

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brownie Upchurch, :
Petitioner :
v. : No. 2156 C.D. 2010
Unemployment Compensation Board of : Submitted: April 8, 2011
Review, :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: May 19, 2011

Brownie Upchurch (Claimant) petitions for review of the September 10, 2010, order of the Unemployment Compensation Board of Review (UCBR) affirming and adopting the referee's determination that Claimant was financially ineligible for benefits. We affirm.

Claimant applied for unemployment benefits, effective April 4, 2010, thereby establishing a base year of January 1, 2009, to December 31, 2009. (Findings of Fact, No. 1.) Claimant received \$4,452 in wages during the first quarter of the base year, \$2,332 in wages during the second quarter of the base year and no wages during the third and fourth quarters. (Findings of Fact, No. 2.) Thus, Claimant had

high quarterly wages of \$4,452 and total base year wages of \$6,765.¹ (Findings of Fact, No. 3.)

Claimant had sustained a work-related injury on July 21, 2008, and had received workers' compensation benefits. (Findings of Fact, No. 4.) Those benefits were suspended on September 2, 2008, when Claimant returned to work without a loss of wages. (Findings of Fact, No. 5.) Claimant continued to work during the first two quarters of 2009, but she did not work during the last two quarters of 2009. (Findings of Fact, Nos. 5-6.) According to a workers' compensation judge (WCJ) decision, Claimant's failure to work during the last two quarters of 2009 was not due to her July 2008 work injury. (Findings of Fact, No. 7.) On May 4, 2010, Claimant's employer paid her \$5,000 in connection with her workers' compensation claim. (Findings of Fact, No. 8.)

Claimant applied for unemployment benefits in April 2010, but the local service center found Claimant financially ineligible because her total base year wages were less than the required amount.² Claimant filed an appeal, and a hearing was held before a referee.

¹ We note that the Notice of Financial Determination sent to Claimant shows that Claimant's high quarterly wages were \$4,453 and that Claimant's total base year wages were \$6,785. (R.R. at 23.) However, this discrepancy does not affect our disposition of the issues in this case.

² Section 404(e)(1) of the Unemployment Compensation Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §804(e)(1), sets forth a table indicating a claimant's qualifying wage based on the claimant's highest quarterly wage.

At the hearing, counsel for Claimant argued that: (1) Claimant was entitled to an alternate base year because of her work injury;³ or (2) the \$5,000 workers' compensation payment Claimant received in May 2010 should be included in her first quarter base year wages. (N.T., 6/15/10, at 3, R.R. at 28.) In support of these arguments, counsel offered the WCJ's decision related to the July 2008 work injury and the September 2008 suspension of benefits. (R.R. at 39-40.) Counsel asserted that Claimant appealed the WCJ's decision and that the employer settled the matter with Claimant, paying Claimant \$5,000 in May 2010 for wages she lost in the first quarter of 2009. (N.T., 6/15/10, at 6, R.R. at 10, 31.)

After considering the arguments and the evidence, the referee concluded that Claimant was not entitled to an alternate base year because there was no evidence that her failure to work during the third and fourth quarters of 2009 was a result of her July 2008 work injury. The referee also concluded that, despite counsel's claim, the record lacked any evidence to support a finding that the \$5,000 payment in May 2010 was for lost wages in 2009. Claimant appealed to the UCBR, which affirmed and adopted the referee's decision. Claimant now petitions this court for review.⁴

³ Section 204(b) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §71(b), states that any employee who does not meet the monetary requirements for unemployment benefits due to a compensable work-related injury may elect to have the base year consist of the four complete calendar quarters immediately preceding the date of the work injury.

⁴ Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Claimant argues that the UCBR erred in failing to find that the \$5,000 workers' compensation payment that Claimant received in May 2010 was for lost wages in the 2009 base year. We disagree. In *Swackhammer v. Unemployment Compensation Board of Review*, 484 A.2d 851, 853 (Pa. Cmwlth. 1984), this court held that workers' compensation benefits are to be excluded from base year wages in determining whether a person qualifies for unemployment benefits. Thus, Claimant cannot prevail on this argument.

Claimant also argues that the referee improperly prevented Claimant from offering as evidence certain medical records that were submitted to, but ignored by, the WCJ.⁵ We disagree.

Section 204(b) of the Workers' Compensation Act (Act)⁶ authorizes an alternate base year when an employee does not meet the monetary requirements for unemployment benefits due to a "compensable" work-related injury. In *Richards v. Unemployment Compensation Board of Review*, 564 Pa. 375, 383, 768 A.2d 852, 856 (2001), our Supreme Court explained that the word "compensable" in section 204(b)

⁵ Claimant asserts that these medical records, and additional testimony by Claimant, would have shown that: (1) Claimant's physicians never released her to return to full duty without restrictions; (2) Claimant did not work in 2009, and the wages paid to Claimant during the first and second quarters of 2009 were wages for "banked time" she earned prior to October 2008; and (3) Claimant's failure to work in 2009 was due to her work injury. Claimant maintains that such evidence would have established her right to an alternate base year.

⁶ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §71(b).

of the Act “requires that the injury be one for which a claimant is entitled to benefits under the substantive, as opposed to the procedural,^[7] provisions of the [Act].”

Here, then, the question was whether Claimant was **entitled** to workers’ compensation in 2009 during a period when she did not work. The referee accepted only the WCJ’s decision as evidence, and not the medical records, because the WCJ’s decision was a final adjudication of Claimant’s entitlement to benefits. Although Claimant advised the referee that she appealed the WCJ’s decision, Claimant also indicated that she settled the matter with her employer.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

⁷ Our Supreme Court noted that, under the procedural provisions of the Act, a claimant may be compensated for an injury pending final adjudication of a petition to terminate, suspend or modify benefits, and the final adjudication may be that the claimant was not entitled to benefits. *Richards*, 564 Pa. at 381-82, 768 A.2d at 856.

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	:	
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ORDER

AND NOW, this 19th day of May, 2011, the order of the Unemployment Compensation Board of Review, dated September 10, 2010, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge