IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard B. Brown,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1129 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	Submitted: November 24, 2010
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: May 3, 2011**

Richard B. Brown (Claimant), pro se, petitions this Court for review of an Order of the Unemployment Compensation Board of Review (Board), which affirmed an Unemployment Compensation Referee (Referee) determination finding Claimant ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law).[1] Essentially, the issue before the Board was whether Claimant's separation from employment was a voluntarily quit or whether his

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

employer, Diamond Cargo Express, terminated Claimant for willful misconduct. The Board credited the testimony of the Owner of Diamond Cargo Express (Employer[2]) that Claimant voluntarily quit and, in doing so, determined that Claimant failed to uphold his burden of showing a necessitous and compelling reason for his quit. On appeal, Claimant contends that: (1) it was erroneous for the Referee to consider Section 402(b) of the Law in determining whether Claimant was ineligible for benefits because the Unemployment Compensation Service Center (Service Center) determined that Claimant was ineligible for benefits under Section 402(e) of the Law, 43 P.S. § 802(e), which was the section at issue on appeal; (2) the Referee was not an impartial arbiter; and, (3) the credibility determination in favor of Employer was not supported by the evidence. For the following reasons, we are constrained to affirm the Order of the Board.

This case was initiated by Claimant when he filed for unemployment compensation benefits after being separated from his employment on October 8, 2009, as an assistant dispatcher for Employer, a position which does not require Claimant to have a valid driver's license. The Service Center found him ineligible for benefits for committing willful misconduct under Section 402(e) because a "driver[']s license was necessary in order for the Claimant to perform his job." (R. Item 4, Service Center Notice of Determination, Findings of Fact (FOF) ¶ 4.) Claimant appealed the Service Center's determination because he was not required to have a valid driver's license to perform his job duties as an assistant dispatcher for Employer. Claimant was represented by counsel at the hearing before the

[2] Because Owner owns Diamond Cargo Express, we will refer to both as "Employer" throughout this opinion.

Referee on December 4, 2009 (First Hearing) and was prepared to present evidence that he did not commit willful misconduct under Section 402(e) of the Law. Employer also appeared at the First Hearing. Claimant testified that he was fired from his position as assistant dispatcher on October 8, 2009, and that Employer did not give Claimant a reason for his discharge. (R. Item 8, First Hr'g Tr. at 5-6.) Employer disagreed with this background information and testified that Claimant voluntarily quit his employment as an assistant dispatcher on October 8, 2009, because "he didn't like being an operator and he didn't like the rate of pay of $11." (R. Item 8, First Hr'g Tr. at 6.) Employer further explained that Claimant's initial position with Employer was as a truck driver at a final rate of pay of $13.00 per hour. Employer testified that he fired Claimant from that position in August 2009 because Claimant was convicted of a DUI and no longer had a valid commercial driver's license. Employer testified that he rehired Claimant about one week later on September 2, 2009, as an assistant dispatcher, and that Claimant quit this position on October 8, 2009. (R. Item 8, First Hr'g Tr. at 6-7.) Because Claimant's counsel indicated at the First Hearing that they were not prepared to argue eligibility for benefits under Section 402(b), in which Claimant would have the burden of showing a necessitous and compelling reason to quit, the Referee continued the hearing for the parties to prepare their case under both Section 402(b) and Section 402(e), at which point the Referee would decide whether Claimant voluntarily quit or whether he was fired, and ultimately, whether Claimant was eligible for benefits under the Law.

At the second hearing on January 4, 2010 (Second Hearing), Claimant and two witnesses appeared, as well as Employer. Essentially, Claimant testified that

he was originally hired by Employer on May 15, 2008, as a truck driver, but after he notified Employer that he could no longer drive a truck because of a DUI conviction, Employer transferred him into the new position of assistant dispatcher at a lower rate of pay. In support of his assertion that he was never fired by Employer but, instead, was transferred to the assistant dispatcher position, Claimant submitted an "Employee Status Change" document allegedly prepared by Employer showing he was transferred, not rehired, and it listed other information about the transfer. (R. Item 14, Second Hr'g Tr. Ex. C-1.) Claimant also testified that he never quit his position as assistant dispatcher; rather, Employer approached him about one week before October 8, 2009, and told him it was not working out and that Claimant's last day of work would be October 8, 2009. Employer's testimony and evidence at the Second Hearing was drastically different than that offered by Claimant. Employer testified that he fired Claimant from the truck driving position after Claimant was convicted of a DUI, and that he later rehired Claimant on September 2, 2009, as an assistant dispatcher because he valued Claimant as an employee. In support of this testimony, Employer also submitted the same form titled "Employee Status Change," but this particular form showed Claimant was rehired, not transferred. (R. Item 14, Second Hr'g Tr. Ex. E-3.) Thus, there were two different documents submitted into evidence, each purporting to be the "Employee Status Change" for Claimant, which totally contradicted each other. (See R. Item 14, Second Hr'g Tr. Exs. C-1, E-3.) With regard to the facts surrounding Claimant's final separation from employment with Employer on October 8, 2009, Employer's testimony was inconsistent. Employer testified that Claimant quit his position as assistant dispatcher on October 8, 2009. Employer also testified that Claimant quit his position as assistant dispatcher about one week

before October 8, 2009, but Claimant and Employer agreed on October 8th being Claimant's last day, which is the last day Claimant worked for Employer. Employer also testified that he was interviewing different candidates to take over Claimant's position as assistant dispatcher the week of October 8th.

Claimant and Employer testified and argued differently: Claimant argued that he was discharged by Employer, under Section 402(e) of the Law, with the burden of proof on Employer to prove that Claimant committed willful misconduct, while Employer asserted that Claimant voluntarily quit his job, under Section 402(b) of the Law, placing the burden on Claimant to show that he quit for necessitous and compelling cause. Employer did not submit evidence of Claimant's willful misconduct because he argued that Claimant quit, and Claimant did not present evidence or testimony of a necessitous or compelling reason to quit because he argued that Employer fired him. As such, the Referee first had to decide whether Claimant quit or whether Claimant was terminated from his employment before he could determine whether Claimant was eligible for benefits.

The Referee ultimately concluded that Claimant voluntarily quit his job with Employer on October 8, 2009 and, in making this determination, credited the testimony of Employer. The Referee made the following factual findings:

1. The claimant began working for Diamond Cargo Express on May 15, 2008 and last worked on October 8, 2009 as a full-time dispatch assistant at a final rate of pay of $11 per hour.

2. On August 20, 2009, the claimant informed the employer that the claimant's driver's license had been revoked as a result of his second conviction for DUI.

3. At that time, the claimant's position was a driver and a valid driver's license was required for that position.

4. The employer discharged the claimant for failure to maintain his driver's license.

5. The employer valued the claimant as an employee and rehired the claimant as an assistant dispatcher on September 2, 2009.

6. The claimant informed the employer that he did not like his job and was dissatisfied with the pay and that he would be leaving effective October 8, 2009.

7. The claimant voluntarily left employment in accordance with this resignation.

8. The claimant reported to the UC Service Center that his separation was due to a discharge for "loss of license."

(R. Item 15, Referee FOF ¶¶ 1-8.) The Referee determined that Claimant was ineligible for benefits because in accepting the new position of assistant dispatcher, which was a lesser paying job than his previous truck driving position, it raised a presumption of suitability. "Because the claimant's mere dissatisfaction with his working conditions did not constitute necessitous and compelling reasons for leaving employment, the claimant must be found ineligible under Section 402(b) of the Law." (R. Item 15, Referee Decision at 2.)

Claimant appealed the Referee's decision to the Board arguing, among other things, that Employer's testimony and evidence were falsified. Specifically, Claimant put forth a convincing argument that the Employee Status Change document that Employer submitted was forged by highlighting marks on the form, from which one could conclude that the document was redacted. Claimant also took issue with several findings of fact and argued that he was fired from his

position of assistant dispatcher. On May 6, 2010, the Board issued its Order affirming the Referee's decision. While the Board had some concern over the allegedly fraudulent evidence that was presented to the Referee in the form of the Employee Status Change documents, it held that any evidence regarding Claimant's transition in positions from truck driver to assistant dispatcher was irrelevant because the only issue before the Board was whether Claimant quit his job or whether he was terminated from this position on October 8, 2009. The Board ultimately agreed with the Referee's credibility determination in favor of Employer and adopted the Referee's findings of fact and conclusions of law. The Board concluded that Claimant was ineligible for benefits under Section 402(b) of the Law. Claimant now petitions this Court for review.[3]

Initially, we note, as the Board observes, that Claimant's pro se brief is highly disorganized, inordinately long, and fails to comply with multiple Rules of Appellate Procedure. Specifically, the brief fails to comply with: (1) Pa. R.A.P. 124(a) because the brief is single spaced and the formatting is disorganized; (2) Pa. R.A.P. 1513 because it lacks a general statement of objections to the Board's Order, consecutively numbered paragraphs containing a single allegation of fact or other statement, and, due to its inordinate length, it is difficult to tell whether it

[3] This "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 Ins. Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006). Substantial evidence is defined as "such relevant evidence which a reasonable mind would accept as adequate to support a conclusion." Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518, 521 (Pa. Cmwlth. 1999).

contains a short statement of the relief sought; (3) Pa. R.A.P. 2116 because the statement of questions involved, among other things, asks no questions and gives no suggested answers; (4) Pa. R.A.P. 2117 because the statement of the case contains no references to the record that substantiate the factual assertions made by Claimant; and (5) Pa. R.A.P. 2119 because the argument portion of his brief is 27 pages in length that are not sequentially numbered, and not divided into as many parts as there are questions to be argued with no citation of authorities that are deemed pertinent to his arguments. However, our Court is generally inclined to construe pro se filings liberally, Robinson v. Schellenberg, 729 A.2d 122, 124 (Pa. Cmwlth. 1999), and Claimant's non-compliance with the Rules of Appellate Procedure does not impair our ability to discern his issues and arguments or otherwise preclude meaningful appellate review.

In reviewing Claimant's pro se brief, we have discerned three separate questions for review. First, Claimant argues that it was erroneous for the Referee to consider Section 402(b) of the Law in determining whether Claimant was ineligible for benefits because the Service Center determined that Claimant was ineligible for benefits under Section 402(e) of the Law, which was the only section at issue on appeal and the only section that should have been considered. In essence, Claimant is arguing that he was not given a fair hearing before the Referee because the Referee exceeded his scope of review.

The regulation involving appeals before referees, 34 Pa. Code § 101.87, provides:

> When an appeal is taken from a decision of the Department, the Department shall be deemed to have ruled upon all matters and questions pertaining to the claim. In hearing the appeal the tribunal shall consider the issues expressly ruled upon in the decision from which the appeal was filed. *However, any issue in the case may, with the approval of the parties, be heard, if the speedy administration of justice, without prejudice to any party, will be substantially served thereby*.

(Emphasis added). In Sharp Equipment Company v. Unemployment Compensation Board of Review, 808 A.2d 1019 (Pa. Cmwlth. 2002), this Court stated that in addition to requiring a referee to consider issues expressly decided by the Service Center's action, the above regulation "has been interpreted to allow the Referee to consider other issues so long as the claimant is not surprised or prejudiced." Id. at 1025 (citing Hine v. Unemployment Compensation Board of Review, 520 A.2d 102 (Pa. Cmwlth. 1987)).

Here, Claimant, as well as Employer, received a fair hearing. While we acknowledge that Employer failed to respond initially to the Service Center in response to its request for separation information from Employer, which was Employer's first opportunity to allege that Claimant quit under Section 402(b) of the Law, Employer did raise this issue before the Referee in the First Hearing. When Employer disagreed with Claimant's factual background that he was discharged from employment, Employer clearly explained to the Referee his allegation that Claimant quit on October 8, 2009. At that point, the Referee asked Claimant's counsel if they would consent to the Referee taking evidence under both theories of separation (Section 402(b) and 402(e)), which Claimant's counsel denied. As such, the Referee continued the First Hearing for the purpose of giving

Claimant notice that "we will be considering Section[] 402(b) and Section 402(e) of the Law." (R. Item 8, First Hr'g Tr. at 11.) The Referee explained:

> Well what's happened is one party [Claimant], the party that bears the burden is not consenting to have Section 402(b) considered here, that whether this was a quit. . . . [T]he appeal in this case is a Claimant's appeal and as a result the parties aren't on notice that a quit would be an issue according to what I have here. So if [Claimant and his counsel are] claiming that they're surprised and they had – they'll have the opportunity to prepare for that issue. . . . You'll get a new notice in the mail. It will say that both Section 402(b) and Section 402(e) just like this notice did, is officially going to be considered….

(R. Item 8, First Hr'g Tr. at 11.) Additionally, the Notice of Hearing for the Second Hearing that was sent to the parties clearly indicated that the issues to be resolved included whether Claimant's unemployment was due to his discharge from work for willful misconduct under Section 402(e) or whether he voluntarily quit his job for necessitous and compelling reasons under Section 402(b). (R. Item 13, Notice of Hearing for Second Hearing.) Claimant does not contest the sufficiency of the explanation at the First Hearing or the Notice of Hearing and, as a result, no surprise or prejudice exists here. Sharp. Moreover, at the Second Hearing, Claimant brought two witnesses who both testified on Claimant's behalf that Claimant was terminated from his employment, whereas at the First Hearing, Claimant appeared to testify on his own behalf alone, without other witnesses. Under these circumstances, the Pennsylvania Department of Labor and Industry's regulation did not bar the Referee from finding Claimant ineligible for benefits under Section 402(b), and the Board did not err in affirming the Referee's decision.

The second argument we glean from Claimant's pro se brief is that Claimant was not given a fair hearing before the Referee because the Referee was not an impartial arbiter. Claimant specifically takes issue with the fact that Employer was unrepresented at the hearing and the Referee guided him through the proceeding. After reviewing the hearing transcripts, it does not appear that the Referee acted inappropriately or partially in favor of Employer.

"Where a party is not represented by counsel the tribunal before whom the hearing is being held should advise him as to his rights, aid him in examining and cross-examining witnesses, and give him every assistance compatible with the impartial discharge of its official duties." 34 Pa. Code § 101.21(a). We note that at the hearings, the Referee acknowledged that Claimant was represented by counsel and advised both Employer and Claimant of their right to have an attorney, to offer witnesses, and to cross-examine witnesses. The Referee identified all of the documents of record, explained the burden of proof, explained Sections 402(b) and 402(e) of the Law, and explained how he would be taking evidence and testimony to determine whether Claimant's separation was due to a voluntary quit or a discharge. The Referee asked both Claimant and Employer questions surrounding Claimant's termination and gave each party an opportunity to ask questions, cross-examine and give closing remarks. The Referee explained the process to Employer, who was unrepresented, and assisted him impartially during the hearings. The Referee tried to keep the parties and Claimant's counsel from speaking over each other and to otherwise conduct the hearing in an orderly and expeditious manner. At no time did the Referee's statements make it appear that he was partial to Employer's version of the facts. Because there is no evidence in

the record that the Referee was acting as an advocate against Claimant and in favor of Employer, we conclude that Claimant was given a fair hearing.

Finally, Claimant contends that the Referee's and Board's credibility determinations in favor of Employer were erroneous. Claimant argues that the Employee Status Change document that Employer submitted was clearly redacted, and that, although evidence regarding Claimant's transition phase is irrelevant to the issue surrounding his final separation from employment on October 8, 2009, this fraudulent piece of evidence submitted by Employer is relevant in determining credibility of the parties. Additionally, Claimant points out that Employer's testimony regarding Claimant's separation from employment was inconsistent in that Employer argued that Claimant quit on October 8th and also testified that Claimant quit one week prior to October 8th. As such, Claimant contends that the Referee should have credited the consistent and truthful testimony of Claimant over that of Employer.

The Referee is not the final fact-finder in unemployment compensation cases; the Referee acts merely as the representative or agent of the Board. The resolving of conflicts in the evidence, *the determination of credibility*, the weighing of the evidence, and the drawing of inferences therefrom are matters for the Board in its capacity as the ultimate fact-finder. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 269-70, 276-77, 501 A.2d 1383, 1385, 1388 (1985). In making credibility determinations, the Board may accept or reject the testimony of any witness in whole or in part. Greif v. Unemployment Compensation Board of Review, 450 A.2d 229 (Pa. Cmwlth. 1982). As long as the

Board's factual findings are supported by substantial evidence, those findings are conclusive on appeal. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343, 1344 (Pa. Cmwlth. 1978). That Claimant may have given "a different version of the events, or . . . might view the testimony differently than the Board, is not grounds 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).

Here, although this Court, in reviewing the evidence and testimony, might have made different credibility determinations in favor of Claimant, this Court is *constrained* to affirm the credibility determinations of the Board and its findings as long as they are supported by the evidence. There is no question that the Board reviewed the Employee Status Change documents submitted by Claimant and Employer and was troubled by the fact that they were contradictory to each other. The Board noted that one or both may have been redacted. We also agree with Claimant that there are portions of Employer's testimony that are inconsistent with regard to the actual date that Claimant quit. However, the Board still found Employer more credible than Claimant, which is solely within its power to do. We cannot change that determination on appeal.

There is substantial evidence in the record to support the finding that Claimant quit his employment with Employer and his last day of employment was October 8, 2009. That evidence consists of Employer's testimony in both the First Hearing and Second Hearing. In the First Hearing, Employer testified that "[Claimant] quit" his position as assistant dispatcher because "he didn't like being

an operator and he didn't like the rate of pay of $11." (R. Item 8, First Hr'g Tr. at 6.) Employer explained that "[Claimant] and I talked days prior to that about his last day . . . so we agreed on the 8th." (R. Item 8, First Hr'g Tr. at 8.) Employer also testified at the Second Hearing that "[Claimant] quit" by resigning on October 8, 2009, because "[h]e didn't like his job and he didn't want to work for $11 an hour." (R. Item 14, Second Hr'g Tr. at 5.) The Board found Employer credible, which means they believed his testimony. Therefore, on appeal, we cannot make different credibility or factual findings and so cannot change the Board's factual finding that Claimant voluntarily quit his job. Because Claimant argued that he really did not quit, he did not provide any reason for quitting and the only evidence was that submitted by Employer. According to Employer's evidence, Claimant quit because he was not happy with the general duties and pay of the job. It is well-settled in this Commonwealth that dissatisfaction with wages or with work assignments is not a necessitous and compelling reason for voluntary termination of employment. Daniels v. Unemployment Compensation Board of Review, 336 A.2d 662, 664 (Pa. Cmwlth. 1975); James v. Unemployment Compensation Board of Review, 296 A.2d 288, 290 (Pa. Cmwlth. 1972). We, therefore, cannot disturb the Board's decision.

Based on the foregoing opinion, we are constrained to affirm the Order of the Board.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard B. Brown,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1129 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

O R D E R

NOW, May 3, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge