IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Deborah A. Stocke,	:	
Petitioner	:	
v.	:	No. 1517 C.D. 2009
Unemployment Compensation Board of Review,	:	Submitted: December 24, 2009
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: March 12, 2010**

Deborah A. Stocke (Claimant) petitions for review of that part of the order of the Unemployment Compensation Board of Review (Board), which affirmed the Unemployment Compensation Referee's (Referee) decision finding Claimant ineligible for benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law).[1] The Board agreed with the Referee that Claimant was

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(b). This section provides that a claimant will be ineligible for benefits if she voluntarily leaves her employment without necessitous and compelling reasons. Id.

ineligible for benefits because she quit her employment with Randstad HR Solutions (Randstad) without a necessitous and compelling reason.[2]

Claimant applied for unemployment compensation benefits after becoming separated from her employment. The Unemployment Compensation Service Center (Service Center) issued a determination finding Claimant ineligible for benefits under Section 402(b). Claimant appealed, and an evidentiary hearing was held before the Referee. During the hearing, Claimant appeared without counsel and testified, and Randstad's Representative and Client Care Specialist, Marcia Bautista, testified by telephone. Following the hearing, the Referee affirmed the Service Center's determination and made the following relevant factual findings:

> 1. Claimant was employed as an In-Store Selling Specialist by Randstad from September 2008 until December 28, 2008, at a pay rate of $22.00 an hour.
> 2. Randstad is a Third-Party Staffing Agency.
> 3. Randstad assigned [C]laimant to work for Gemini Cosmetics.
> 4. At the time of hire, [C]laimant signed an at-will agreement and agreed to contact [Randstad] immediately after the completion of any assignment for the purpose of requesting a new assignment and to remain in contact with [Randstad] indicating availability for assignments.
> 5. The agreement informed [C]laimant that any failure to contact [Randstad] after an assignment or to remain in contact would constitute a voluntary resignation.
> 6. Claimant's job assignment with Gemini Cosmetics ended on December 28, 2008.
> 7. Claimant did not contact employer, Randstad, after her job assignment ended with Gemini.

[2] The Referee also disapproved a claim credit for compensable week ending January 3, 2009, in the amount of $3,228.00 because of a non-fault overpayment under Section 804(b)(1) of the Law, 43 P.S. § 874(b)(1), and the Board affirmed. Claimant argues that this determination should be overruled if this Court reverses the Board's determination as to Section 402(b).

. . . .

11. After [C]laimant's job assignment with Gemini Cosmetics ended on December 28, 2008, [Randstad] had additional assignments available for [C]laimant.

(Referee Findings of Fact (FOF) ¶¶ 1-7, 11.) Based on these findings, the Referee found Claimant ineligible for benefits under Section 402(b) because her failure to contact Randstad after her job assignment with Gemini Cosmetics (Gemini) ended constituted "a constructive voluntary leaving of her employment." (Referee's Decision at 2.) The Referee was unconvinced by Claimant's argument that she did not contact Randstad because she did not read the employment agreement and because other employees of Randstad received benefits when their job assignment ended. Claimant appealed to the Board.

After reviewing the record, the Board affirmed the Referee's decision and adopted the Referee's findings of fact and conclusions of law. The Board also noted:

> [C]laimant signed the employment agreement with [E]mployer[-Randstad] and knew or should have known that she was to call [E]mployer[-Randstad] when her assignment ended. [C]laimant's conduct in failing to contact [E]mployer[-Randstad] evidenced an intent to quit her employment. [C]laimant failed to credibly establish a necessitous and compelling reason for her actions or that she made a reasonable effort to maintain her employment. [C]laimant is not credible that [E]mployer[-Randstad] treated her differently than similarly situated employees.

(Board's Order.) Claimant now petitions this Court for review.[3]

---

[3] This Court's review of a Board decision "is limited to considering whether the Board erred as a matter of law or committed any constitutional violations, and whether any necessary factual findings are supported by substantial evidence." Smith v. Unemployment Compensation Board of Review, 967 A.2d 1042, 1045 n.3 (Pa. Cmwlth. 2009). Substantial evidence is defined as "relevant

(Continued…)

Before this Court, Claimant argues that the Board erred in determining that Claimant was ineligible for benefits under Section 402(b) of the Law, which states that a claimant will not be eligible to receive unemployment compensation in a week where her "unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature . . . ." 43 P.S. § 802(b).[4] Claimant argues[5] that:

---

evidence that a reasonable mind might consider adequate to support a conclusion." Walsh v. Unemployment Compensation Board of Review, 943 A.2d 363, 368 (Pa. Cmwlth. 2008).

[4] Whether a claimant had "cause of a necessitous and compelling nature" is a question of law which may be reviewed by this Court. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 358, 378 A.2d 829, 832 (1977).

[5] For sake of clarity, we have consolidated the five issues raised in Claimant's brief into three issues. The five issues raised in Claimant's brief are as follows:

> I. Whether the Unemployment Compensation Board of Review (UCBR) erred in affirming several essential findings of fact.
>
> . . . .
>
> II. Whether the UCBR erred as to its finding that the rule that employees were required to call Randstad after they were laid off by Gemini was consistently enforced and uniformly applied.
>
> . . . .
>
> III. Whether the UCBR erred as to its conclusion of law that [Claimant] voluntarily quit her employment with Randstad because Randstad was not [Claimant's] employer.
>
> . . . .
>
> IV. Whether the UCBR erred in finding that [Claimant] voluntarily quit her employment when it ignored evidence that the At-Will Agreement was a contract of adhesion which when construed against the drafter was inapplicable in this case, and whose sole purpose was to trap claimants, like [Claimant] in this case, so that the employer, Gemini, might avoid paying unemployment compensation.
>
> . . . .
>
> V. Whether the UCBR erred in holding that [Claimant] voluntarily quit her job when [Claimant] was denied a fair hearing under 34 Pa. Code sec. 101.21(a).

(Claimant's Br. at 7.)

(1) Gemini, and not Randstad, is her true employer under the Law; (2) the Referee's factual findings are not supported by substantial evidence; and (3) the Referee denied Claimant a fair hearing.

Claimant first asserts that, pursuant to Section 4(j)(2.1) of the Law, 43 P.S. § 753(j)(2.1),[6] Randstad is not her employer, but simply a payroll company, and that Gemini was her true employer because Gemini offered Claimant her job and provided assignments to her. Claimant does not argue that the Board misapplied the Law's definition of "employer"; rather, she contends that, *as a matter of fact*, Gemini was her employer. Thus, Claimant asserts that the Referee's finding that Claimant had to contact Randstad, her "employer," at the end of her Gemini assignment is not supported by the evidence. Essentially, Claimant asks this Court to adopt her preferred version of the facts.

---

[6] Section 4(j)(2.1) of the Law defines "employer" as:

> An individual or entity that transfers some or all of its work force to the payroll of another individual or entity, directly or indirectly, as part of or resulting in an arrangement whereby the individual or entity shares employer functions with respect to some or all of its work force with the other individual or entity shall be the employer of the employe or employes covered by the arrangement with the other individual or entity. This paragraph shall include, without limitation, an arrangement known as a professional employer arrangement or employe leasing arrangement. This paragraph does not include a temporary help arrangement in which an individual or entity utilizes one or more workers supplied by another individual or entity to supplement its work force in special, temporary work situations such as absences, skill shortages, seasonal work loads and special assignments.

43 P.S. § 753(j)(2.1).

However, it is well-settled that the Board is the ultimate finder of fact and arbiter of witness credibility. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 269-70, 276-77, 501 A.2d 1383, 1385, 1388 (1985). In making factual findings, 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, 230 (Pa. Cmwlth. 1982). Thus, as long as the Board's factual findings are supported by substantial evidence, which "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," those findings are conclusive on appeal. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343, 1344 (Pa. Cmwlth. 1978). That a 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, Claimant argues that Gemini offered her a seasonal job, hired her, and provided her work assignments; however, Claimant did not submit any evidence to support these contentions[7] or her assertion that Gemini, not Randstad, was her employer under the Law. Instead, Claimant testified that her "first job assignment with Randstand [sic] was in September 2008," that Randstad was a "third party staffing agent" that assigned her to work for Gemini, and that her work for Gemini was "seasonal." (Referee Hr'g Tr. at 5-7.) Additionally, Randstad submitted an At-

[7] It appears that Claimant submitted documents pertaining to Claimant's work schedule with Gemini. However, these documents alone fail to show that Gemini hired Claimant and provided her work assignments. (See R. Item 10, Referee Hr'g Tr. with Claimant's Exhibits.)

Will Agreement that Claimant admitted she signed on September 4, 2008. (Hr'g Tr. at 4, 8-9.) Specifically, the At-Will Agreement provides:

> The undersigned employee agrees and understands that he/she is *being offered employment by Randstad HRS* on an at-will basis for a specific project or undertaking and that his/or [sic] employment is limited to the duration of such project or undertaking. The employee also understands that that *his/her employment is only with Randstad HRS* and that *he/she is not an employee of any of Randstad HR Solution's clients*.
>
> The employee further understands that[:]
>
> Randstad HR Solutions may terminate his/her employment at anytime without notice and with or without cause.
>
> *The employee is required to contact the Company (1-800-382-7297) immediately after the completion of any assignment for the purpose of requesting a new assignment, and remain in contact with the Company indicating availability for assignments, and failure to do so will constitute a voluntary resignation that may affect my eligibility for unemployment benefits.*
>
> . . .
>
> The employee further agrees that upon termination of the employment relationship, there will be no further obligation or responsibility on the part of Randstad HRS, or its clients, to the employee. *By the employee's signature below, the employee acknowledges that he/she understands the above, and that he/she voluntarily agrees to its terms*.

(At-Will Agreement, Hr'g Tr. Ex. 7 (emphasis added).) In finding that Randstad was Claimant's employer, the Board implicitly credited the contents of the At-Will Agreement and rejected Claimant's testimony that Randstad was simply a dummy corporation that merely provides payroll services. This Court is bound by that credibility determination on appeal, Kells v. Unemployment Compensation Board of Review, 378 A.2d 495, 497 (Pa. Cmwlth. 1977), and, thus, we have no basis upon which to accept Claimant's argument that the Board erred in crediting Randstad's evidence and finding that Claimant was employed by Randstad. (FOF ¶ 1.)

Next, Claimant argues that the Board's findings of fact numbers 1, 2, 3, and 11 are not supported by substantial evidence.[8] However, the Board's factual findings that: Claimant was employed by Randstad as an in-store selling specialist (FOF ¶ 1); Randstad was a third-party staffing agency (FOF ¶ 2); and Randstad assigned Claimant to work for Gemini (FOF ¶ 3), are fully supported by the testimony of Claimant and Randstad's documentary evidence. (See Referee Hr'g Tr. at 4-9; At-Will Agreement, Hr'g Tr. Ex. 7.) Moreover, the Board's finding that "[a]fter [C]laimant's job assignment with Gemini Cosmetics ended on December 28, 2008, [Randstad] had additional assignments available for [C]laimant," (FOF ¶ 11), is supported by Ms. Bautista's testimony that, had Claimant contacted Randstad as required, "there could have been work available" through Randstad.[9] (Referee Hr'g Tr. at 10.)

In order to receive benefits under Section 402(b) of the Law, a claimant has the burden of showing that she had necessitous and compelling reason to quit her job. Central Dauphin School District v. Unemployment Compensation Board of Review, 893 A.2d 831, 832 (Pa. Cmwlth. 2006). Generally, cause of a necessitous and compelling nature is cause that "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." Taylor v.

[8] Because Claimant failed to challenge any of the remaining factual findings, those findings are conclusive on appeal. Campbell v. Unemployment Compensation Board of Review, 694 A.2d 1167, 1169 (Pa. Cmwlth. 1997).

[9] Even if this finding is not supported by the evidence because of Ms. Bautista's indefinite statement that work "could" have been available, such error would be harmless because this finding is not necessary to support ineligibility of benefits under Section 402(b) of the Law.

Unemployment Compensation Board of Review, 474 Pa. 351, 358-59, 378 A.2d 829, 832-33 (1977). Here, Claimant signed the At-Will Agreement with her employer, Randstad, and knew or should have known that she was to contact Randstad when her work assignment ended. The Board found that Claimant failed to make a reasonable effort to maintain her employment by failing to stay in contact per the terms of the At-Will Agreement.[10] Moreover, the Board rejected Claimant's assertion that she did not know she was supposed to stay in contact with Randstad after her work assignment with Gemini ended in December. As such, Claimant did not establish a necessitous and compelling reason for her quit.[11]

Finally, Claimant argues that she was denied a fair hearing under 34 Pa. Code § 101.21(a), which states:

---

[10] Claimant's argument that the Board erred by "ignor[ing] evidence that the At-Will Agreement was a contract of adhesion" is without merit. (Claimant's Br. at 21-24.) The Board is correct that, in unemployment compensation cases, eligibility of benefits is not based on contract law, but on "the factual matrix at the time of separation," Connelly v. Unemployment Compensation Board of Review, 450 A.2d 1097, 1099 (Pa. Cmwlth. 1982) (quoting Gianfelice Unemployment Compensation Case, 396 Pa. 545, 551, 153 A.2d 906, 909 (1959)). Here, the Board's determination of ineligibility under Section 402(b) was based on all the evidence presented at the hearing: testimony by Claimant and Ms. Bautista, as well as the documentary evidence introduced, including the At-Will Agreement. The Referee and Board found Randstad's witness and documentary evidence credible that Claimant was to contact Randstad when her assignment with Gemini was complete, and that failure to do so constituted a voluntary resignation. Further, we note that the language of the At-Will Agreement is clear, concise, and straightforward such that Claimant could easily understand the terms of her employment.

[11] Given our disposition, the non-fault overpayment under Section 804(b)(1) of the Law remains in effect.

> In a hearing the tribunal may examine the parties and their witnesses. 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). Specifically, Claimant contends that the Referee failed to assist Claimant, who was unrepresented at the hearing, to adequately develop the facts necessary to find that Gemini, not Randstad, was her employer. Additionally, Claimant argues that the Referee "badgered [her] until she agreed with his legal conclusion as to who was her employer." (Claimant's Br. at 25.) Further, Claimant argues that the Referee helped "the unrepresented employer['s witness] to formulate her refusal to respond" to a question relating to differential treatment of all other seasonal employees. (Claimant's Br. at 26.) We find Claimant's arguments unconvincing.

After reviewing the hearing transcript, this Court concludes that the Referee adequately advised Claimant and Ms. Bautista of their rights and allowed each party to examine and cross-examine the witness, give a closing argument or statement, and an opportunity to add to their closing argument if they so desired. It also appears that the Referee patiently conducted the hearing in a fair and impartial manner. While Claimant is correct that a referee is required to assist "*pro se* claimants in developing the facts necessary for a decision," Procito v. Unemployment Compensation Board of Review, 945 A.2d 261, 264 (Pa. Cmwlth. 2008), "the referee is not required to become and should not assume the role of a claimant's advocate." McFadden v. Unemployment Compensation Board of Review, 806 A.2d 955, 958 (Pa. Cmwlth. 2002). The Referee allowed each party to question the witnesses and assisted both in formulating questions and objections. The Referee did not badger Claimant into

admitting that Randstad was Claimant's employer but, rather, asked Claimant to clarify her position with Randstad and her assignment with Gemini.[12] Further, the

[12] After Claimant had testified that: her "first job assignment with Randstand [sic] was in September of 2008," (Referee Hr'g Tr. at 5); Randstad was a "third-party staffing agent," (Hr'g Tr. at 6); and Randstad assigned Claimant to service Gemini (Referee Hr'g Tr. at 6), the following dialog took place:

> C[laimant] Okay. First, if I may go back just prior to my employment with Randstand [sic] so I can explain my relationship that I've had in the past with Randstand [sic]. Prior to my – first off let me back up here. I was a full-time employee with Gemini Cosmetics as a retail area manager. July 15, 2008, my position – my full-time salaried position had been eliminated. Through those few years that I did work for Gemini Cosmetics, I used – our company used Randstand [sic] as our third party employer. Basically me being the manager, I had a staff of in store promotional people that would receive their schedules, assignments, work duties directly from me and Randstand [sic] basically served as our payroll service. I would approval [sic] their timesheets, send them to Randstand [sic] on a weekly basis and they served basically as our payroll service. They did not serve as the assignments that we would give out. Unfortunately in July, my position – my full-time managerial position was eliminated, but with the opportunity from Gemini that I could come back in September working as a part-time in store promotional person just like the people I used to hire being put on Randstand's [sic] payroll, being paid by a third party Employer, however . . .
>
> R[eferee] Just a minute.
>
> C Okay.
>
> R Who was paying you after September 2008? Was it Randstand [sic]?
>
> C Randstand [sic]
>
> R Go ahead.
>
> C Because then I became a Randstand [sic] – I went on their payroll system, but getting my assignments from Gemini Cosmetics. I did in the documents that I sent you, I did show you the format in which we received our assignments. I received a schedule of assignments starting in September that went all the way through December 28th of 2008. That was the employment time that I was with Gemini Cosmetics using Randstand [sic] as our payroll service. Effective – then I was laid off . . .
>
> R. I thought you said payroll services, but your Employer was Randstand [sic].
>
> C They . . .
>
> R Who was your Employer, ma'am?

(Continued…)

Referee did not assist Ms. Bautista in a manner inconsistent with his responsibilities or in a manner that favors Randstad over Claimant. The Referee merely clarified Ms. Bautista's response to one of Claimant's questions as an objection based on relevance.[13] The Referee performed the duties required of him under 34 Pa. Code § 101.21(a) such that Claimant was afforded a fair hearing.

C But they did not give us our job assignments. Our job assignment – the contact . . .
R M'am . . .
C . . . person came from Gemini.
R Ma'am, who wrote your paycheck between September and December of 2008?
C Randstand [sic] did.
R So you worked for Randstand[sic]. Is that correct?
C I guess in a way it is that it's a third party Employer. They are the –were the – Gemini Cosmetics actually contracts them to pay our paychecks. That's how it is.
R But you're saying pay your paychecks. Were you paid by Gemini Cosmetics?
C Not after July.
R Okay. Go ahead. So it was Randstand [sic] who was your Employer between December – September and December 2008?
C Yes.
R Go ahead.
C Then at the end of December because it is a seasonal position, December 28th I was – my assignment ended. My – excuse me. My schedule had ended with Gemini and knowing it would not be reinitiated until February because we are seasonal employees.

(Referee Hr'g Tr. at 6-7 (ellipses in original).)

[13] Employer questioned Claimant as to whether she signed the At-Will Agreement, which she answered affirmatively. When questioned as to whether she realized that the At-Will Agreement required her to call Randstad at the end of her work assignment with Gemini, Claimant responded:

C To be honest with you, I did not know that because I – what I thought when we were signing up for unemployment and it asked you if you were available

(Continued…)

to work, that is stating that yes, I was available to work. I will also tell you that I have several people that I have contacted who have not have done the same procedure who have not had to go through this, so my argument is if you're doing it for one, then you have to do it for everybody and I could probably give you a list of thirty to forty people who have been employed by Randstand [sic] through either Gemini Cosmetics or Liz Claiborne Cosmetics who I was employed with previously in a managerial position that have never gone through that procedure of calling in Randstand [sic] at the end of their assignment.

(Referee Hr'g Tr. at 8-9.) Following this questioning, Claimant was able to question Ms. Bautista:

C . . . . Ms. Bautista, again, I will just go back to when I was in the managerial position and filing all of the paperwork to Randstand [sic] for my employees. When they're [sic] assignments ended from me depending on which company I was with, Liz Claiborne or Gemini Cosmetics. Those people had signed At Will Agreements also and not one of them had ever contacted Randstand [sic] about employment and I have people that would testify to that nature.

R What's the question?

C The question is why is it that I am being singled out when there are many, many other people in this – it is a different type of an industry, a different type of a business. I have been singled out when I have talked to many other people that are using or have used Randstand [sic] in the past and have not gone through this same procedure and have signed the At Will Agreement.

EW [Ms. Bautista] I don't think the purpose of this hearing is to speak about any other employee except yourself.

R I think she's raising an objection to your question. What's the relevancy of the other employees since the only employee who is a party to this hearing is yourself? Is that the objection you're raising . . .

EW Yes.

R . . . Do you have a response to it?

C I mean my response is that it's just not fair that one person is being singled out when I have documentation of many other people that have not done the same – have followed the same procedure.

(Referee Hr'g Tr. at 9 (last two ellipses in original).)

The Referee did nothing improper by clarifying Ms. Bautista's response as an objection based on relevance. Further, Claimant did not present any testimony by other witnesses or documentary evidence to support her contention that no other employee of Randstad, hired to

(Continued…)

Accordingly, we are constrained to affirm the Board's order.

____
RENÉE COHN JUBELIRER, Judge

---

service Gemini, was required to contact Randstad after the work assignment with Gemini ended. Thus, Claimant's argument that the Referee failed to permit Claimant to "establish the facts to prove her claim that the rule about phoning Randstad was not uniformly enforced nor fairly applied," (Claimant's Br. at 17), is without merit.

THE COMMONWEALTH COURT OF PENNSYLVANIA

Deborah A. Stocke,	:	
Petitioner	:	
v.	:	No. 1517 C.D. 2009
Unemployment Compensation Board of Review,	:	
Respondent	:	

O R D E R

NOW, March 12, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

____

RENÉE COHN JUBELIRER, Judge