IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Woolf Steel, Inc., Petitioner	:	
	:	No. 2164 C.D. 2010
v.	:	
	:	Submitted: February 25, 2011
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: June 24, 2011

Woolf Steel, Inc. (Employer) petitions for review of the September 16, 2010, order of the Unemployment Compensation Board of Review (Board), which affirmed a referee's determination that Douglas E. Kreiser (Claimant) is not ineligible for benefits pursuant to sections 401(d)(1) and 402(b) of the Unemployment Compensation Law (Law).[1] We affirm.

Claimant worked for Employer as a general fabricator for approximately fifteen years. (Reproduced Record (R.R.) at 12a.) Near the end of December 2009, Claimant informed Employer that he was scheduled to have surgery on January 8,

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §§801(d)(1) and 802(b). Section 401(d)(1) provides that an employee is eligible for benefits if he is able to work and available for suitable work. Section 402(b) provides that a claimant is ineligible for benefits if his unemployment is due to his voluntarily leaving work without cause of a necessitous or compelling nature.

2010, for a melanoma on his back and that he would be absent from work for a period of four to six weeks. (R.R. at 13a-14a.) Claimant's last day of work was January 7, 2010. (Finding of Fact No. 1.)

On February 4, 2010, Employer requested Claimant to provide further information regarding his intent to return to work. (Finding of Fact No. 3.) Claimant provided Employer with a healthcare provider's certificate on February 9, 2010, restricting Claimant from lifting more than twenty pounds for an additional two weeks and more if further surgery is needed. (Finding of Fact No. 4; R.R. at 30a-33a.) Following the receipt of the certificate, Employer sent Claimant a letter dated February 12, 2010, specifying that Claimant must return to work, without restrictions, no later than 7:00 a.m. on Monday, March 1, 2010. The letter further advised Claimant that he must provide a release from his physician or he would not be permitted to work. Finally, the letter stated that if Claimant failed to return to work at the specified time with the physician's release, Claimant would be terminated effective his last day of work, January 7, 2010. (Findings of Fact Nos. 6-8.)

On February 25, 2010, Claimant received a certification from his physician's office to return to work without restriction on March 1, 2010. (Finding of Fact No. 10.) Although Claimant submitted the certification as directed, on February 26, 2010, Claimant attempted to discuss his lack of strength in his left arm, his severe back pain, and resolve his concerns about starting work on the following Monday with Employer's vice president. (Finding of Fact No. 11.) On March 2, 2010, Claimant voluntarily resigned his employment due to his safety concerns. (Finding of Fact No. 13.)

On March 22, 2010, the local service center issued a Notice of Determination concluding that Claimant was eligible for benefits under section

401(d)(1) of the Law, 43 P.S. §801(d)(1), but ineligible for benefits under section 402(b) of the Law, 43 P.S. §802(b). Claimant timely appealed, and a hearing was held before a referee on May 24, 2010. During the hearing, Claimant testified that he did not return to his job due to safety concerns. Claimant explained that his position routinely required the ability to lift and to work around welding and hot equipment. (R.R. at 16a.) Claimant's job description requires that a fabricator have the ability to lift, pull, push, and turn up to 100 pounds of material; have the ability to stand, bend, stretch, and reach for an entire shift; and have the ability to hold and operate grinders, torches, power brushes, and welding equipment. (R.R. at 33a.) Claimant stated that, due to the lack of strength in his back and left hand, he feared that his safety and the safety of any nearby workers would be jeopardized. (R.R. at 16a.)

Claimant confirmed that he obtained the February 25, 2010, certification to return to work without restriction from his physician following his receipt of the February 12, 2010, letter from Employer instructing him to do so. (R.R. at 15a.) However, Claimant further indicated that he only obtained the certification out of concern that he would lose his medical benefits as of his last day of work, January 7, 2010, and become liable for all costs related to his surgery on the following day. (R.R. at 17a.) Claimant explained that he feared a retroactive loss of his medical insurance from that date and that he would become responsible for approximately $30,000.00 in medical costs. Id.

Claimant further stated that, when delivering the requested certification on February 26, 2010, he spoke to the production supervisor about his safety concerns and was told he would need to speak to William Woolf, Employer's vice-president, before he started working. (R.R. at 16a.) Claimant testified that he returned to work on March 1, 2010, as instructed and told Woolf that he did not feel

safe working because of the lack of strength in his arm. (R.R. at 16a.) According to Claimant, Woolf responded that he would get back to Claimant after he consulted others about Claimant's concerns. (R.R. at 16a.) Claimant said that he returned to work on March 2, 2010, with a letter outlining his concerns about returning to work, but Woolf refused to accept it. (R.R. at 16a.) As to the letter, Claimant testified:

> That letter basically was stating that because of the problems with safety and the fact that I did not feel safe working in an environment where I would be required to lift and be around welding equipment and hot equipment – I have a patch on my back that's approximately that big I have no feeling in and I was concerned whether or not that and the lack of strength in my left hand using the several pieces of equipment that are constantly in use at that job that there would be a possibility of injury for me or someone else in the immediate area.

(R.R. at 16a.) Claimant also affirmed he is able to work but cannot do a lot of heavy lifting or repetitive action with his left arm until his muscles regain strength. (R.R. at 19a.)

Woolf testified that Claimant was given the opportunity to return to work on March 1, 2010, after he submitted the certification listing no restrictions. Woolf stated that Claimant was asked three times between March 1, 2010, and March 2, 2010, whether he was going to return to work and he said he would not. (R.R. at 21a.) Woolf further explained that when Claimant refused to work without providing any other explanation from a medical provider, Employer interpreted that action as a voluntary quit. (R.R. at 22a.)

On June 16, 2010, the referee issued an order reversing the service center's determination that Claimant was ineligible for benefits. The referee found that, although Claimant voluntarily resigned his employment, Claimant credibly

testified that he believed that the weakness in his arm and back would jeopardize the safety of himself and others and that performing his normal job would exacerbate and aggravate his medical condition. The referee also accepted Claimant's testimony that he tried to discuss his concerns with Employer's vice president. (Finding of Fact No. 11.) Accordingly, the referee concluded that Claimant established a necessitous and compelling cause for ending his employment relationship[2] and is not ineligible for benefits under section 402(b) of the Law. (R.R. at 3a.) In addition, the referee found that Claimant is able and available for suitable work. (Finding of Fact No. 14.) Thus, the referee also concluded that Claimant is not disqualified from receiving benefits under section 401(d)(1) of the Law. (R.R. at 4a.)

Employer timely appealed, and on September 16, 2010, the Board issued an order affirming the referee's order and adopting the referee's findings and conclusions. (R.R. at 38a.)

On appeal to this Court,[3] Employer contends that Claimant did not establish necessitous and compelling cause to terminate his employment. Employer argues that Claimant failed to sustain his burden of proof under section 402(b) of the Law because he failed to provide Employer sufficient notice and medical documentation of his health problems.

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[2] An employee seeking benefits after voluntarily terminating his employment has the burden to prove cause of a necessitous and compelling nature for the voluntary quit. Pennsylvania Liquor Control Board v. Unemployment Compensation Board of Review, 879 A.2d 388 (Pa. Cmwlth. 2005).

[3] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

In Genetin v. Unemployment Compensation Board of Review, 499 Pa. 125, 451 A.2d 1353 (1982),[4] our Supreme Court set forth the standard applicable where a claimant asserts medical reasons for his voluntary quit. Genetin provides that in such cases a claimant may meet his burden under section 402(b) of the Law by showing: (1) adequate health reasons existed to justify the voluntary termination; (2) the claimant communicated such reasons to the employer; and (3) the claimant is available to work if reasonable accommodations can be made. In Genetin, the court also stated that "once [the employee] has communicated his medical problem to the employer and explained his inability to perform the regularly assigned duties, an employee can do no more." Id., 499 Pa. at 131, 451 A.2d at 1356.

Employer argues that the instant case is distinguishable from Genetin because Claimant did not communicate his medical condition to Employer. Employer notes that an employee has an obligation to communicate his medical

[4] The claimant in Genetin was employed as a truck driver and took a leave of absence for medical reasons. The claimant informed his employer that he intended to resign because his condition prevented him from performing his former duties. Nevertheless, he returned to work and was assigned to sweep floors for the balance of the day. The claimant did not return to work the next morning. In support of his claim for unemployment benefits, the claimant asserted that the sweeping job was a make-work position and that his employer had no suitable work available for him. He conceded, however, that he did not discuss the possibility of suitable work with his employer. The Board held that the claimant was ineligible for benefits because he failed to demonstrate that he made a good faith effort to preserve his employment, and this court affirmed. Genetin v. Unemployment Compensation Board of Review, 433 A.2d 565 (Pa. Cmwlth. 1981), rev'd and remanded, 499 Pa. 125, 451 A.2d 1353 (1982).

However, our Supreme Court rejected the notion that an employee must specifically request a transfer to a more suitable position. Instead, the court in Genetin held that where an employee voluntarily terminates employment because of a medical condition, the employee must establish that he can no longer perform his regular duties due to the medical condition, inform his employer that he can no longer perform his regular duties, and be available for suitable work consistent with his medical condition. Pursuant to the Supreme Court's holding, if the employee does this in good faith, it is up to the employer to provide suitable work. Genetin, 499 Pa. 125, 451 A.2d 1353 (1982).

problems to his employer and to explain his inability to perform his regularly assigned duties, and Employer asserts that Claimant failed to do so in this case. However, in making this argument, Employer disregards the Board's finding that Claimant attempted to explain his concerns regarding his medical condition and that his efforts were rebuffed. (Finding of Fact No. 11.) Employer also contends that the evidence Claimant provided was insufficient to establish a legitimate safety concern and that the Board's findings in that regard are not supported by substantial evidence. However, the Board accepted Claimant's testimony that he obtained a medical release to prevent Employer from retroactively terminating his medical benefits and that he continued to suffer significant weakness and pain. Contrary to Employer's assertion, Claimant's testimony provides ample support for the Board's findings.[5]

Employer relies on Fox v. Unemployment Compensation Board of Review, 522 A.2d 713 (Pa. Cmwlth. 1987), which is distinguishable from the instant case. The claimant in Fox was found ineligible for benefits because she quit without giving her employer notice of her limitations and thereby deprived her employer of the opportunity to accommodate her situation. That is not the scenario here. In this case, Claimant attempted to provide Employer notice that, because of the weakness in

[5] Employer also relies on St. Barnabas, Inc. v. Unemployment Compensation Board of Review, 525 A.2d 885 (Pa. Cmwlth. 1987), to contend that an employee must establish that the reason for quitting is real and not perceived. However, the facts and legal analysis in St. Barnabas do not involve that issue. The claimant in St. Barnabas resigned from her employment alleging humiliating treatment and sexual harassment by her supervisor. Although the employer had procedures in place to report such treatment, the claimant failed to notify the employer of her reasons for leaving. This Court held that the claimant was ineligible for benefits because, by failing to utilize the employer's reporting procedure and allow the employer an opportunity to correct the problem, she failed to demonstrate that she acted with ordinary common sense. Thus, the issue in St. Barnabas was not whether the humiliating treatment and sexual harassment were real but whether the claimant had carried her burden to prove that she made her employer aware of the harassment.

his back and left arm, he had concerns about his ability to safely perform his job. Because the Board accepted Claimant's testimony that he attempted to provide Employer with notice of his medical concerns, Employer's reliance on Fox is misplaced.

Employer maintains that the safety concerns Claimant raised are vague and unsubstantiated by any medical documentation. However, we explained that a claimant need not always produce expert medical testimony or medical documentation to satisfy his burden to present "competent evidence":

> The distinction between 'competent evidence' ... and the 'competent medical evidence' requirement articulated in the opinion of the court below is vital. *The former is a broader standard which allows an applicant to meet the burden with his own testimony and supporting documents.* The latter is a more stringent requirement which could result in the denial of benefits simply because an applicant fails to provide the expert testimony of a physician even where such testimony would be superfluous or cumulative. The broader standard more effectively comports with this Court's view that the Unemployment Compensation Law must be liberally and broadly construed. Steffy v. Unemployment Compensation Board of Review, 453 A.2d 591, 594 (Pa. 1982) (emphasis added). This Court subsequently interpreted Steffy to allow a claimant to satisfy his or her burden of production by presenting her testimony and/or supporting documents. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994); Judd v. Unemployment Compensation Board of Review, 496 A.2d 1377 (Pa. Cmwlth. 1985). In Goettler Distributing, Inc. v. Unemployment Compensation Board of Review, 508 A.2d 630 (Pa. Cmwlth. 1986), this Court expressly concluded that the disjunctive "and/or" interpretation of Steffy was the better analysis and was consistent with the broad and liberal interpretation of the Law.

Philadelphia Parking Authority v. Unemployment Compensation Board of Review, 1 A.3d 965, 968-969 (Pa. Cmwlth. 2010)[6].

Employer also contends that the certification from Claimant's physician releasing him to work without restriction demonstrates that there was not a safety concern, and that Claimant was, in fact, able to work.[7] However, the Board accepted Claimant's testimony that Claimant asked for the certification only out of fear of losing his medical benefits, retroactive to his last date of work on January 7, 2010, and then becoming responsible for approximately $30,000.00 in medical costs. (Finding of Fact No. 9.) In unemployment compensation cases, the Board is the ultimate fact finder and has exclusive authority to determine witness credibility and the weight to be accorded evidence. Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518 (Pa. Cmwlth. 1999) The Board's findings are conclusive on appeal so long as the record, when viewed in its entirety, contains substantial

[6] The claimant in Philadelphia Parking Authority was reassigned to a 3:30 p.m. to midnight shift as a money room technician after complications from diabetes left her unable to perform her original position as a supervisor. The claimant also was diagnosed with sleep apnea, which caused her to fall asleep without realizing it. The employer discharged the claimant for sleeping while on duty in violation of the employer's work rule. The Board relied on the claimant's testimony to find that her actions did not equate to willful misconduct and hold that she was eligible for benefits. The employer appealed, arguing that the Board erred by relying solely on the claimant's testimony to establish that her medical condition provided good cause for her actions. Affirming the Board's decision, we held that a claimant need not provide expert medical testimony in order to establish that a physical illness caused her non-compliance with the employer's directive.

[7] The certification on which Employer relies is a pre-printed, fill-in-the-blank hospital form entitled "Certificate for School/Work Absence" that was signed by an LPN on the doctor's behalf. (Record item no. 2, Ex. 14.) We note that without corroboration, this document is insufficient as a matter of law to support a finding of fact. See Myers v. Unemployment Compensation Board of Review, 533 Pa. 373, 625 A.2d 622 (1993); Vann v. Unemployment Compensation Board of Review, 508 Pa. 139, 494 A.2d 1081 (1985) (hearsay evidence admitted without objection may support a finding only if it is supported by other competent evidence).

evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977).

Finally, regarding the issue of Claimant's availability to work, Employer argues that Claimant failed to provide Employer adequate information regarding his limitations thereby negating Employer's ability to find suitable accommodations for him. Again, Employer mischaracterizes the facts as found by the Board, i.e., that Claimant attempted to provide Employer with notice of his safety concerns, and Employer refused to acknowledge them. (Finding of Fact No. 11.) Further, Claimant's credible testimony that, after his resignation, he searched for work in other areas and attended interviews supports the Board's determination that Claimant is able and available for suitable work. (Finding of Fact No. 14.)

Having carefully reviewed the record, we conclude that Claimant has satisfied the standard enunciated in Genetin. Claimant provided sufficient credible evidence to establish that adequate health reasons existed causing him to voluntarily terminate his employment, that he tried to communicate these concerns to Employer, and that he was available to work. Therefore, the Board properly concluded that Claimant is not ineligible for benefits under sections 401(d)(1) or 402(b) of the Law.

Accordingly, we affirm.

PATRICIA A. McCULLOUGH, Judge

President Judge Leadbetter dissents.

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Woolf Steel, Inc., Petitioner	:	No. 2164 C.D. 2010
v.	:	
Unemployment Compensation Board of Review, Respondent	:	

ORDER

AND NOW, this 24th day of June, 2011, the order of the Unemployment Compensation Board of Review, dated September 16, 2010, is affirmed.

PATRICIA A. McCULLOUGH, Judge