

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph C. Lawrence,	:	
Petitioner	:	
	:	
v.	:	No. 2313 C.D. 2009
	:	
Unemployment Compensation	:	Submitted: July 2, 2010
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: September 20, 2010

In this appeal,¹ Joseph C. Lawrence (Claimant) asks whether the Unemployment Compensation Board of Review (Board) erred in denying him unemployment benefits. The Board denied Claimant benefits on the grounds Claimant voluntarily quit his employment to accept an early retirement incentive and, had he not done so, he would not have been laid off.

¹ Before this Court are four other related cases: Donnelly v. Unemployment Comp. Bd. of Review, (Dkt. No. 2496 C.D. 2009, filed September 20, 2010); Bixler v. Unemployment Comp. Bd. of Review, (Dkt. No. 2314 C.D. 2009, filed September 20, 2010); Diehl v. Unemployment Comp. Bd. of Review, ___ A.3d ___ (Pa. Cmwlth., Dkt. No. 2421 C.D. 2009, filed September 20, 2010); and, Dehoff v. Unemployment Comp. Bd. of Review, (Dkt. No. 275 C.D. 2010, filed September 20, 2010). This Court issued orders permitting the Petitioners in those cases to proceed *seriatim* with this appeal.

The petitioners in all five cases are joined by the Pennsylvania AFL-CIO as *amicus curiae*.

Claimant adopts by reference the arguments made by the petitioner/claimant in Diehl v. Unemployment Compensation Board of Review, ___ A.3d ___ (Pa. Cmwlth., Dkt. No. 2421 C.D. 2009, filed September 20, 2010). There, the claimant primarily argued the Board’s decision ignored the clear and unambiguous language of the “voluntary layoff option” proviso (VLO proviso) contained in Section 402(b) of the Unemployment Compensation Law² (Law) (“no otherwise eligible claimant shall be denied benefits for any week in which his unemployment is due to exercising the option of accepting a layoff, from an available position pursuant to a labor-management contract agreement). The claimant in Diehl also asked this Court to overrule, or, alternatively, distinguish on its facts, our *en banc* decision in Renda v. Unemployment Compensation Board of Review, 837 A.2d 685 (Pa. Cmwlth. 2003), appeal denied, 581 Pa. 685, 863 A.2d 1151 (2004), which held the VLO proviso is inapplicable where a claimant accepts an early retirement incentive package. The claimant in Diehl also argued the Board capriciously disregarded evidence that he had good cause to voluntarily leave his employment. Based on our rejection of these and other assertions in Diehl, we affirm the Board’s decision.

The Board found the following facts. Claimant worked for ESAB Group, Inc. (Employer) for approximately 39 years at a final rate of pay of approximately \$19.16 per hour. Claimant’s last day of employment was March 31, 2009.

² Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(b).

Employer offered an early retirement package to Claimant and other employees as part of a downsizing effort. The early retirement package provided for some severance pay, vacation payments and insurance coverage.

Claimant believed if he retired and accepted the package he would save an employee with less seniority from possible layoff, and “he didn’t wish to work with scabs.” Bd. Op., 10/28/09, Finding of Fact (F.F.) No. 4. Claimant’s belief that Employer would lay him off or require him to work in an unsuitable position was “pure speculation.” F.F. No. 5. Claimant voluntarily retired and accepted the early retirement incentives.

Claimant subsequently applied for unemployment benefits, which were initially denied. Claimant appealed. A referee conducted a hearing at which Claimant testified. Claimant was unrepresented at the hearing; however, the president of Claimant’s union assisted Claimant and also testified as a witness. Employer did not appear at the hearing. Ultimately, the referee affirmed the initial denial of benefits. Claimant, assisted by counsel for the first time, appealed to the Board.

The Board affirmed the referee’s denial of benefits, explaining:

The claimant voluntarily terminated his employment in order to retire and accept a severance package. The claimant quit allegedly to allow other workers to keep their jobs and he did not wish to work with scabs. The claimant’s speculation about layoff or transfer to unsuitable work was just that – speculation. The claimant has not demonstrated reason of a

necessitous and compelling nature for voluntarily terminating his employment. Benefits are denied.

Bd. Op. at 2. Claimant now appeals to this Court.

On appeal,³ Claimant adopts by reference the arguments set forth in the brief of the petitioner/claimant in Diehl. The claimant there essentially raised four issues. First, he asserted the Board erred in denying benefits under Section 402(b) of the Law where he exercised an option of accepting a layoff from an available position pursuant to an agreement between Employer and his labor union. Next, he argued the Board capriciously disregarded evidence that he had good cause for leaving his employment. Additionally, the claimant maintained, prior to leaving his employment, he received assurances from the local UC service center that he would qualify for benefits. Finally, the claimant asserted that awarding benefits would be “revenue neutral” for the unemployment compensation fund because, had he not accepted a layoff, Employer would have laid off another employee who would be receiving the benefits the claimant sought.

³ “Our review is limited to determining whether the findings of fact are supported by substantial evidence and whether there was a violation of the constitution or agency procedure of law.” Caterpillar, Inc. v. Unemployment Comp. Bd. of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 n.5 (1997).

As fact finder, the Board determines the weight assigned to the evidence. Tapco, Inc. v. Unemployment Comp. Bd. of Review, 650 A.2d 1106 (Pa. Cmwlth. 1994). Credibility determinations are exclusively within the Board’s province. Melomed v. Unemployment Comp. Bd. of Review, 972 A.2d 593 (Pa. Cmwlth. 2009).

Unchallenged findings are conclusive on appeal. Campbell v. Unemployment Comp. Bd. of Review, 694 A.2d 1167 (Pa. Cmwlth. 1997). In addition, the Board’s findings are conclusive on review if supported by substantial evidence in the record, taken as a whole. Tapco.

As a further point, Claimant notes that here, unlike in Diehl, the Board's decision did not even reference the VLO proviso.

In Diehl, we rejected all of the claimant's arguments. Specifically, after a review of the long line of cases addressing the VLO proviso, we reiterated our prior holdings that the VLO proviso does not apply where a claimant accepts an early retirement incentive package.

Also, for several reasons, we rejected the claimant's argument that Renda conflicts with the plain language of the VLO proviso, as well as the claimant's attempts to distinguish Renda.

We further rejected the claimant's assertion that the Board capriciously disregarded evidence that he left work for a necessitous and compelling reason. In particular, the record adequately supported the Board's findings that the claimant was in no danger of being laid off because continuing work was available to him as a high seniority employee, and the claimant voluntarily quit to help the company and to receive early retirement incentives. Additionally, we indicated the claimant offered no specific, direct evidence of communications or actions by Employer that his job was imminently threatened. In short, we concluded, because the Board's findings were adequately supported and because those findings, in turn, supported the Board's determination that there were no necessitous or compelling reasons forcing the claimant in Diehl to retire early, the Board did not capriciously disregard evidence.

Finally, we deemed waived the claimant's undeveloped arguments that he was entitled to benefits based on an alleged representation by a local UC office employee, and that a grant of benefits would be revenue neutral to the unemployment compensation fund. We also explained these arguments failed on their merits.

Our decision in Diehl controls here. More specifically, the facts presented here are virtually identical to those presented in Diehl. Thus, as in Diehl, we conclude the VLO proviso is inapplicable here where Claimant accepted an early retirement incentive package, and we again decline to overrule or factually distinguish Renda. Further, we reject Claimant's contention that the Board's failure to specifically reference the VLO proviso in its decision compels a different result. We reiterate our repeated holdings, discussed at length in Diehl, that the VLO proviso is inapplicable where, as here, a claimant accepts an early retirement incentive package. Thus, the Board's failure to specifically mention the VLO proviso does not warrant reversal.

In addition, as in Diehl, we discern no capricious disregard of evidence on the issue of necessitous and compelling cause. More particularly, similar to Diehl, the Board here found:

2. The employer offered an early retirement package to the claimant and other employees as part of a downsizing effort.
3. The early retirement package provided for some severance pay, vacation payments and insurance coverage.

4. The claimant believed if he retired and accepted the package he would save an employee with less seniority from possible layoff and he didn't wish to work with scabs.

5. It was the claimant's pure speculation that he was going to be laid off or work in an unsuitable position for which he quit and accepted the bonus.

6. The claimant voluntarily retired effective March 31, 2009.

F.F. Nos. 2-6. These findings, which are supported by Claimant's testimony and documentary evidence, see Referee's Hearing of 8/11/09, Notes of Testimony, at 3, 4-6, 7, 8; Ex. C-1, in turn, support the Board's determination that there were no necessitous and compelling reasons forcing Claimant to retire early.

Nevertheless, Claimant argues his situation includes an issue in addition to those presented in Diehl. Specifically, Claimant contends, prior to accepting the early retirement package, Employer assigned him to a new, onerous job, a fact which gave him necessitous and compelling cause to leave work. Claimant argues his new assignment was physically demanding, and he was unable to perform it because of a prior work injury. Claimant asserts this forced job change constitutes a separate basis for awarding benefits. We disagree.

First, Claimant did not raise this issue in his petition for review to this Court; therefore, it is waived. See Jimoh v. Unemployment Comp. Bd. of Review, 902 A.2d 608 (Pa. Cmwlth. 2006) (issues not contained in petition for review or fairly comprised therein are deemed waived).

Also, this argument fails on the merits. As stated above, the Board determined, “[t]he claimant’s speculation about ... transfer to unsuitable work was just that – speculation. The claimant has not demonstrated reason of a necessitous and compelling nature for voluntarily terminating his employment.” Bd. Op. at 2; see also F.F. No. 5. No error is apparent in the Board’s determination.

More specifically, at hearing, Claimant testified that his last position prior to retirement was “[s]hipping [r]eceiving [c]lerk.” N.T. at 2. Claimant explained that this position was not his original position; he previously worked for Employer as a “rewinder.” N.T. at 5. Claimant bid into the shipping clerk position because, while working as a rewinder, he sustained a knee injury that prevented him from performing the duties required of that position. N.T. at 5. In response to questioning by his union president, Claimant testified there was a possibility that, if his shipping clerk position was eliminated, the only available remaining job would be the rewinder position that he was physically unable to perform. N.T. at 4-6. Thus, Claimant presented speculative testimony regarding the potential impact of his physical limitations on his prospects of future employment with Employer. Claimant did not testify that, at the time he accepted the early retirement incentive package, his shipping clerk position was imminently threatened, but rather, “if any other shipping job was [eliminated], it probably would have been [his] job,” forcing him to return to the rewinder job he could no longer physically perform. N.T. at 4, 6 (emphasis added).

More importantly, when asked if he was aware of the possible elimination of the shipping clerk position when he accepted the early retirement

package or whether the possible elimination of that position arose later, Claimant responded, “I’m not sure, I think it happened a little bit later, I’m not, I don’t remember exactly anymore. But it wasn’t much difference in time.” N.T. at 5 (emphasis added). Thus, Claimant did not definitively testify that the possible elimination of his shipping clerk position impacted his decision to accept the early retirement package. Claimant’s testimony regarding his speculation about his future employment prospects does not establish the requisite necessitous and compelling cause to voluntarily quit his employment. Indeed, “[w]here ... the [e]mployer [does] not specifically tell the claimant that he [will] be laid off and continuing work remain[s] available ... speculation about his future prospects does not amount to necessitous and compelling cause to terminate his employment.” Johnson v. Unemployment Compensation Board of Review, 869 A.2d 1095, 1115 (Pa. Cmwlth. 2005), appeal denied sub nom., Huntzinger v. Unemployment Compensation Board of Review, 585 Pa. 699, 889 A.2d 90 (2005). Thus, even if Claimant properly preserved this issue, we agree with the Board that Claimant’s speculation about a possible transfer to unsuitable work did not constitute good cause for Claimant to voluntarily terminate his employment.

Finally, for the same reasons expressed in Diehl, we reject Claimant’s arguments concerning the alleged representations made by the local UC office personnel, and the revenue neutral effect of an award of benefits on the UC Fund. As in Diehl, Claimant waived these issues by failing to raise them in his petition for review or fully develop them in his brief to this Court. Further, for the reasons set forth in Diehl, these arguments fail on their merits.

Accordingly, for the reasons more fully expressed in Diehl, we affirm.

ROBERT SIMPSON, Judge

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	:	
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ORDER

AND NOW, this 20th day of September, 2010, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge