

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kathleen Barnett, :
Petitioner :
 :
v. : No. 314 C.D. 2011
 : Submitted: July 8, 2011
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: September 20, 2011

Kathleen Barnett (Claimant) petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) denying her claim for unemployment compensation benefits. The Board found that Claimant failed to accept suitable work without good cause, rendering her ineligible for benefits under Section 402(a) of the Unemployment Compensation Law (Law).¹ Discerning no error in the Board's adjudication, we affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(a). It provides, in relevant part:

An employe shall be ineligible for compensation for any week—

- (a) In which his unemployment is due to failure, without good cause, either to apply for suitable work at such time and in such manner as the department may prescribe, or to accept suitable work when offered to him by the employment officer or by any employer, irrespective of whether or not

(Footnote continued on the next page . . .)

Claimant worked as a claims processing and COBRA administrator for Employee Benefit Resources, Inc. (Employer) from November 28, 2005, to August 21, 2009, when she was laid off due to lack of work. Claimant was granted unemployment compensation benefits. In February 2010, Employer contacted Claimant by phone and in writing to recall her to her former position. When Claimant did not respond, Employer notified the Erie Unemployment Compensation Service Center (UC Service Center) that it had offered Claimant her former position and she had declined the offer.

On March 24, 2010, the UC Service Center issued a Notice of Determination finding Claimant eligible for benefits for the stated reason that Employer had not given the UC Service Center timely notice of its decision to offer Claimant her former job. Employer appealed, and the Referee conducted a hearing.²

Employer presented the testimony of David Shull, Employer's vice president. Shull testified that Claimant's position became available again after her layoff because Employer acquired new accounts that "led to about doubling the size of [Employer's] administration business." Notes of Testimony, July 2, 2010, at 5 (N.T.____). Employer offered Claimant her former position at the same rate of pay in a series of phone calls and by letter dated February 18, 2010. Claimant did

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such work is in "employment" as defined in this act: Provided, That such employer notifies the employment office of such offer within seven (7) days after the making thereof.

Id.

² The original testimony before the Referee was lost due to mechanical failure of the recording equipment. Accordingly, the Board remanded the matter to the Referee for a *de novo* hearing for the purpose of establishing a record. This testimony is drawn from that hearing.

not respond. Shull testified that Employer informed the UC Service Center of Claimant's deemed refusal of employment "two to three weeks" after the February 18, 2010, letter. N.T. 10.

Shull testified that Claimant was taken to the emergency room with a "very rapid heartbeat" on one occasion while she was working for Employer, but she did not relate this incident to her work. N.T. 7. Shull testified that Employer introduced new claims processing software while Claimant was still working, which was a stressful time for employees in the claims department. However, Claimant never told Employer that this stress affected her mental health. Further, the stress was temporary and has resolved now that the new software is working well.

Claimant testified on her own behalf. She stated that Employer did not respond to employee complaints of stress and that she did not consider any of Employer's managerial employees to be "honest enough or trustworthy enough for [Claimant] to go to with issues that specifically related to [her]." N.T. 7. Claimant testified that she enjoyed her work with Employer and sought to handle work stress by undertaking management therapy from August 2007 until January 2009. She stopped therapy because of the cost, both in co-pays and in lost work hours. Claimant testified that she did not inform Employer that she was attending therapy for work-related stress because she did not "feel comfortable going to anyone and confiding with them in that way." N.T. 8. Claimant stated that she does not want to return to work for Employer because of its stressful work environment, which will be detrimental to her health.

The Referee found that work-related stressors caused Claimant to have mental health issues, for which she sought treatment during her employment.

The Referee found that Claimant's work-related stress provided her with good cause for not accepting Employer's job offer. Employer appealed to the Board.

The Board reversed the Referee's decision, resolving all conflicts in testimony in favor of Employer. The Board rejected as not credible Claimant's testimony that the job caused her physical and mental problems, noting that Claimant never informed Employer of these facts. Further, Claimant did not give Employer an opportunity to accommodate her. The Board found that Claimant did not quit her job as a result of the stress; rather, Claimant was laid off due to a lack of work.³ Finally, Claimant's refusal to return to work rendered her ineligible.

The Board addressed Employer's notice to the UC Service Center on March 3, 2010, of its job offer and Claimant's refusal, which was 13 days after it called Claimant back to work. The Board found that Employer's delay in notifying the UC Service Center was "partially created by the conduct of [Claimant]." Certified Record, Item No. 18, at 3 (C.R.____). Stated otherwise, during those 13 days Employer was not sure whether Claimant had received the offer or what she had decided. Accordingly, the Board found that Employer's "delay was, at most, a technical failure that should not affect the determination of ineligibility." *Id.* Claimant now petitions this Court for review.

³ In the discussion portion of its opinion, the Board stated that Claimant did not begin therapy until after she was laid off. In its brief, the Board acknowledges that this statement was based on a typographical error in Finding of Fact No. 3, which states that Claimant began therapy on August 30, 2009, as opposed to August 30, 2007. However, the Board maintains that this error is harmless because it does not alter the outcome of the Board's decision. The Board's decision is based on its finding that Claimant failed to inform Employer of her work-related stress and, therefore, did not provide Employer with an opportunity to accommodate her.

On appeal,⁴ Claimant presents two issues for our consideration. First, Claimant contends that her rejection of Employer's job offer does not render her ineligible for benefits because Employer failed to provide notice of the job offer to the UC Service Center within seven days as required by Section 402(a) of the Law. Second, Claimant contends that the Board capriciously disregarded evidence that Claimant established good cause for her refusal to accept Employer's job offer.

We begin with Claimant's issue that Employer failed to comply with Section 402(a) of the Law, which states that an employer that offers suitable work to a claimant must notify the UC Service Center "of such offer within seven (7) days after the making thereof." 43 P.S. §802(a). Claimant contends that the Board did not have notice until March 22, 2010, the date that Employer's letter to Claimant was stamped as received by the Board. However, Claimant does not challenge the Board's Finding of Fact No. 9, which states:

[Employer] notified the [UC Service Center] on or about March 3, 2010, that [Claimant] was offered her previous position and that she turned it down.

C.R., Item No. 18, at 2. Thus, we proceed based on the established fact that Employer's notice was six days late, *i.e.*, 13 days after it offered Claimant her former job on February 18, 2010.

This Court has held that strict compliance with the notice provision of Section 402(a) is not required where it would be inconsistent with the objectives of the Law and where the claimant is not prejudiced by the delay. *McKeesport*

⁴ This Court's scope of review in an unemployment compensation case is limited to determining whether constitutional rights were violated, whether an error of law has been committed, or whether necessary findings of fact are supported by substantial evidence. *Blue v. Unemployment Compensation Board of Review*, 616 A.2d 84, 86 n.4 (Pa. Cmwlth. 1992).

Hospital v. Unemployment Compensation Board of Review, 619 A.2d 813, 815 (Pa. Cmwlth. 1992). In *McKeesport Hospital*, notice to the UC Service Center was five days late. This Court held that the notice requirement of Section 402(a) was directory and not mandatory, stating that

we cannot declare claimants to be eligible and grant them benefits merely as a result of rigid application of technical standards where, otherwise, said claimants are clearly ineligible. To do so would be inconsistent with the fundamental purpose and intent of the Act, which is to provide a semblance of economic security to those who are unemployed through no fault of their own.

Id. (quoting *Barillaro v. Unemployment Compensation Board of Review*, 387 A.2d 1324, 1328 (Pa. Cmwlth. 1978)). We explained that Section 402(a) acts as a time bar to an Employer’s recall request only when the delay in notifying the unemployment authorities is so great that it prejudices the claimant. For example, prejudice to a claimant may occur where the claimant receives benefits to which she is not entitled and becomes subject to “no fault recoupment.” *Id.*

Claimant does not claim that she was prejudiced by Employer’s delay; rather, she argues that Section 402(a) demands strict compliance. That is simply not the case, as was established in *McKeesport Hospital*. Based on this Court’s holding in that case, and the fact that the delay in the present case was only one day longer, we hold that Employer fundamentally complied with Section 402(a)’s notice provision. Claimant, who has neither alleged nor demonstrated she was prejudiced by Employer’s six day delay, may not invoke that notice provision to overcome her ineligibility for benefits.⁵

⁵ Claimant argues that *Kiger v. Unemployment Compensation Board of Review*, 489 A.2d 977 (Pa. Cmwlth. 1985), is analogous. In *Kiger*, the employer waited 43 days to notify the UC **(Footnote continued on the next page . . .)**

In her second issue, Claimant argues that the Board capriciously disregarded evidence that Claimant established good cause for refusing Employer's job offer. In determining whether the Board capriciously disregarded evidence, this Court must decide if the Board deliberately disregarded competent evidence that a person of ordinary intelligence could not conceivably have avoided in reaching a particular result. Stated another way, we consider whether the Board willfully or deliberately ignored evidence that any reasonable person would have considered to be important. *Jackson v. Unemployment Compensation Board of Review*, 933 A.2d 155, 156 n.4 (Pa. Cmwlth. 2007). The capricious disregard standard of review should not intrude upon the Board's fact-finding role or discretionary decision-making authority. *Diehl v. Unemployment Compensation Board of Review*, 4 A.3d 816, 824 (Pa. Cmwlth. 2010).

Whether a claimant had good cause for refusing suitable work is a question of law subject to this court's review. *Rising v. Unemployment Compensation Board of Review*, 621 A.2d 1152, 1153 (Pa. Cmwlth. 1993). The burden is on the claimant to show that the work available was not suitable and that she had good cause for refusing it. *Id.* at 1154. Section 4(t) of the Law, 43 P.S. §753(t), provides that in determining whether work is suitable for a claimant, the Board must consider, *inter alia*, the degree of risk involved to a claimant's health, safety and morals; her physical fitness; her prior training and experience; and the

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Service Center about its offer of re-employment. This Court found that failing to enforce the statutory reporting requirement for such a long period "would be tantamount to removing the statutory seven-day notice requirement altogether." *Id.* at 978. We agree with the Board that the present case, where Employer's notice to the UC Service Center occurred six days late, is more analogous to *McKeesport Hospital*, 619 A.2d 813, where the employer's notice was five days late.

distance of the available work from her residence.⁶ To constitute good cause for refusing suitable work, real and substantial reasons must be offered. *Eck v. Unemployment Compensation Board of Review*, 651 A.2d 689, 692 (Pa. Cmwlth. 1994).

Claimant contends that the Board capriciously disregarded evidence that she established good cause for her refusal to accept Employer's job offer. Specifically, Claimant argues that the stress she experienced before her layoff was work-related and the Board erred in finding that Employer was unaware of that fact. In support, Claimant argues that David Shull, Employer's vice president, testified that Claimant's stress was "obvious" and, thus, Claimant did not have to notify Employer that her work was causing her stress. We disagree.

Although Shull may have been aware that Claimant was suffering from stress, it does not follow that he knew that her stress was caused by the workplace. It was Claimant's duty to inform Employer that her stress was work-related, and she admitted that she did not do so. The Board credited Employer's testimony that it did not know the nature of Claimant's medical problem or that it affected her ability to perform her job. Claimant also did not refute Employer's

⁶ Section 4(t) of the Law states, in relevant part:

"Suitable Work" means all work which the employe is capable of performing. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to his health, safety and morals, his physical fitness, prior training and experience, and the distance of the available work from his residence. The department shall also consider among other factors the length of time he has been unemployed and the reasons therefor, the prospect of obtaining local work in his customary occupation, his previous earnings, the prevailing condition of the labor market generally and particularly in his usual trade or occupation, prevailing wage rates in his usual trade or occupation, and the permanency of his residence....

43 P.S. § 753(t).

credited testimony that the stress in the claims department was temporary and had abated after Claimant was laid off. In short, Claimant offered no evidence that Employer's offer of re-employment was not suitable, nor did she establish good cause for refusing such work. There was no capricious disregard of evidence.

Accordingly, we affirm the decision of the Board.

MARY HANNAH LEAVITT, Judge

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Board of Review,	:	
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ORDER

AND NOW, this 20th day of September, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter, dated February 9, 2011, is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge