

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kristy L. Anker, :  
Petitioner :  
 :  
v. : No. 434 C.D. 2010  
 : Submitted: October 15, 2010  
Unemployment Compensation :  
Board of Review, :  
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: December 29, 2010

Kristy Anker (Claimant), *pro se*, petitions for review of an adjudication of the Unemployment Compensation Board of Review denying her claim for benefits under the Unemployment Compensation Law (Law).<sup>1</sup> In doing so, the Board affirmed the Referee’s decision that Claimant was ineligible for benefits under Section 402(b) of the Law, 43 P.S. §802(b),<sup>2</sup> because she voluntarily quit her job without a necessitous and compelling reason. Finding no error in the Board’s disposition of Claimant’s appeal, we affirm.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§751-914.

<sup>2</sup> Section 402(b) provides, in relevant part, that “[a]n employe 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.” 43 P.S. §802(b).

Claimant was employed by Longwood at Oakmont (Employer) as a full-time dietary aide from August 4, 1999, through August 17, 2009. On her last day of work, Claimant and her supervisor had a disagreement during Claimant's annual performance review. Claimant did not return to work after August 17, 2009.

Claimant applied for unemployment compensation benefits. In her questionnaire, Claimant wrote that she became frustrated during the performance review and "made a silly comment" that she might call off work the next day. Certified Record, Item No. 2 (C.R. \_\_\_). Claimant stated that she worked the remainder of her shift and called her supervisor from home later that day to apologize for the "silly comment." *Id.* According to Claimant, her supervisor called her back and informed her that Employer "had agreed to terminate me then she said let me rephrase myself -- you resigned." *Id.*

In its questionnaire, Employer stated that Claimant quit her job on August 17, 2009. Employer's representative explained:

During [Claimant's] annual performance review [Claimant] continually spoke in a belligerent and rude manner to her supervisor. She cursed at her supervisor using foul language .... Although the supervisor tried to continue the conversation, [Claimant] jumped up and said "I quit" and stormed out of the meeting. Although she later called and apologized, the behavior she exhibited during her review were the exact issues being addressed by her supervisor -- we [accepted] her resignation.

C.R. Item No. 3. The Duquesne UC Service Center determined that Claimant had voluntarily quit her job without a necessitous and compelling reason and denied benefits. Claimant appealed. A Referee's hearing was scheduled for November 4,

2009, and a Notice of Hearing was mailed to each of the parties on October 20, 2009. C.R. Item No. 7.

Neither party appeared at the Referee's hearing. The Referee noted for the record that "[n]either party's Hearing Notice was returned by the Postal Authorities as undeliverable." C.R. Item No. 8, Transcript of Testimony, November 4, 2009, at 1. In a decision dated November 4, 2009, the Referee affirmed the UC Service Center's denial of benefits. The Referee explained that because Claimant did not appear at the hearing, she failed to provide competent evidence that her separation from employment was involuntary or that she had a necessitous and compelling reason for quitting. Claimant appealed and requested a remand hearing.

Following a review of the record, the Board adopted the Referee's findings and conclusions and affirmed the denial of benefits. The Board also denied Claimant's request for a remand hearing, noting that "[t]he Notice of Hearing was mailed to the claimant's last known address and was returned as undeliverable." Board Opinion at 1. Claimant's request for reconsideration by the Board was denied. She now petitions for this Court's review.

On appeal, Claimant contends that she did not attend the Referee's hearing because she never received the Notice of Hearing. Claimant suggests there is a conflict between the Referee's decision, which states that she was notified of the time, date and place of the hearing, and the Board's adjudication, which states that the Notice of Hearing "was returned as undeliverable." *Id.* Claimant believes that she was wrongfully denied benefits because she never had the opportunity to prove that her separation from work was involuntary.

Under the so-called mailbox rule, proof of mailing raises a rebuttable presumption that the mailed item was received. *Department of Transportation, Bureau of Driver Licensing v. Grasse*, 606 A.2d 544, 545 (Pa. Cmwlth. 1992) (certification of driving record showing that notice was given was competent to establish that notice was sent). It is well-settled that the presumption under the mailbox rule may not be rebutted solely by testimony denying receipt of the item mailed. *Id.* See also *Janick v. Unemployment Compensation Board of Review*, 383 A.2d 973 (Pa. Cmwlth. 1978) (rejecting claimant’s allegation that she was not given notice of Referee’s hearings where record contained “Notice of Hearing” forms sent to claimant and her attorney).

In this case, the Department established a rebuttable presumption that Claimant received the Notice of Hearing. The copy of the Hearing Notice certified to this Court indicates that it was mailed on October 20, 2009. C.R. Item No. 7. It was mailed to Claimant’s correct address, 103 Kellywood Manor, New Kensington, PA 15068-9393, and advised her that the Referee’s hearing would be conducted on November 4, 2009, at 11:00 a.m. in New Kensington. C.R. Item No. 7. Claimant’s contention that she never received the Hearing Notice is insufficient to rebut the presumption established by the mailbox rule.<sup>3</sup>

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<sup>3</sup> In support of her claim that she never received the Notice of Hearing, Claimant cites the Board’s statement in its adjudication that “[t]he Notice of Hearing was mailed to the claimant’s last known address and was returned as undeliverable.” Board Opinion at 1. In its brief to this Court, the Board explains that this was a typographical error and should have read “was *not* returned as undeliverable.” Board’s Brief at 5 n.3 (emphasis added). We accept the Board’s explanation and note that it comports with the Referee’s finding that neither party’s Hearing Notice was returned as undeliverable. There is no evidence of record that Claimant’s Hearing Notice was returned by postal authorities.

Claimant also states in her brief, without any supporting legal argument, that she was wrongfully denied benefits because she did not voluntarily quit her job. Whether a separation from employment is a discharge or a quit is a legal determination. *Nolan v. Unemployment Compensation Board of Review*, 797 A. 2d 1042, 1045 (Pa. Cmwlth. 2002). It is axiomatic that a claimant bears the burden of proving that her separation from employment was a discharge. *Kassab Archbold & O'Brien v. Unemployment Compensation Board of Review*, 703 A.2d 719, 721 (Pa. Cmwlth. 1997). Unfortunately for Claimant, her failure to appear at the Referee's hearing meant that she failed to provide any competent evidence to meet her burden of proof on the ultimate legal issue. Accordingly, the Board did not err in deciding the case based upon the available records<sup>4</sup> and denying benefits under Section 402(b) of the Law, 43 P.S. §802(b).

For all of the foregoing reasons, the Board's order is affirmed.

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MARY HANNAH LEAVITT, Judge

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<sup>4</sup> The pertinent regulation governing hearings before the Department or a Referee provides: "If a party notified of the date, hour and place of a hearing fails to attend a hearing without proper cause, the hearing may be held in his absence. *In the absence of all parties, the decision may be based upon the pertinent available records.*" 34 Pa. Code §101.51 (emphasis added).

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Board of Review,	:	
Respondent	:	

**ORDER**

AND NOW, this 29<sup>th</sup> day of December, 2010 the order of the Unemployment Compensation Board of Review in the above-captioned matter, dated January 27, 2010, is AFFIRMED.

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MARY HANNAH LEAVITT, Judge