*, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994). "It is irrelevant whether the record contains evidence to support findings other than those made by the fact-finder; the critical inquiry is whether there is evidence to support the findings actually made." *Ductmate Industries, Inc. v. Unemployment Compensation Board of Review*, 949 A.2d 338, 342 (Pa. Cmwlth. 2008) (citation omitted).

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O R D E R

AND NOW, this 2nd day of February, 2015, the order of the Unemployment Compensation Board of Review dated January 24, 2014, at No. B-13-09-B-9527, is affirmed.

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DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE FRIEDMAN FILED: February 2, 2015

I respectfully dissent. I believe that the Board erred in denying Claimant's request to reopen the case for a new referee's hearing under 34 Pa. Code §101.24(a)[1] because Claimant established that her failure to attend the initial hearing was for proper cause. Therefore, I would reverse the Board's order and remand for a new hearing before the referee.

The majority concludes that Claimant's failure to appear at the referee's hearing was the result of her own negligence in misreading the hearing notice (Notice) and, thus, not for proper cause. *See generally Savage v. Unemployment*

[1] "If a party who did not attend a scheduled hearing subsequently gives written notice . . . and it is determined by the tribunal that h[er] failure to attend the hearing was for reasons which constitute 'proper cause,' the case shall be reopened." 34 Pa. Code §101.24(a).

Compensation Board of Review, 491 A.2d 947 (Pa. Cmwlth. 1985). I disagree. Claimant did not simply "misread" the Notice. The Notice stated, at the top of the first page in bold letters, "**NOTICE OF TELEPHONE HEARING**." (R.R. at 2a.) In her appeal to the Board, Claimant explained that, based on the Notice's heading, she understood that the hearing would be held via telephone and waited by her home telephone at the scheduled date and time of the hearing. When she did not receive a telephone call, she contacted the referee's office and was informed that she had missed the live hearing. According to Claimant, "I was shocked that the interview was in person since the Title of the notice I received was 'A Telephone Hearing.' I did not by any means miss the meeting intentionally." (R.R. at 17a.)

Although the majority recognizes that the heading on the Notice stated, "**NOTICE OF TELEPHONE HEARING**," the majority relies on the words "In Person" that appear beneath "CLAIMANT" and "EMPLOYER" at the top of the first page. The majority also points out that Claimant apparently understood other portions of the Notice because, consistent with the Notice's instructions, she requested an Arabic interpreter and mailed in documentary evidence in advance of the hearing. The majority therefore concludes that Claimant should have also understood that she was supposed to appear in person. I cannot agree with this analysis.

Claimant did not "misread" the Notice; the Notice was misleading. Regardless of whether Claimant understood the written instructions within the Notice, the heading on the Notice prominently stated, "**NOTICE OF TELEPHONE HEARING."** It was not unreasonable for a layperson such as Claimant to believe

that the hearing would be anything other than a telephone hearing.[2] In my view, the evidence does not support a finding of negligence, particularly where Claimant had complied with the instructions within the Notice and was prepared to testify before the referee at the scheduled date and time.

Because I would conclude that Claimant's failure to appear was for proper cause, I would reverse the UCBR's order and remand for a new hearing. Accordingly, I respectfully dissent.

_____

ROCHELLE S. FRIEDMAN, Senior Judge

[2] Remarkably, it is not until page four of the Notice that one learns that the *only* party scheduled to participate in the hearing "By Telephone" was the agency representative. (R.R. at 5a.)