IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mozip Sign Company,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1926 C.D. 2009
	:	
Unemployment Compensation Board of Review,	:	Submitted: March 5, 2010
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: May 26, 2010**

Mozip Sign Company (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) reversing the decision of the Unemployment Compensation Referee (Referee). In its decision, the Board concluded that Stephen R. Roberts (Claimant) had cause of a necessitous and compelling nature to quit his employment with Employer and, therefore, that he was not ineligible to receive benefits under Section 402(b) of the Unemployment

Compensation Law (Law).[1] Employer's arguments before this Court are that the Board erred by disregarding certain findings of fact made by the Referee and in determining that Claimant had necessary and compelling cause to quit his employment. For the reasons that follow, we affirm.

Claimant filed for unemployment compensation benefits on March 30, 2009. The Philadelphia Unemployment Compensation Service Center (Service Center) granted Claimant benefits on April 4, 2009, and Employer appealed that determination. The Referee presided over an evidentiary hearing on April 17, 2009, at which both Employer and Claimant presented witnesses. The Referee issued a decision reversing the determination of the Service Center on April 28, 2009, pursuant to Section 402(b) of the Law. The Referee found that Employer's president (President) "told the claimant [that he] could not [quit his employment because President's son hit and fired Claimant] and to wait there until [President] spoke to his son to find out what happened." (Referee's Decision, Findings of Fact ¶ 9.) The Referee concluded that Claimant's failure to wait for the President to speak with his son about the incident suggested that Claimant chose to quit without making a reasonable effort to preserve his employment. (Referee's Decision at 2.) Claimant appealed to the Board. The Board made the following findings of fact:

> 1. The claimant was last employed as a die cutter by the Mozip Sign Company and his last day of work was March 10, 2009.
>
> 2. The president's son works at the company doing maintenance/clean up.

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

3. The president's son has a learning disability and is not in a supervisory position.

4. The president's son threatens the workers on a daily basis.

5. The claimant has been threatened before by the president's son that he would fire him.

6. On March 10, 2009, the president was informed by a manager of the sign department that the claimant had indicated that he was quitting because he had an issue with the president's son punching him.

7. The president stopped the claimant as he was walking out and asked what had happened.

8. The claimant had told the president that he was quitting because his son had hit him and fired him.

9. The claimant left and did not return.

10. The claimant quit because he was hit and threatened by the president's son.

(Board Decision, Findings of Fact (FOF) ¶¶ 1-10.) The Board held that Claimant had cause of a necessitous and compelling nature to quit his employment because of being assaulted by President's son. Employer now petitions this Court for review.[2]

Before this Court, Employer argues that the Board erred in determining that Claimant had a necessitous and compelling cause to quit his employment. Section

[2] This Court's review "is limited to a determination of whether constitutional rights have been violated, errors of law committed, or whether essential findings of fact are supported by substantial evidence." Grever v. Unemployment Compensation Board of Review, 989 A.2d 400, 402 n.4 (Pa. Cmwlth. 2009). "'Substantial evidence' is such [relevant] evidence as a reasonable mind might accept as adequate to support a conclusion." Beverly Enterprises, Inc. v. Unemployment Compensation Board of Review, 702 A.2d 1148, 1150 n.1 (Pa. Cmwlth 1997) (quoting Leonard S. Fiore, Inc. v. Department of Labor and Industry, Prevailing Wage Appeals Board, 526 Pa. 282, 284 n.2, 585 A.2d 994, 996 n.2 (1991)).

402 of the Law states, in pertinent part, that "[a]n employee shall be ineligible for compensation for any week . . . (b) [i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature." 43 P.S. § 802(b). A claimant whose unemployment is due to a voluntary separation from his employment bears the burden of proving that the separation "was for cause of a necessitous and compelling nature." Yurack v. Unemployment Compensation Board of Review, 435 A.2d 663, 664 (Pa. Cmwlth. 1981). A fear for one's personal safety, which is real and substantial, can be cause of a necessitous and compelling nature to quit employment. Department of Corrections, State Correctional Institute at Graterford v. Unemployment Compensation Board of Review, 547 A.2d 470, 473 (Pa. Cmwlth. 1988). A physical attack in the workplace can be considered a "real, not imaginary, substantial, not trifling reason[]" to end employment. Break N Eat Corp. v. Unemployment Compensation Board of Review, 426 A.2d 1262, 1263 (Pa. Cmwlth. 1981).

In determining whether Claimant had a necessitous and compelling reason to quit his employment, we must address Employer's argument that the Board erred in disregarding some of the findings of fact made by the Referee. Section 504 of the Law gives the Board the power to reverse or modify the Referee's determination. 43 P.S. § 824. The Pennsylvania Supreme Court has held that this provision establishes the Board as the ultimate finder of fact in unemployment compensation cases. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 270, 276, 501 A.2d 1383, 1385, 1388 (1985). The Court held that when a dispute as to the facts of a case exists, the Board has the "power to substitute its judgment for that of its referees." Id. at 270, 501 A.2d at 1385. Here, a conflict existed between the testimony of President

and Claimant. Accordingly, the Board, as the ultimate fact finder, had the power to resolve the conflict in evidence differently than the Referee.

In its factual findings, the Board found that Claimant told President that he was quitting because President's son had hit him and fired him. (FOF ¶ 8.) The Board concluded that Claimant is not ineligible for benefits under 402(b) because "a reasonable person of ordinary common sense, under similar circumstances, would be compelled to quit." (Board Decision at 2.) Employer argues that the Board, like the Referee, should have found that President told Claimant that Claimant should wait until he spoke with his son. President did proffer such testimony. (Referee Hr'g Tr. at 8.) However, Claimant testified that when he told President that his son fired and hit him, President's only response was that his son "cannot do that." (Referee Hr'g Tr. at 16.) Moreover, Claimant testified that President had previously received complaints about other belligerent behavior by his son in the form of repeated threats to fire employees, but took no action in response. (Referee Hr'g Tr. at 17.) A disputed fact exists here because Employer's testimony suggests that Claimant left before President could respond to the situation. The Board resolved the dispute in favor of Claimant and found only that "[t]he president stopped the claimant as he was walking out and asked what had happened," but did not find that President asked Claimant to wait while he investigated the matter. (FOF ¶ 7.) Consistent with Claimant's testimony, the Board also determined that President was or should have been aware that his son had behaved hostilely towards employees, threatening to fire them. (Board Decision at 2.) Based on the conflicting testimony presented, the Board was free to accept Claimant's version of events and not make the same

findings on this disputed issue that were made by the Referee. Peak, 509 Pa. at 270, 501 A.2d at 1385.

Next, we address the Board's holding that Claimant had a necessitous and compelling cause to quit his employment. As discussed above, the Board found that President's son hit Claimant. (FOF ¶ 10.) This is supported by Claimant's testimony that President's son punched him in the stomach. (Referee Hr'g Tr. at 16.)[3] Claimant, in this instance, had cause of a necessitous and compelling nature to leave his employment when he was physically attacked by President's son.[4] Claimant worked in an industrial place of business, and he operated heavy machinery. While working, on at least one if not two occasions, President's son physically assaulted

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[3] We note that there is some discrepancy in the record as to the date on which President's son punched Claimant. Claimant testified that on the date he quit, March 10, 2009, President's son pulled him off a forklift. (Referee Hr'g Tr. at 11.) Claimant also testified that President's son punched him in the stomach, but the parties' testimony is ambiguous as to whether this happened on March 9, 2009 or March 10, 2009:

> R[eferee] Okay. [President], did [Claimant] say that your son punched him?
> EW1 [President] Yes.
> R Or physically assaulted him?
> EW1 He said he punched me in the stomach.
> R [Claimant] did you say he punched you in the stomach?
> C[laimant] He did – he assaulted me on March 9th, which he did physically strike me, which [President] was aware of. March 10th when he assaulted me a second time . . . .

(Referee Hr'g Tr. at 16.)

[4] Other than asserting that the Board ignored the factual findings of the Referee that showed that Claimant did not wait for President to return from speaking with his son and that employer considered Claimant to have voluntarily quit when Claimant left without waiting as requested by President, Employer raises no argument in its brief regarding whether Claimant failed to take positive steps to preserve his employment.

Claimant. Claimant left his employment because President's son assaulted him. (FOF ¶ 10; Referee Hr'g Tr. at 8.)

In Break N Eat, the claimant did not return to work after he was beaten by a manager of his employer, Break N Eat. This Court affirmed the Board's decision affirming the determination of the Referee to grant benefits. In doing so, this Court stated that "[w]e believe it is reasonable to conclude that the beating incident can be deemed to have provided the claimant with real, not imaginary, substantial, not trifling reasons which 'compelled' his termination of employment." Break N Eat, 426 A.2d at 1263. This Court also noted that it was significant that "Break N Eat is a family corporation; and the management official responsible for beating the claimant was one of the family members." Id. at 1263 n.2. Similar to the beating of the claimant in Break N Eat, the assault on Claimant by a fellow employee, President's son, gave Claimant a real and substantial reason which compelled him to terminate his employment. Therefore, we agree with the Board that Claimant had cause of a necessitous and compelling reason to quit his employment.

Accordingly, we affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

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O R D E R

NOW, May 26, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

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RENÉE COHN JUBELIRER, Judge