IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Luk Oil,	:	
Petitioner	:	
	:	
v.	:	No. 2004 C.D. 2009
	:	Submitted: April 16, 2010
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: June 29, 2010

Luk Oil (Employer) appeals from an order of the Unemployment Compensation Board of Review (Board) reversing the decision of the Referee and granting unemployment compensation benefits to Anthony L. Mike (Claimant) because he was not offered suitable work by Employer. For the reasons that follow, we reverse the Board.

Claimant worked for Employer as a cashier. His last day of work was November 18, 2008, when he voluntarily terminated his employment.[1] He filed for

[1] Claimant states in his brief that the reasons he left his employment are not relevant here.

unemployment compensation benefits which were denied by the Department of Labor's Office of UC Benefits under Section 402(a) of the Unemployment Compensation Law (Law)[2] because Claimant had been offered a job with Employer which Claimant had refused on April 9, 2009.[3] The job was for work that was considered suitable[4] for Claimant, and Claimant denied that he refused a job.

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[2] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(a). Section 402(a) of the Law provides, in relevant part:

> An employe shall be ineligible for compensation for any week –
>
> (a) In which his unemployment is due to failure, without good cause, either to apply for suitable work at such time and in such manner as the department may prescribe, or to accept suitable work when offered to him by the employment officer or by any employer, defined in this act: Provided, That such employer notifies the employment office of such offer within seven (7) days after the making thereof.

[3] The decision does not explain why the Board only decided the case under Section 402(a) of the Law and not under Section 402(b) of the Law, 43 P.S. §802(b), for a voluntary termination.

[4] Section 4(t) of the Law, 43 P.S. §753(t), defines "suitable work," in pertinent part, as follows:

> "Suitable Work" means all work which the employe is capable of performing. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to his health, safety and morals, his physical fitness, prior training and experience, and the distance of the available work from his residence. The department shall also consider among other factors the length of time he has been unemployed and the reasons therefore, the prospect of obtaining local work in his customary occupation, his previous earnings, the prevailing condition of the labor market generally and particularly in his usual

(Footnote continued on next page…)

At the hearing before the Referee, Darryl Wynn testified for Employer and stated that after Claimant left his employ for the second time, he received information that Claimant was applying for unemployment and that Employer was going to contest his application. He also stated that he contacted Claimant four times to offer him his same job back. Because he did not have all of the paperwork in front of him at the hearing, the best he could recollect from memory was one specific time that he contacted Claimant on February 27, 2009. On that date, he stated that he had to send a worker to Claimant's home because he did not have his cell phone number. He asked the worker to have Claimant call him. He also stated that there were three other times that he spoke with Claimant, the second time being when Claimant came into his place of business after he contacted Claimant's grandmother and asked her to tell Claimant to come talk about his job.

Claimant's recollection of his contact with Employer was different. He testified that once he left his job with Employer, he got a job at K-Mart. He initially denied ever receiving a job offer from Employer after leaving his job, but then stated that while he was working at K-Mart, he received a phone call from Employer on February 27, 2008, offering him a night cashier job but that he could not accept it because he was working at K-Mart part-time. However, he admitted that he was ultimately fired from K-Mart and was collecting unemployment. He stated that Employer never offered him a job after he left K-Mart and he was in school from 8:00 a.m. until 1:00 p.m. Claimant admitted that Employer had sent

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(continued…)

> trade or occupation, prevailing wage rates in his usual trade or occupation, and the permanency of his residence.

an employee to his house because Employer could not reach him by phone to ask him to call about returning to work. Claimant testified, though, that they did not talk about the job because, "You accused me of stealing. Every time I worked, you kept saying I was…" (Reproduced Record at 31.) Eventually Claimant admitted that he had stopped in to Employer's place of business and was offered his old job but he did not take the job because "I didn't want to get accused of stealing. That's why I wouldn't come back to work." (Reproduced Record at 33.)

The Referee found that Claimant's last day of work for Employer was on November 18, 2008, and after that date, Claimant had pursued employment and worked at other facilities. Claimant had been contacted by Employer and offered work on four separate occasions after his separation on November 18, 2008, and was specifically offered work on February 27, 2009, as a cashier at a rate of $8 per hour which he declined. The last offer made to Claimant to work for Employer was in April 2009, which he again declined. The Referee then concluded that Claimant's testimony was incredible and the record was clear that he was repeatedly offered work, which he declined without establishing good cause for so doing. The Referee denied him benefits under Section 402(a) of the Law, and Claimant appealed to the Board.

The Board reversed the Referee's decision finding that while Claimant was employed by Employer, he had been accused of theft by Employer on at least one occasion. After Claimant left Employer and was working for K-Mart, Claimant was contacted by Employer and offered back his job, but Claimant refused because it conflicted with his current schedule. After leaving K-Mart,

Claimant was again contacted by Employer and offered his job but Claimant declined because he did not want to work in an environment where he was subjected to accusations of theft. The Board stated that although Employer credibly established that on at least four occasions it offered Claimant the opportunity to return to his job, the issue was whether that offer was for suitable work, and Claimant testified that "he declined the offer because he did not want to be subjected to the continual accusation that he had stolen" money from Employer. (Board's August 25, 2009 decision at 2.) Because Employer failed to offer sufficient credible testimony or evidence that the offer was for suitable work, Claimant met his burden that suitable work was not offered and that he did not reject a suitable offer, the Board granted benefits.[5] This appeal by Employer followed.[6]

[5] Employer filed a request for reconsideration which was denied by the Board. Attached to the request was documentation indicating that Claimant had worked for Employer and that he had voluntarily terminated his employment on another occasion with Employer. A specific document that Employer attached entitled "Employee Warning Notice" dated July 27, 2007, and signed by Claimant indicated that on that prior occasion, Claimant voluntarily terminated his position on July 27, 2007, because he had been stealing from Employer's cash drawer to pay for a prostitute whom he was caught with during work hours by the Chester Police Department. (*See* Reproduced Record at 61.) When Claimant asked to have his job back, strangely enough, Employer agreed on a trial basis. (*See* Reproduced Record at 62.) Employer also attached documentation stating that it had been trying to help Claimant but Claimant repeatedly stole money from his cash drawer. However, Employer never fired Claimant for stealing money from the business. (*See* Reproduced Record at 48-51.) Employer has not appealed the denial of his request for reconsideration.

[6] Our scope of review of the Board's decision is limited to determining whether constitutional rights were violated, whether the adjudication was in accordance with the law, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. §704; *Hessour v. Unemployment Compensation Board of Review*, 942 A.2d 194 (Pa. Cmwlth. 2008).

Employer contends that the Board erred in determining that suitable work was not offered to Claimant because the Board found that it offered Claimant employment on at least four different occasions, and the offer of work was for the same job, same hours of work and the same rate of pay as previously held by Claimant. Claimant, however, contends that the work was not suitable and he had good cause to turn down the offers because he would have been subject to continual harassment based on previous accusations of theft.

The Board's finding that Claimant had been accused of theft by Employer at least once while in its employ and that he did not accept Employer's job offer to return to work for Employer because he did not want to work in an environment where he would be subjected to "continual" accusations of theft was based on the following testimony:

> Employer (E): And you called me in response to that, right? We talked about the job, right?
>
> Claimant (C): I couldn't come back because I was working.
>
> E: Because you didn't want to work at night. That's what you said to me.
>
> C: I didn't want to work at night.
>
> E: But you worked at night the two prior times you worked for me, right?
>
> C: *You accused me of stealing.* Every time I worked, you kept saying I was…
>
> E: *We're not even going to talk about the stealing part because you were stealing.*

C: *No, I wasn't.*

E: But that's irrelevant right now. Did I call you -- did you call me and we talked about the job?

C: I said no, sir.

(Reproduced record at 31.) (Emphasis added.) Other than this lone statement by Claimant, there is no other evidence of "continual" allegations or "harassment" by Employer that Claimant was stealing from the business. "Harassment" is defined as "to annoy persistently." Webster's Ninth New Collegiate Dictionary 552 (1989). Without any other evidence of Claimant being annoyed persistently by Employer regarding stealing money from the business, this sketchy testimony does not constitute substantial evidence of "harassment" or "continual" allegations as found by the Board and does not turn a suitable job offer into one that is not.

Accordingly, the order of the Board is reversed, and Claimant is denied unemployment compensation benefits.

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DAN PELLEGRINI, JUDGE

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O R D E R

AND NOW, this 29th day of June, 2010, the order of the Unemployment Compensation Board of Review, dated August 25, 2009, at No. B-487815, is reversed, and Claimant Anthony L. Mike is denied unemployment compensation benefits.

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DAN PELLEGRINI, JUDGE

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HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE FRIEDMAN FILED: June 29, 2010

I respectfully dissent. The majority holds that the record does not contain substantial evidence to support the Unemployment Compensation Board of Review's (UCBR) finding that Luk Oil (Employer) had accused Anthony L. Mike (Claimant) of theft on at least one occasion, (UCBR's Findings of Fact, No. 2), and that Claimant declined to take his job back because he did not want to work in an environment where he was subjected to accusations of theft, (UCBR's Findings of Fact, No. 6). I cannot agree. Moreover, Employer did not raise that issue; thus, it is waived.

The UCBR concluded that Claimant was entitled to benefits under section 402(a) of the Unemployment Compensation Law (Law).[1] Section 402(a) of the Law provides that an employee shall be ineligible for benefits for any week in which his unemployment is due to failure, without good cause, to accept suitable work when offered by an employer. 43 P.S. §802(a). Cases decided under section 402(b) of the Law, 43 P.S. §802(b), which address whether a voluntary quit was made for a necessitous and compelling reason, are persuasive in determining whether an employee had good cause for refusing an offer of work under section 402(a) of the Law. *Shaffer v. Unemployment Compensation Board of Review*, 531 A.2d 533 (Pa. Cmwlth. 1987). Under section 402(b) case law, an employee need not indefinitely subject himself to unjust accusations. *First Federal Savings Bank v. Unemployment Compensation Board of Review*, 957 A.2d 811 (Pa. Cmwlth. 2008), *appeal denied*, 601 Pa. 685, 970 A.2d 1148 (2009).

I. Substantial Evidence

Here, the UCBR found that Claimant had good cause for refusing a job offer from Employer because Claimant did not want to be subjected to the continual accusation that he had stolen from Employer. (UCBR's op. at 2.) This finding is based on the following testimony.

> E We talked about the job, right?
>
> ….
>
> C You accused me of stealing. **Every time I worked, you kept saying I was … [stealing]**.

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

> E We're not even going to talk about the stealing part because you were stealing...
>
> C **No, I wasn't.**

(N.T. at 7) (emphasis added).

> E You stood in my lobby and said to me that you would come back to work that night. You did not show up. Now did you or did you not do that?
>
> C I came there, but I wouldn't show up because … I didn't want to get accused of stealing. That's why I wouldn't come back to work because every time … [you accused me of stealing].

(N.T. at 9.) The UCBR obviously believed Claimant's testimony that he did not steal and that Employer kept unjustly accusing him of stealing. It is the province of the UCBR, not this court, to make credibility determinations. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 501 A.2d 1383 (1985). Thus, I conclude that the above testimony constitutes substantial evidence to support the UCBR's finding.

II. Waiver

Although the majority does not address the issue, the UCBR argues that its findings are binding on appeal because Employer failed to challenge them in its brief. I agree.

In the Statement of Questions Involved portion of its brief, Employer raises this single issue:

> Whether the claimant, who resigned his employment after two prior incidents of admitted theft, had good cause to refuse an offer to return to work because he did not want to return to work under the cloud of suspicion occasioned by his prior thefts from the employer?

(Employer's brief at 1.) In setting forth this question, Employer does not argue that the record lacks substantial evidence to support the UCBR's findings of fact, nor does Employer raise this issue elsewhere in its brief. Employer argues only that Claimant's discomfort from being caught stealing does not constitute good cause for refusing Employer's job offer.[2] Thus, Employer has waived any challenge to the UCBR's findings of fact.

Accordingly, I would affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

[2] The only fact that Employer implicitly disputes is that its accusations of theft were unjust. Employer claims that Claimant did steal. However, the UCBR believed that Claimant did not steal from Employer, and, as an appellate court, we cannot review that credibility determination.