

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Fanini, :
Petitioner :
v. : No. 2172 C.D. 2010
Unemployment Compensation : Submitted: April 8, 2011
Board of Review, :
Respondent :

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: July 25, 2011

Michael A. Fanini (Claimant) petitions, *pro se*, for review of an adjudication of the Unemployment Compensation Board of Review (Board) denying his claim for benefits. In doing so, the Board affirmed the decision of the Referee and held that Claimant was ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law)¹ because he voluntarily quit his job without cause of a necessitous and compelling nature. Concluding that the Board did not err, we affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§751-914. In relevant part, Section 402(b) provides that an employee is ineligible for compensation when “his employment is due to voluntarily leaving work without cause of a necessitous and compelling nature[.]” 43 P.S. §802(b).

Claimant worked full-time as a carpenter for Intech Construction (Employer), and he normally worked day shift. On Wednesday, February 17, 2010, Claimant was laid off due to lack of work. Employer then contacted Claimant and asked him to work a night shift job, at the Philadelphia Airport, for two weeks beginning Monday, February 22, 2010. Claimant reluctantly accepted and informed Employer that he could only work night shift temporarily.

Claimant worked night shift from February 22 to March 5, 2010. Claimant contends that during this time he experienced various “last minute” changes to his work schedule and extensions of the night shift assignment. On Friday, March 5, 2010, Employer requested that Claimant continue to work night shift through Wednesday, March 10, 2010. Claimant told Employer that he would need to discuss the matter with his wife because it was impacting their child care arrangements. On Monday, March 8, 2010, Claimant informed Employer that he could not continue working night shift due to his family’s child care needs. Claimant requested to return to day shift, but was told that there was no day shift work available. Claimant did not return to work.

Claimant filed for unemployment compensation benefits, which the Philadelphia UC Service Center granted upon finding Claimant quit his job for a necessitous and compelling reason. Employer appealed and a hearing was held before a Referee.²

At the hearing, Claimant testified about his acceptance of the night shift assignment. He noted that he took the job because he was told that it would only be for one week and that he informed Employer that he could work at night for one week only. Claimant admitted, nevertheless, that he worked the night shift

² Claimant was represented by counsel at the hearing before the Referee.

job for two weeks without protest. Next, Claimant stated that the night shift was expected to be a temporary assignment, but Employer extended it multiple times. This caused his decision to not return to work on March 8, 2010.

Claimant then testified that when he worked day shift he would pick up his son from daycare at 4:30 p.m. on his way home from work. Claimant's normal night shift hours were 10:00 p.m. to 6:00 a.m. Prior to accepting the airport assignment, Claimant had worked night shift on only one occasion. When he began the airport assignment, Claimant arranged for a relative to pick up his son from daycare. Unfortunately, that relative suffers from a serious medical condition and could not be depended upon to pick the child up every day. The Referee asked Claimant why he could not pick his son up from daycare at 4:30 p.m. when he did not start work until 10:00 p.m. Claimant replied that he would be sleeping at that time. Claimant maintained that he did not quit his job, but instead took a lay-off rather than continue working nights.

Gina White, Employer's Field Services Coordinator, testified on behalf of Employer. White stated that she originally told Claimant the night shift job would last two weeks. She remembered that he reluctantly accepted because he did not want to work nights. White testified that, after Claimant was told the night shift job would be extended three more days beginning March 8, 2010, Claimant called her and told her he could no longer work the night shift. White advised Claimant that if he did not show up for work it would be considered a quit. White testified that continuing night shift work was available for Claimant, and, possibly, after that job was completed day shift work would have become available.

The Referee found that the night shift job Employer offered to Claimant, and which he accepted, was to last two weeks. The Referee further found that Claimant quit his job because he was dissatisfied with working night shift, and that continuing work was available to Claimant. Finding that Claimant lacked a necessitous and compelling reason for quitting, the Referee held that he was ineligible for benefits under Section 402(b) of the Law. Claimant appealed to the Board.³ In affirming the Referee's determination, the Board adopted and incorporated the Referee's findings of fact and conclusions of law. The Board expressly noted that it found Employer's witness to be credible and resolved all conflicts in testimony in favor of Employer.⁴ Claimant requested reconsideration of the Board's decision, which was denied. Claimant now petitions for this Court's review.

³ On appeal to the Board, Claimant submitted a brief which contained new explanations of his testimony before the Referee, as well as additional information and documents that were not offered at the hearing. Pursuant to its regulation and established case law the Board did not consider this information. *See* 34 Pa. Code §101.106 (noting the Board can either review based upon the evidence previously submitted or direct the taking of additional testimony). *See also Tener v. Unemployment Compensation Board of Review*, 568 A.2d 733, 738 (Pa. Cmwlth. 1990). Similarly, in his appeal to this Court Claimant attempts to advance these new facts, including that the start and end times of his work day for the night shift job varied. We cannot consider this information. *Tener*, 568 A.2d at 738 (this Court is bound by the facts certified in the record on appeal and will not consider evidence submitted to the Board that was not offered to the Referee).

⁴ It is well-settled that the Board is the ultimate finder of facts and, as such, has the discretion to make credibility determinations and resolve conflicts in the evidence. *City of Pittsburgh, Department of Public Safety v. Unemployment Compensation Board of Review*, 927 A.2d 675, 679 (Pa. Cmwlth. 2007) (noting this Court will not reverse the Board on appeal when its findings are supported by substantial evidence).

On appeal,⁵ Claimant raises two issues for our review, which may be summarized as follows.⁶ Claimant contends that the Board erred in finding him ineligible for benefits under Section 402(b). Claimant argues that he had necessitous and compelling reasons to quit because of (1) the adverse effects working night shift had on his child care arrangements and (2) Employer's unilateral modifications of his work schedule.

Section 402(b) of the Law states, in relevant part, that “[a]n employe shall be ineligible for compensation for any week ... [in] which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature[.]” 43 P.S. §802(b).⁷ The failure of an employee to take all reasonable steps to preserve employment results in a voluntary termination. *Dopson v. Unemployment Compensation Board of Review*, 983 A.2d 1282, 1284 (Pa. Cmwlth. 2009). When an employee voluntarily terminates his employment he bears the burden of proving that he quit for necessitous and compelling reasons. *Renda v. Unemployment Compensation Board of Review*, 837 A.2d 685, 692 (Pa. Cmwlth. 2003).

⁵ Our review is limited to determining whether constitutional rights were violated, whether errors of law were committed, and whether findings of fact are supported by substantial evidence. *Beddis v. Unemployment Compensation Board of Review*, 6 A.3d 1053, 1055 n.2 (Pa. Cmwlth. 2010).

⁶ Claimant also makes a brief argument that the Board erred in finding him ineligible under Section 402(e) of the Law. That argument is based upon a typographical error in the Referee's order. The Referee did not find Claimant ineligible under Section 402(e) of the Law, as the order states, but found him ineligible under Section 402(b) of the Law.

⁷ Whether one has “cause of a necessitous and compelling nature” to terminate his employment is the ultimate conclusion drawn from the underlying factual findings and, as such, is subject to appellate review. *Taylor v. Unemployment Compensation Board of Review*, 474 Pa. 351, 358, 378 A.2d 829, 832 (1977).

Necessitous and compelling cause will be found where the circumstances produce pressure, both real and substantial, that would compel a reasonable person under the same circumstances to act in the same manner. *Id.* at 691. Lack of work, perpetual layoffs and drastic reductions in hours are common examples of necessitous and compelling reasons to terminate one's employment. *See, e.g., Staub v. Unemployment Compensation Board of Review*, 673 A.2d 434, 437 (Pa. Cmwlth. 1996).

Pennsylvania courts have also held that, in certain situations, the inability of a parent to provide child care can constitute a necessitous and compelling reason for terminating employment. *Dopson*, 983 A.2d at 1284. *See also Shaffer v. Unemployment Compensation Board of Review*, 928 A.2d 391, 394 (Pa. Cmwlth. 2007). Generally, in these cases, the claimant must have made an exhaustive effort to find alternative child care arrangements to no avail. *Shaffer*, 928 A.2d at 394.

For example, in *Truitt v. Unemployment Compensation Board of Review*, 527 Pa. 138, 589 A.2d 208 (1991), our Supreme Court held that a waitress demonstrated a necessitous and compelling reason to quit her job when her employer required her to work until 3:00 a.m. and she had no one to watch her two young children. Although the children's grandmother usually watched them while claimant was working, the grandmother sustained an injury that prevented her from doing so. The claimant could not find a substitute or arrange a different work schedule. In finding that a necessitous and compelling reason to quit existed, our Supreme Court stated:

[T]he sudden physical disability of a trusted baby-sitter and the unavailing search for a replacement within two days produced both "real and substantial pressure" on [claimant] to terminate

her employment. Considering the hours that [she] was required to work, we believe that any reasonable person who had to find child care on this short notice would have done what [claimant] did. Claimants need not place their children with strangers or unchecked day care agencies....

[Claimant] attempted to find someone or an agency, to no avail, to watch her children ... and, additionally, she sought to arrange a different schedule with her employer. The employer declined to accommodate her either temporarily or permanently. There is nothing more that we can or should ask of an employee before that employee terminates his or her employment.

Truitt, 527 Pa. at 143, 589 A.2d at 210.

Relying on *Truitt*, Claimant contends that he had a necessitous and compelling reason to quit because working night shift adversely affected his normal child care arrangement and his alternative arrangement with his relative was not reliable. However, *Truitt* is distinguishable from the present case.

In *Truitt* the evidence established that the claimant had exhausted all possible alternative sources of child care and simply could not work her normal shift. In the case *sub judice*, the record shows only that Claimant's relative was unable to guarantee that she could pick up his son from daycare every day because of her medical condition. There is no indication that Claimant attempted to find other individuals who could pick up his son from daycare, or that he inquired into alternative sources of child care. Moreover, Claimant did not prove that working night shift rendered him completely unable to care for his son. Claimant did not start work until 10:00 p.m., while his son needed to be picked up from daycare at 4:30 p.m. When asked by the Referee why he could not pick up his son, Claimant

replied that it was because he would be sleeping at 4:30.⁸ Claimant did not explain why he could not go to sleep earlier and pick up his son and care for him until his wife got home from work. Claimant proved only that he accepted Employer's offer to work night shift and thereafter discovered that it was inconvenient. Claimant did not make a reasonable effort to preserve his employment, nor did he prove he quit for a necessitous and compelling reason.

Alternatively, Claimant argues that by offering him only night shift work and extending the length of that work, Employer unilaterally changed the conditions of his employment. Thus, pursuant to our decision in *Mauro v. Unemployment Compensation Board of Review*, 751 A.2d 276 (Pa. Cmwlth. 2000), Claimant believes he quit for necessitous and compelling reasons. Claimant's argument in this regard also lacks merit.

Mauro involved a carpenter who, at his interview, told his employer that he could only work certain hours and at a certain location because of his child care needs. *Id.* at 278. Employer agreed to those terms when it hired him. Shortly thereafter, employer decided to ignore its commitment and began to require claimant to work varying hours at different job locations. This Court found employer's unilateral change in the conditions of employment gave the claimant necessitous and compelling reason to quit.

Such is not the case here. The record shows Claimant was laid off from his day shift position. Employer offered him a night shift job expected to last two weeks, and Claimant accepted the offer, working the job for two weeks. Employer then requested a three-day extension of the night shift job so that the

⁸ Claimant stated he usually got off work at 6:00 a.m., went to bed at 1:00 p.m., and woke up around 8:00 p.m.

project could be completed. Such a brief extension of a work assignment does not rise to the level of a unilateral change in the conditions of employment that would justify a quit. Moreover, the present case is distinguishable from *Mauro* because Claimant did not attach any conditions to his acceptance of the night shift position. Thus, Claimant's argument in this regard lacks merit.

In sum, Claimant did not establish that he had a necessitous and compelling reason to voluntarily terminate his employment. Therefore, the Board did not err in holding that Claimant was ineligible for benefits under Section 402(b) of the Law. Accordingly, we affirm.

MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 25th day of July, 2011, the order of the Unemployment Compensation Board of Review, dated August 17, 2010, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge