

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michele A. Maniscalco, :  
Petitioner :  
v. : No. 1905 C.D. 2010  
Unemployment Compensation : No. 1906 C.D. 2010  
Board of Review, : Submitted: April 29, 2011  
Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: June 3, 2011

In these consolidated appeals,<sup>1</sup> Michele A. Maniscalco (Claimant) petitions for review of two orders of the Unemployment Compensation Board of Review (Board). The first order mailed July 15, 2010, affirms the Referee's decision and order denying Claimant unemployment compensation benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law)<sup>2</sup> and ordering that an overpayment of benefits in the amount of \$5,408 is to be recouped as a non-fault overpayment of unemployment compensation benefits under Section

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<sup>1</sup> This Court consolidated these matters by order entered October 7, 2010.

<sup>2</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(b). Section 402(b) provides that an employee who voluntarily terminates her employment without cause of a necessitous and compelling nature is ineligible for benefits.

804(b) of the Law.<sup>3</sup> The second order, also mailed July 15, 2010, affirms the Referee’s decision and order denying Claimant federal Emergency Unemployment Compensation (EUC) benefits and ordering that the overpayment in the amount of \$5,200 should be recouped as a non-fraud overpayment of EUC benefits.<sup>4</sup> We affirm.

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<sup>3</sup> 43 P.S. §874(b). Section 804(b)(1) of the Law provides that “any person who other than by reason of his fault has received with respect to a benefit year any sum as compensation under the Law 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.” 43 P.S. §874(b)(1).

<sup>4</sup> See Title IV of the Supplemental Emergency Appropriations Act of 2008, P.L. 110-252, 122 Stat. 2323, Sections 4001(b) and (c), 26 U.S.C. §3304 Note. Section 4001 provides as follows:

(b) Provisions of Agreement – Any agreement under subsection (a) shall provide that the State Agency of the State will make payment of emergency unemployment compensation to individuals who –

(1) have exhausted all rights to regular compensation under the State law or under Federal law with respect to a benefit year (excluding any benefit year that ended before May 1, 2007);

(2) have no rights to regular compensation or extended compensation with respect to a week under such law or any other State unemployment compensation law or to compensation under any other Federal law (except as provided under subsection (e)); and

(3) are not receiving compensation with respect to such week under the unemployment compensation law of Canada.

(c) Exhaustion of Benefits – For purposes of subsection (b)(1), an individual shall be deemed to have exhausted such individual’s rights to regular compensation under a State law when –

(1) no payment of regular compensation can be made under such law because such individual has received all regular compensation available to such individual based on employment or wages during such individual’s base period; or

*(Continued....)*

The facts and conclusions adopted by the Board in this matter with respect to Claimant's denial of benefits pursuant to Section 402(b) of the Law are as follows.<sup>5</sup> Claimant last worked for Creative Beginnings Daycare (Employer) as of October 31, 2008, as full time employee. Claimant worked for Employer for almost two years.

On October 31, 2008, Claimant was at work helping with a Halloween party. On this date, Claimant spoke briefly with Hilary Cecera, Employer's representative. Claimant mentioned some things about the problems that she was having with her housing situation. Claimant had spoken about this at earlier points in time as well. There was an ongoing problem as to whether Claimant could remain in her housing.

On Sunday, November 2, 2008, Claimant again spoke with Ms. Cecera. Claimant explained that she would not be able to come to work the next day. Claimant, in her own words, explained that she would not be able to come to work for probably two weeks or so and that she was not sure as to exactly when she could return to work. Claimant explained that she would have to get her belongings together and things like that and she was not sure as to exactly what date she could return.

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(2) such individual's rights to such compensation have been terminated by reason of the expiration of the benefit year with respect to which such rights existed.

<sup>5</sup> Claimant has not preserved any issues with respect to the non-fault overpayment of regular unemployment compensation benefits or EUC benefits by failing to set forth such issues in the Statement of Questions Involved portion of her brief. See Pa.R.A.P. 2116(a) ("No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby."). Therefore, we affirm, with no further discussion, the Board's July 15, 2010 order appealed by Claimant affirming the Referee's denial of EUC benefits docketed with this Court at 1906 CD 2010. We also will not address Section 804(b) of the Law.

During the foregoing conversation, Claimant asked on a number of occasions whether she was being fired. Ms. Cecera indicated that Claimant was not being fired. Claimant was not discharged or fired during this conversation.

Claimant did not show up for work the following day [November 3, 2008] and eventually opened her unemployment compensation claim with an application for benefits dated November 9, 2008. Claimant voluntarily left her place of employment by not returning to work.

The Board resolved the conflicts in the testimony in favor of Employer concerning the conversations between Claimant and Ms. Cecera. The Board concluded that Claimant was never terminated on Sunday, November 2, 2008, and that Ms. Cecera did not indicate in any way that Claimant was to be terminated. The Board concluded further that Ms. Cecera repeatedly told Claimant that she was not being fired and that the bottom line was that Claimant never returned to work. Based on foregoing conclusions, the Board determined that Claimant was not fired but rather voluntarily left her place of employment and that if Claimant believed she was fired, such belief was unreasonable. Therefore, Claimant had the burden of demonstrating a necessitous and compelling reason to leave her job. The Board concluded that Claimant failed to meet her burden and denied Claimant benefits pursuant to Section 402(b) of the Law. This appeal followed.<sup>6</sup>

Herein, Claimant raises the following issue in her brief for review by this Court: Whether the Board erred by affirming the Referee's decision denying

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<sup>6</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).

Claimant unemployment compensation benefits on the ground of voluntary quit where the Referee made no finding regarding the reasonableness of Claimant's choice where the record demonstrated that Claimant's legal and family obligations gave rise to an overpowering circumstance that created a necessitous and compelling reason to quit her employment.<sup>7</sup>

Initially, we will address the Board's contention that Claimant has failed to preserve any issues for review; therefore, her petition for review should be dismissed. The Board contends that Claimant failed to preserve the issue presented in the Statement of Question Involved portion of her brief by failing to raise this issue in her petition for review. We agree.

Claimant filed her petition for review with this Court *pro se*. Therein, Claimant adamantly asserts that she did not quit her job and that Ms. Cecera's testimony that she was not fired is not truthful. Claimant does not assert in her petition for review that she had a necessitous and compelling reason to voluntarily quit her employment due to legal and family obligations or that the Board failed to set forth any findings regarding the reasonableness of Claimant's choice. Accordingly, Claimant has failed to preserve the issue set forth in the Statement of

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<sup>7</sup> The question of whether particular facts constitute a voluntary quit is a question of law fully reviewable by this Court. Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlt. 1988). The claimant bears the burden of proving a necessitous and compelling reason for voluntarily terminating the employment relationship. Mutual Pharmaceutical Company, Inc. v. Unemployment Compensation Board of Review, 654 A.2d 37 (Pa. Cmwlt. 1994). A determination that a claimant voluntarily quit is not an absolute bar to the recovery of unemployment compensation benefits. Monaco v. Unemployment Compensation Board of Review, 523 Pa. 41, 565 A.2d 127 (1989). A claimant may prove necessary and compelling reasons that could excuse the voluntary action of the claimant. Id. A cause of necessitous and compelling nature is one that results from circumstances which produce pressure to terminate employment which is both real and substantial and which would compel a reasonable person under the circumstances to act in the same manner. Id.

Questions Involved portion of her counseled brief by failing to raise it in her *pro se* petition for review filed with this Court. See Pa.R.A.P. 1513(a); Tyler v. Unemployment Compensation Board of Review, 591 A.2d 1164 (Pa. Cmwlth. 1991) (issue not raised in the stated objections in petition for review nor "fairly comprised therein" in accordance with Pa.R.A.P. 1513(a) is waived and will not be addressed by this Court).

With regard to Claimant's contention in her petition for review that she did not quit and that the facts prove that Ms. Cecera's testimony that Claimant was not fired is untruthful, we point out that it was well within the Board's province to accept Ms. Cecera's testimony as credible. The Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985). Thus, it is simply not within this Court's province to overturn the Board's credibility determinations.

Notwithstanding our determination that Claimant has waived the argument raised in her brief that she had a necessitous and compelling reason to voluntarily quit her employment, we note that this was not Claimant's position before the Referee or on appeal to the Board. Throughout her testimony at the Referee's hearing, Claimant maintained that she did not quit her job but was fired; therefore, she offered no testimony that she had good cause to quit. See Certified Record, Transcript of March 4, 2010 Hearing at 13; 32. (Claimant specifically testified: "I would not have quit. . . . The facts are at the moment that I was fired and that's what the facts have always been." Claimant testified further: "I did not ask for an indefinite period of time off; I simply said I could not be in that Monday morning because I was required to be in a court hearing first thing in that morning." ).

Therefore, the record does not support a finding, based on Claimant's testimony, that Claimant voluntarily quit her employment for a necessitous and compelling reason such as legal and family obligations or that Claimant attempted to preserve her employment by asking for a brief leave of absence for two to three weeks as argued in her brief. In short, Claimant cannot cite to Employer's testimony to support her burden to prove that she had good cause to quit when Claimant consistently denied throughout her testimony that she did not quit but was fired. See Bowman v. Unemployment Compensation Board of Review, 410 A.2d 422, 424 (Pa. Cmwlth. 1980) ("Claimant has maintained from the beginning of these proceedings that he did not voluntarily terminate his employment but that he was discharged. He made no alternative argument and offered no evidence to prove that he left his position for cause of a necessitous and compelling nature. Obviously, then, Claimant has failed to carry his burden of proof.").

Accordingly, the Board did not err by failing to make any findings regarding the reasonableness of what Claimant now characterizes as a voluntary termination of her employment. The Board's orders are affirmed.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michele A. Maniscalco,	:	
Petitioner	:	
	:	
v.	:	No. 1905 C.D. 2010
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Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

**ORDER**

AND NOW, this 3rd day of June, 2011, the orders of the Unemployment Compensation Board of Review entered in the above-captioned matters are affirmed.

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JAMES R. KELLEY, Senior Judge