

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David M. Holland,	:	
Petitioner	:	
	:	
v.	:	No. 2625 C.D. 2009
	:	Submitted: May 14, 2010
Unemployment Compensation Board of Review,	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: August 5, 2010

Petitioner David M. Holland (Claimant) petitions *pro se* for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed a Referee’s decision and order that denied unemployment compensation benefits to Claimant pursuant to Section 402(b) of the Unemployment Compensation Law (Law).¹ For the reasons set forth below, we affirm the Board’s order.

Claimant applied for unemployment compensation benefits after not returning to his job as a plumbing mechanic with Pendel and Co., Inc. (Employer) following his scheduled vacation. The Allentown UC Service Center (Service

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

Center) issued a determination, finding Claimant ineligible for benefits under Section 402(b) of the Law. Claimant appealed the Service Center's determination, raising the issue of whether he was constructively discharged.

An evidentiary hearing was held before a Referee, during which Claimant testified that he was discharged from his employment with Employer because he complained to Employer about paying for the maintenance and inspection of his company truck. Claimant testified he was not aware of any company policy requiring employees to pay for the maintenance of their company trucks, and Employer became upset with him when he refused to authorize deductions from his pay for the maintenance on his work truck. (Certified Record (C.R.), Item No. 10, at p.11.) Claimant testified that he believed Employer had fired him when Employer told him that if he did not pay for the truck maintenance he "was done here." (*Id.* at p.10.)

Employer presented the testimony of Robert Conneen (Owner) and Robert Conneen Jr. (Company Representative) in support of its position. The Owner testified that Claimant told him that he was dropping his work truck off at the garage before he went on vacation, and he told Claimant "I hope it doesn't cost a lot of money." (*Id.* at p.18.) The Owner testified that if an employee needs to get an oil change or tires for his work truck, the employee pays for the work. (*Id.* at p.17.) Employer then reimburses the employee. (*Id.*) The Owner testified that he never told Claimant he was fired. (*Id.* at p.20.)

Following the hearing, the Referee issued a decision in which he determined Claimant to be ineligible for benefits under Section 402(b) of the Law because his separation was due to voluntarily leaving employment. The Referee made the following relevant findings:

1. Claimant last worked for Pendel and Company Inc. on July 17, 2009. He worked with the employer for approximately fifteen years. Claimant and other employees were working reduced hours and claimant was working 32 hours per week and was paid \$22 per hour.
2. Claimant was going to go on vacation and spoke with Mr. Conneen approximately two weeks prior to his going on vacation. Claimant was going to do something with his son. Claimant mentioned that he would have the company vehicle gone over and inspected while claimant was on vacation. Mr. Conneen mentioned something in his own words that he hoped that the cost would not hammer him. That is the repair cost. The company picks up the cost for repairs.
3. On July 17, 2009 claimant again spoke with Mr. Conneen. Claimant was going to be going on vacation as of this time and claimant indicated that he would take the vehicle to the repair shop. Mr. Conneen mentioned that he hoped that it does not cost a lot of money. Nothing was said to claimant about claimant being responsible for any repair cost. Nothing more was said about the matter. The conversation ended.
4. After the conversation Mr. Conneen believed that the repairs would be done at the repair shop and that claimant would return to work after vacation.
5. Claimant never returned to work and abandoned the job without any explanation to the employer at all.
6. Claimant had never been asked to pay for any repair and the employer did not insinuate on July 17, 2009 that claimant would be asked to pay for any repair.
7. As claimant explained to the Referee he was allegedly terminated from the job by the employer because he would not pay for any repair cost to the vehicle. The employer did not terminate claimant and the employer did not ask or insinuate that it wanted claimant to pay for any repairs.

(C.R., Item No. 11.)

The Referee concluded that Claimant did not act as a reasonable and prudent person might, under the circumstances, to take good faith steps to maintain his employment relationship. (*Id.*) Finally, the Referee concluded that Claimant did not meet his burden to demonstrate a necessitous and compelling reason for leaving his employment as required by Section 402(b) of the Law. (*Id.*)

Claimant appealed to the Board, which issued an order affirming the Referee's determination. (C.R., Item No. 14.) The Board also denied Claimant's request that the record be remanded for additional testimony. (*Id.*) In its order, the Board adopted and incorporated the Referee's findings of fact and conclusions of law. Claimant now petitions this Court for review of the Board's order. (*Id.*)

On appeal,² Claimant essentially argues that the Board erred when it determined that Claimant voluntarily terminated his employment without cause of a necessitous and compelling nature.³ Claimant appears to take the position that

² This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704. Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules, Inc. v. Unemployment Comp. Bd. of Review*, 604 A.2d 1159 (Pa. Cmwlth. 1992).

³ Claimant appears to attempt to raise a number of other issues in his brief before this Court. In the "Statement of Questions" portion of his brief, Claimant lists the following four issues:

1. Why was the proper hearsay objection . . . not applied?
2. When an Employer is acting retaliatory is there any recourse?
3. When economic duress is imposed in the way of threats and financial distress what is the reasonable alternative to constructive dismissal?

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4. Would a [an] honest reasonable Employer offer a job back to an employee who gave testimony under oath about other employees using unemployment compensation to supplement their income while they still work to help them and the Employer through hard times?

(Claimant's brief at "Questions.") Claimant also argues in his brief that he did not receive due process, and that his First, Fifth and Fourteenth Amendment rights were violated. Claimant's petition for review, however, did not include any of the above questions and issues. Instead, Claimant's petition for review provides only that:

The payment of the work truck was being forced upon me. I had no contract of employment in writing. I could not return to my job due to constructive discharge. I can not obtain the tape of the hearing until the UC legal department releases it. The transcript highlights and the bill are my defense.

(Claimant's petition for review at 1). Additionally, Claimant's brief lacks pertinent discussion and citation to relevant authorities as to the above questions and issues (with the exception of the provisions of the Fifth and Fourteenth Amendments), and it provides minimal discussion, if any, and no legal citations, as to the issue set forth in the petition for review.

It is well settled that where a petitioner fails to include an issue in his petition for review, but addresses the issue in his brief, this Court has declined to consider the issue, since it was not raised in the stated objections in the petition for review or fairly comprised therein. *Tyler v. Unemployment Comp. Bd. of Review*, 591 A.2d 1164, 1167 (Pa. Cmwlth. 1991). Moreover, under Pa. R.A.P. 2119(a), "[t]he argument [section of the brief] shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part . . . the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent." Arguments not properly developed in a brief will be deemed waived by this Court. *Rapid Pallet v. Unemployment Comp. Bd. of Review*, 707 A.2d 636 (Pa. Cmwlth. 1998); *see also Grosskopf v. Workmen's Comp. Appeal Bd. (Kuhns Mkt.)*, 657 A.2d 124, (Pa. Cmwlth.), *appeal denied sub nom., Grosskopf v. Kuhns Mkt.*, 542 Pa. 667, 668 A.2d 1139 (1995) (it is not Court's role to become petitioner's counsel, and when petitioner's brief is inadequate to present specific issues for review, Court will not consider merits of case).

Because Claimant did not raise in his petition for review the issue of whether his First, Fifth, or Fourteenth Amendment constitutional rights were violated or the questions set forth in the statement of questions in his brief, he has waived these issues and questions on appeal. We generously construe Claimant's petition for review and brief as preserving for appellate review **(Footnote continued on next page...)**

the Referee and Board did not properly consider the circumstances of Claimant's case. Specifically, Claimant contends that he did not voluntarily quit his employment. Rather, Claimant maintains that Employer constructively discharged him from his employment because he would not pay for maintenance to his work truck.

The Board is the ultimate finder of facts and has "the power to substitute its judgment for that of its referee on disputed facts." *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 270, 501 A.2d 1383, 1385 (1985). Findings made by the Board are conclusive on appeal where the findings are supported by substantial evidence of record. *Lindsay v. Unemployment Comp. Bd. of Review*, 789 A.2d 385, 389 (Pa. Cmwlth. 2001). On appellate review, we must "examine the testimony in the light most favorable to the party in whose favor the Board has rendered its decision, giving that party the benefit of all inferences that can logically and reasonably be drawn from the testimony, to see if substantial evidence for the Board's conclusion exists." *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules, Inc. v. Unemployment Comp. Bd. of Review*, 604 A.2d 1159 (Pa. Cmwlth. 1992).

In this case, the record reveals that the Board resolved the conflicts in the testimony, in relevant part, in favor of Employer and found the testimony of Employer to be credible. (C.R., Item No. 14.) The law is clear that the Board is

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the issue of whether the Board erred when it determined that Claimant voluntarily terminated his employment without cause of a necessitous and compelling nature.

empowered to determine matters of witness credibility and evidentiary weight, and this Court is bound by such determinations on appeal. *Peak*, 509 Pa. at 272, 501 A.2d at 1386.

Section 402(b) of the Law provides that an employee shall be ineligible for compensation for any week “[i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.” Whether an employee was fired or discharged from his job is a question of law, and this Court must determine whether the facts surrounding the separation from employment constitute a voluntary resignation or a discharge. *Maines v. Unemployment Comp. Bd. of Review*, 532 A.2d 1248, 1250 (Pa. Cmwlth. 1987).

A claimant seeking unemployment compensation benefits bears the burden of establishing either that (1) his separation from employment was involuntary or (2) his separation was voluntary but he had a cause of a necessitous or compelling nature that led him to discontinue the relationship. *Spadaro v. Unemployment Comp. Bd. of Review*, 850 A.2d 855, 859 (Pa. Cmwlth. 2004). Where an employee, without action by the employer, leaves or quits work, the employee’s action is considered voluntary under the Law. *Roberts v. Unemployment Comp. Bd. of Review*, 432 A.2d 646, 648 (Pa. Cmwlth. 1981). A finding of voluntary termination is precluded unless there is a conscious intention to leave the employment. *Fekos Enters. v. Unemployment Comp. Bd. of Review*, 776 A.2d 1018, 1021 (Pa. Cmwlth. 2001).⁴

⁴ Merely leaving the work premises is generally not enough to demonstrate an employee’s intent to voluntarily terminate her employment. *Philadelphia Parent Child Ctr., Inc. v. Unemployment Comp. Bd. of Review*, 403 A.2d 1362, 1363 (Pa. Cmwlth. 1979). An employee, however, who leaves her employment without informing her employer when or if she is planning to return may be held to have voluntarily quit. *Unemployment Comp. Bd. of Review v. Metzger*, 368 A.2d 1384, 1386 (Pa. Cmwlth. 1977).

To be interpreted as a discharge, the employer's language must possess the immediacy and finality of a firing. *Charles v. Unemployment Comp. Bd. of Review*, 552 A.2d 727, 729 (Pa. Cmwlth. 1989). The employer need not use the specific words "fired" or "discharged." *Wise v. Unemployment Comp. Bd. of Review*, 700 A.2d 1071, 1073 (Pa. Cmwlth. 1997). An employer's words that the employee should not report back to work the following day if he could not meet the daily standards are considered to show the requisite immediacy and finality necessary to constitute a discharge. *Torsky v. Unemployment Comp. Bd. of Review*, 474 A.2d 1207, 1210 (Pa. Cmwlth. 1984).

We now consider whether Claimant's employment separation was voluntary in nature. Claimant appears to dispute findings of fact numbers six (6) and seven (7), in which the Board found that Employer did not terminate Claimant and did not ask or insinuate that Claimant pay the cost of repairs for his work truck. (C.R., Item No. 14.) Claimant alleges he was terminated because he complained about paying for the necessary inspection and maintenance of his work truck. (C.R., Item No. 10 at p.10.) In support of that argument, Claimant testified that Owner told him that he was "done here" if he did not pay for the truck, and Owner told Claimant that he hoped the repairs for Claimant's work truck were not going to cost a lot of money. (*Id.* at pp.10, 18.) Owner testified, to the contrary, that he never told Claimant he was fired. (*Id.* at p.20.) Owner testified that there were no written policies regarding how the work trucks were to be maintained by the company. (*Id.* at p.22.) Owner testified that the verbal agreement with employees who had a truck was they received a gas card and they were to take care of the preventative maintenance on the truck and bring him the bill so he could reimburse the employee. (*Id.* at p.24.) Owner testified that he never asked

Claimant to pay for the truck's maintenance. (*Id.* at p.23.) Here, the Board found the testimony offered by Employer's witnesses to be more credible than Claimant's. (C.R., Item No. 14.) Based upon those credibility assessments, the Board found that Employer did not terminate Claimant or ask or insinuate that Claimant was required to pay for the inspection and maintenance of his work truck. Employer's testimony constituted substantial evidence of record to support those findings. We agree, therefore, with the Board's conclusion that Employer did not terminate Claimant, and Claimant's separation from employment was voluntary.

Because the Board determined that Claimant's separation from employment was voluntary, Claimant had to establish that he had cause of a necessitous or compelling nature for terminating his employment relationship in order to be eligible for unemployment compensation benefits. To establish a cause of a necessitous and compelling nature a claimant must show: (1) the existence of circumstances that created real and substantial pressure to leave employment; (2) that such circumstances would compel a reasonable person to leave employment; (3) that he acted with common sense; and (4) that he made a reasonable attempt to continue his employment. *Comitalo v. Unemployment Comp. Bd. of Review*, 737 A.2d 342, 344 (Pa. Cmwlth. 1999).

The Board found that Employer did not ask Claimant to pay the bill for any inspection or maintenance of the work truck, or insinuate that Claimant would be fired if he did not pay for those expenses. (C.R., Item No. 14.) Owner testified that the last time he saw Claimant was the morning before Claimant dropped off the truck. (C.R., Item No. 10 at p.17.) The Board found that Claimant did not return to work after his vacation and abandoned his job. (C.R., Item No. 14.) Considering the totality of these circumstances, we conclude that Claimant

did not have real and substantial pressure to quit his employment. Claimant, therefore, failed to establish a cause of a necessitous and compelling nature.

In addition, Claimant failed to prove that he made a reasonable attempt to continue his employment. Claimant testified that he left all of his tools and stuff in the truck when he dropped the truck off at the garage. (C.R., Item No. 10.) Owner testified that Claimant's credit card and keys were dropped off at Employer's shop the Monday after their conversation regarding maintenance of the work truck. (*Id.* at p.18.) In addition, Owner testified that Claimant did not contact him again after he dropped off the truck. (*Id.* at p.27.) The Board, crediting Employer's witnesses, found that "Claimant never returned to work and abandoned his job *without explanation to Employer at all.*" (C.R., Item No. 14) (emphasis added). Based upon that finding, the Board properly concluded that Claimant did not make a reasonable effort to maintain his employment relationship before he quit.

For the above reasons, we conclude that the Board did not err in determining Claimant to be ineligible for unemployment compensation benefits under Section 402(b) of the Law. Accordingly, we affirm the order of the Board.

P. KEVIN BROBSON, Judge

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Petitioner	:	
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v.	:	No. 2625 C.D. 2009
	:	
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 5th day of August, 2010, the order of the Unemployment Compensation Board of Review is hereby **AFFIRMED**.

P. KEVIN BROBSON, Judge