

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert F. Mastropaolo, :  
Petitioner :  
v. : No. 1409 C.D. 2010  
Unemployment Compensation : Submitted: November 12, 2010  
Board of Review, :  
Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: December 22, 2010

Robert F. Mastropaolo (Claimant), *pro se*, petitions for review of an order of the Unemployment Compensation Board of Review (Board) affirming the Referee’s decision denying Claimant unemployment compensation benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law).<sup>1</sup> We affirm.

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<sup>1</sup> 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, in pertinent part:

An employe shall be ineligible for compensation for any week—

\* \* \*

(b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature,

(Continued....)

Claimant filed a claim for benefits with the Indiana UC Service Center upon the separation of his employment as a full-time Manager of Change Management with Independence Blue Cross (Employer). The Service Center representative issued a determination denying his claim for benefits pursuant to Section 402(b) of the Law. A notice of determination of non-fault overpayment of benefit was issued to Claimant pursuant to Section 804(b) of the Law.<sup>2</sup>

Claimant appealed both determinations and a hearing was conducted before a Referee on February 25, 2010. Claimant appeared at the Referee's hearing *pro se* and testified on his own behalf. No one appeared on Employer's behalf at the hearing.

By decision and order mailed on March 1, 2010, the Referee affirmed the Service Center's determination finding Claimant ineligible for benefits pursuant to Section 402(b) of the Law. The Referee also affirmed the Service Center's determination that Claimant received a non-fault overpayment of benefits. Claimant appealed to the Board. Upon review of the record and the testimony submitted at the hearing before the Referee, the Board adopted the Referee's findings of fact and conclusions of law, which are as follows.

Claimant was last employed as a full-time Manager of Change Management with Employer from November 3, 1975, until October 30, 2009. Employer offered a Voluntary Early Retirement Program (VERP) package to its

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irrespective of whether or not such work is "employment" as defined in this act.

<sup>2</sup> 43 P.S. §874(b). Section 804(b) of the Law provides in pertinent part that "any person who other than by reason of his fault has received with respect to a benefit year any sum as compensation under this act to which he was not entitled shall not be liable to repay such sum but shall be liable to have such sum deducted from any future compensation payable to him with respect to such benefit year, or the three-year period immediately following such benefit year ...."

eligible employees which ended on October 30, 2009. The VERP offered an incentive adding three years to an employee's retirement age and three years to the employee's service in computing the employee's pension plus a monetary benefit in the form of a pension.

Claimant found the VERP lucrative. Claimant was not told that he would be laid off, that his job would be eliminated, or that he would be discharged from employment if he did not accept the VERP. Claimant believed that he was not guaranteed continued employment. Claimant was concerned about the uncertainties of Employer's future and was afraid that he would lose the benefits and incentives offered under the VERP if he did not accept the package.

Claimant believed that Employer's VERP was involuntary based on information in a document provided by Employer which pertains to the ARRA Subsidy Application, which states that Employer considers the VERP as involuntary termination of employment for the purposes of the health benefits subsidy. Claimant was aware that this was an additional incentive offered by Employer.

Claimant had continuing work available to him had he not accepted the VERP. On October 30, 2009, Claimant voluntarily retired by accepting the VERP.

Based on the foregoing findings of fact, the Board concluded that Claimant accepted Employer's VERP as a matter of personal choice as Employer did not specifically inform Claimant that he would be laid off. The Board pointed out that speculation about future employment prospects does not amount to a necessitous and compelling reason to terminate employment. The Board stated further that had Claimant not accepted the VERP, continuing work was available to him and there was nothing in the evidence which would justify the conclusion that

Claimant had a necessitous and compelling reason to quit his job. Accordingly, the Board affirmed the Referee's decision denying Claimant's unemployment compensation benefits pursuant to Section 402(b) of the Law. Claimant then filed a request for reconsideration on the basis that the Law had not been applied consistently to all the employees who accepted Employer's VERP and filed applications for unemployment compensation benefits. The Board denied Claimant's request. Claimant then filed the instant appeal from the Board's order.<sup>3</sup>

As noted herein, a claimant is ineligible for unemployment compensation benefits if he voluntarily becomes unemployed without cause of a necessitous and compelling nature. Section 402(b) of the Law, 43 P.S. § 802(b). A necessitous and compelling cause for unemployment "results 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." McCarthy v. Unemployment Compensation Board of Review, 829 A.2d 1266, 1270 (Pa. Cmwlth. 2003). The

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<sup>3</sup> This Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003). An adjudication cannot be in accordance with the law if it is not decided on the basis of law and facts properly adduced; therefore, appellate review for the capricious disregard of material, competent evidence is an appropriate component of appellate consideration if such disregard is properly before the reviewing court. Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002). When determining whether the Board capriciously disregarded the evidence, the Court must decide if the Board deliberately disregarded competent evidence that a person of ordinary intelligence could not conceivably have avoided in reaching a particular result, or stated another way, if the Board willfully or deliberately ignored evidence that any reasonable person would have considered to be important. Id. at 203 n.12, 812 A.2d at 487 n. 12; Porco.

burden of proving that his voluntary termination was necessitous and compelling rests with the claimant. Mansberger v. Unemployment Compensation Board of Review, 785 A.2d 126 (Pa. Cmwlth. 2001).

It is now well settled that in the context of corporate downsizing, the critical inquiry is whether the fact finder determined the circumstances surrounding a claimant's voluntary quit indicated a likelihood that his fears would materialize, that serious impending threats to his job would be realized, and that his belief that his job is imminently threatened is well-founded. Renda v. Unemployment Compensation Board of Review, 837 A.2d 685 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 581 Pa. 686, 863 A.2d 1151 (2004);<sup>4</sup> Staub v. Unemployment Compensation Board of Review, 673 A.2d 434 (Pa. Cmwlth. 1996); Peoples First National Bank v. Unemployment Compensation Board of Review, 632 A.2d 1014 (Pa. Cmwlth. 1993). “[S]peculation pertaining to an employer’s financial condition and future layoffs, however disconcerting, does not establish the requisite necessitous and compelling cause.” Renda, 837 A.2d at 692 (quoting Staub, 673 A.2d at 437). Where at the time of retirement suitable continuing work is available, the employer states that a layoff is possible but not likely, and no other factors are found that remove an employee’s beliefs from the realm of speculation, a claim for unemployment compensation benefits fails despite the offer to leave. Id.

Herein, Claimant argues that he proved that he had a necessitous and compelling reason to leave his employment. Claimant contends that the following substantial reasons support his decision: (1) he was only given forty-five days to

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<sup>4</sup> See also Diehl, Jr. v. Unemployment Compensation Board of Review, 4 A.3d 816 (Pa. Cmwlth. 2010), wherein this Court, in an *en banc* decision, declined to overrule Renda and reverse the long standing holding of this Court that Section 402(b) of the Law does not apply where a claimant accepts an early retirement incentive package.

make a life altering decision; (2) he could not make an informed decision as to whether to accept the VERP since Employer refused to offer any assurances that his job and position were secure; (3) he was given no guarantee of continued employment beyond October 30, 2009, since Employer was downsizing; (4) the imminent and inevitable possibility of layoffs was of great concern to him; (5) the circumstances and negative information being disseminated by Employer put real and substantial pressure on him to leave his employment; and (6) he was concerned he would lose his health benefits for himself and his family if he did not accept the VERP.<sup>5</sup>

Finally, Claimant argues that the Law has been applied inconsistently with respect to the employees who accepted Employer's VERP and filed for unemployment compensation benefits. Claimant contends that some claimants who left Employer under the same, exact circumstances as he, with the same VERP, have been granted benefits, while others, like him, have been denied. Claimant argues that the Board's application of the Law is therefore discriminatory. In support of this argument, Claimant requests that this Court review new evidence, that he had no prior knowledge of at the time of the Referee's hearing, which shows that some former co-workers were approved for and are receiving unemployment compensation benefits.

It is well settled that this Court has generally upheld the grant of compensation benefits where claimants have left employment to accept voluntary

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<sup>5</sup> Claimant argues that this Court's decision in Teeters v. Unemployment Compensation Board of Review, 710 A.2d 380 (Pa. Cmwlth. 1988), supports his contention that accepting the VERP was the reasonable, common sense and responsible thing to do. However, Teeters was overruled by this Court's decision in Mansberger v. Unemployment Compensation Board of Review, 785 A.2d 126 (Pa. Cmwlth. 2001). Therefore, Claimant's reliance on Teeters is misplaced.

retirement incentive packages and continuing work was unavailable or evidence provided by either the employee or employer showed a likelihood of imminent layoff. Staub; Philadelphia Parking Authority v. Unemployment Compensation Board of Review, 654 A.2d 280 (Pa. Cmwlth. 1994); Eby v. Unemployment Compensation Board of Review, 629 A.2d 176 (Pa. Cmwlth. 1993). As recently pointed out by this Court, “[in] those cases, unemployment benefits were awarded where the record revealed the employers informed the claimants that they were within a group that could be laid off if they did not accept early retirement packages, and there was no competent evidence that continuing work was available to the claimants if they did not accept the early retirement offers.” Diehl, 3 A.3d at 825-26.<sup>6</sup>

In the present matter, Claimant did not testify or present any credible evidence that he was informed by Employer that his specific job was going to be eliminated or that he was being laid off due to lack of work on a date certain. Claimant testified that, while he had received copies of corporate correspondence from the office of the president indicating further reductions in staff if the 2010 financial plan objectives were not met and additional corporate correspondence indicating an imminent layoff, the correspondence was addressed to the corporate office and not to him specifically; therefore, the correspondence did not concern him. See Certified Record, Notes of Testimony of February 25, 2010 Referee’s Hearing at 8. Claimant also testified that he consulted with his attorney and tax advisor before accepting the VERP. Id. at 7.

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<sup>6</sup> For example, in Eby, benefits were granted to the claimant because his undisputed testimony, supported by a letter from his employer, provided that he was specifically identified as part of a group that would be laid off due to lack of continuing work. Eby, 629 A.2d at 178.

Clearly, based on the foregoing testimony and Claimant's testimony that: (1) no one told him he was going to be laid off; (2) no one told him that his job was going to be eliminated; and (3) no one told him that he was going to be discharged, his reasons for accepting the VERP were based on a fear that his job would possibly be eliminated and that he would possibly lose his health benefits. Id. Claimant testified further that continuing work would have been available had he not accepted the VERP. Id. As such, Claimant's reasons for accepting the VERP are insufficient to satisfy Claimant's burden.

As stated previously herein, "speculation pertaining to an employer's financial condition and future layoffs, however disconcerting, does not establish the requisite necessitous and compelling cause." Renda, 837 A.2d at 692 (quoting Staub, 673 A.2d at 437). Fears over job security based on possibilities do not constitute a necessitous and compelling reason to terminate one's employment particularly where the record supports the finding that continuing work was available and where the employee was not informed that he would be laid off.

This matter is distinguishable from this Court's decisions in Philadelphia Parking Authority and Eby, where there was evidence that the claimant's position would definitely be eliminated, and more akin to our decision in Peoples. In Peoples, the claimant was not definitively told that he would be laid off and testified that there was only a possibility that he would be laid off. Peoples, 632 A.2d at 1018. This Court determined that the claimant was disqualified from receiving benefits because his purely speculative belief that a layoff was imminent created a voluntary choice to leave his employment in order to avoid the possibility of being laid off in the future. Id.

With respect to Claimant's request for this Court to consider newly discovered evidence, we note that the Board denied Claimant's request for



reconsideration based on the same contention and Claimant does not specifically challenge the Board's discretion in denying his request for reconsideration. Moreover, this Court, in its function as an appellate court, cannot consider anything which is not part of the certified record in a case. Smith v. Smith, 637 A.2d 622, 623-24 (Pa. Super. 1993), petition for allowance of appeal denied, 539 Pa. 680, 652 A.2d 1325 (1994). Therefore, we will not consider any documents attached to Claimant's brief which are not part of the certified record.

Furthermore, the Board makes all determinations concerning eligibility for unemployment compensation benefits on a case by case basis as each application for benefits normally involves numerous fact-specific issues regarding each claimant's situation. As such, it was entirely appropriate for the Board, based on the evidence presented, to issue determinations with different outcomes with respect to any employee who accepted Employer's VERP and then later applied for unemployment compensation benefits. See McGoldrick v. Unemployment Compensation Board of Review, 526 A.2d 461 (Pa. Cmwlth. 1987)(Unless cases are consolidated, the Board is required, pursuant to its own regulations, to set forth separate findings of fact, conclusions of law, and appropriate reasons for its decisions.) Therefore, it is irrelevant for the purposes of this appeal that some former employees may have been deemed eligible for unemployment compensation.

Accordingly, because Claimant's departure in this case to accept the VERP was based on speculation and to avoid the mere possibility of being laid off in the future, he was properly denied benefits under section 402(b) of the Law.<sup>7</sup>

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<sup>7</sup> We note that Claimant submitted into evidence at the Referee's hearing documentation showing that he was permitted to participate in federal health insurance coverage pursuant to the

*(Continued....)*

Peoples. The Court empathizes with the difficult position that Claimant found himself in when faced with the choice of whether to accept the VERP offered by Employer or to continue to remain employed. However, based on the Board's findings and the legal standard applicable to this matter, we are compelled to affirm the Board's order.<sup>8</sup>

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JAMES R. KELLEY, Senior Judge

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ARRA for the purpose of proving that his decision to accept the VERP was involuntary. However, the fact that Claimant's acceptance of the VERP may have been deemed involuntary for purposes of participating in federal health insurance coverage, is of no moment. The Board is charged with determining whether a claimant has met his or her burden of proving a necessitous and compelling reason to terminate employment based on the provisions of this Commonwealth's Unemployment Compensation Law, not federal law.

<sup>8</sup> Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Wheelock Hatchery, Inc. v. Unemployment Compensation Board of Review, 648 A.2d 103 (Pa. Cmwlth. 1994). In addition, issues of credibility are for the Board which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988).

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Petitioner	:	
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v.	:	No. 1409 C.D. 2010
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Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

**ORDER**

AND NOW, this 22nd day of December, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

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JAMES R. KELLEY, Senior Judge