

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

John Giantonio,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 47 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: May 14, 2010
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: June 30, 2010**

John Giantonio (Claimant) petitions for review of the November 9, 2009 order of the Unemployment Compensation Board of Review (Board) that affirmed the Unemployment Compensation Referee's (Referee) decision denying him benefits under Section 402(b) of the Unemployment Compensation Law (Law).<sup>1</sup> Claimant also petitions for review of the Board's December 14, 2009 order denying his request

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

for reconsideration. Claimant argues that he should not have been denied benefits under Section 402(b) because he had cause of a necessitous and compelling nature for voluntarily terminating his employment and that the Board abused its discretion by failing to grant his request for reconsideration.

Claimant applied for unemployment compensation after becoming separated from his employment with Sunoco, Inc. (Employer). On July 1, 2009, the Unemployment Compensation Service Center (Service Center) issued a notice of determination denying Claimant benefits under Section 402(b) of the Law. Claimant timely appealed the Service Center's determination, and the Referee conducted an evidentiary hearing on August 18, 2009, at which only Claimant appeared and testified.<sup>2</sup> On August 20, 2009, the Referee issued a decision and order in which she made the following findings of fact:

1. The claimant was last employed by Sunoco as a Parts Machinist from June 14, 1981 and his [last] day of work was May 29, 2009.
2. Approximately at the end of March 2009, the claimant was notified the employer was having a layoff.
3. Senior employees were offered an incentive package of one year severance pay for each year worked up to 26 weeks, and Unemployment Compensation benefits.<sup>[3]</sup>

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<sup>2</sup> Prior to the hearing, Employer's authorized agent, TALX UC Express, notified the Referee's Office that Employer would not be participating in the hearing. (Letter from TALX UC Express to Referee's Office (August 11, 2009) at 1.)

<sup>3</sup> Claimant testified that the severance package offered by Employer was "two week's pay for every year you've worked there up to 26 weeks, which came out to one year [salary]" as opposed to the one year of severance pay for each year worked as indicated in the Referee's  
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4. If senior employees did not take the layoff, junior employees would be laid off.
5. The claimant was not advised his employment would be in jeopardy if he did not take the incentive package.
6. The claimant accepted the employer's incentive package.
7. In May 2009, the claimant was informed the layoff would be effective June 1, 2009.
8. The claimant was laid off June 1, 2009, as part of the employer's voluntary incentive package.

(Referee's Decision/Order at 1.) The Referee reasoned that the testimony offered by Claimant provided "mere uncertainty and speculation about the future existence of his job," which "[did] not create a necessitous and compelling cause for leaving employment." (Referee's Decision/Order at 2.) The Referee specifically noted Claimant's testimony that, if senior employees failed to take the incentive package, more junior employees would face the threat of being laid off. Accordingly, the Referee affirmed the Service Center's determination and denied Claimant benefits under Section 402(b) of the Law.

Claimant timely appealed to the Board. On November 9, 2009, the Board issued an order adopting and incorporating the Referee's findings of facts and conclusions of law and affirming the Referee's decision and order. Thereafter, Claimant requested reconsideration of the Board's order on November 23, 2009. The Board issued an order on December 14, 2009 denying Claimant's request for

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findings. (Hr'g Tr. at 4; Referee's Decision/Order at 1.) While this fact is not in dispute, the Referee's findings of fact suggest a typographical error.

reconsideration and directing that the November 9, 2009 order stand as final. On January 15, 2010, Claimant filed a petition for review with this Court purporting to challenge the Board's November 9, 2009 determination on the merits of his appeal from the Referee's decision, as well as its December 14, 2009 denial of his request for reconsideration.

Before this Court, Claimant first argues that the Board erred in concluding that he was ineligible for unemployment compensation benefits because he accepted a voluntary early retirement incentive package. In response, the Board argues that Claimant did not properly preserve this issue for our Court's review because he failed to file a timely petition for review of the Board's November 9, 2009 order, which addressed the merits of his appeal from the Referee's decision and order.<sup>4</sup> We agree with the Board.

If the claimant, any affected employer, or the Board wishes to file an appeal to this Court, they must do so within 30 days of the mailing date of the Board's decision. 34 Pa. Code. § 101.112(b). Any aggrieved party seeking reconsideration of the Board's decision must submit a request for reconsideration within 15 days after the issuance of the Board's decision. 34 Pa. Code. § 101.111(a). Filing a request for reconsideration does not toll the 30-day period for appeals to this Court. Ziev v. Department of Public Welfare, 548 A.2d 701, 703 (Pa. Cmwlth. 1988). Should the

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<sup>4</sup> This Court's scope of review is limited to determining whether constitutional rights were violated, findings of fact were supported by substantial evidence, or whether an error of law was committed. Elser v. Unemployment Compensation Board of Review, 967 A.2d 1064, 1069 n.6 (Pa. Cmwlth. 2009).

Board grant a request for reconsideration, the 30-day time period for filing a petition for review does not begin until the entry of a new order following the reconsideration of the merits of the original order. United States Steel Corp. v. Pennsylvania Public Utility Commission, 850 A.2d 783, 788 n.8 (Pa. Cmwlth. 2004).<sup>5</sup> A claimant's failure to bring a timely appeal before this Court results in the Board's decision remaining final and any subsequent attempts to raise issues related to that decision on appeal being waived or dismissed. Unemployment Compensation Board of Review v. Buongiovanni, 345 A.2d 783, 785 (Pa. Cmwlth. 1975).

Here, the Board issued its order disposing of the merits of Claimant's appeal from the Referee's decision and order on November 9, 2009. Claimant responded to that order by filing a timely request for reconsideration with the Board on November 23, 2009. Because the Board denied Claimant's request for reconsideration, Claimant needed to file his petition for review within 30 days of November 9, 2009 in order to preserve any challenge to the Board's merits determination. However, Claimant did not file his petition for review with this Court until January 15, 2010, which is 68 days after the Board issued its November 9, 2009 order. Therefore, because Claimant failed to timely petition for review of the Board's November 9, 2009 order, such order became final, and any challenge thereto is waived.<sup>6</sup>

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<sup>5</sup> A litigant wishing to preserve a claim on appeal while requesting reconsideration by the Board should file a notice of appeal simultaneously with the request for reconsideration so as to preserve the right to appeal regardless of the Board's determination as to the reconsideration request. City of Philadelphia v. Frempong, 865 A.2d 314, 318 (Pa. Cmwlth. 2005).

<sup>6</sup> Even if this Court were to address Claimant's arguments on the merits of the Board's November 9, 2009 decision, we would affirm the Board's determination. A claimant is ineligible for unemployment compensation benefits if he voluntarily becomes unemployed without cause of a necessitous and compelling nature. 43 P.S. § 802(b). A necessitous and compelling cause for  
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unemployment “results from circumstances which produce pressure to terminate employment that is both real and substantial, and which would compel a reasonable person under the circumstances to act in the same manner.” McCarthy v. Unemployment Compensation Board of Review, 829 A.2d 1266, 1270 (Pa. Cmwlth. 2003). The burden of proving that his voluntary termination was necessitous and compelling rests with the employee. Mansberger v. Unemployment Compensation Board of Review, 785 A.2d 126, 128 (Pa. Cmwlth. 2001). If an employer elects not to testify or provide evidence regarding a claimant’s termination or the possibility of continued work, benefits are not automatically granted “because the burden remains on the claimant to demonstrate necessitous and compelling cause.” Johnson v. Unemployment Compensation Board of Review, 869 A.2d 1095, 1105 (Pa. Cmwlth. 2005).

In situations where claimants have left employment to accept voluntary retirement incentive packages and continuing work was unavailable or evidence provided by either the employee or employer showed a likelihood of imminent layoff, this Court has generally upheld the grant of compensation benefits. Staub v. Unemployment Compensation Board of Review, 673 A.2d 434, 437 (Pa. Cmwlth. 1996); Eby v. Unemployment Compensation Board of Review, 629 A.2d 176, 178 (Pa. Cmwlth. 1993). For instance, in Eby, benefits were granted to the claimant because his undisputed testimony, supported by a letter from his employer, provided that he was specifically identified as part of a group that would be laid off due to lack of continuing work. Eby, 629 A.2d at 178. On the other hand, in Peoples First National Bank v. Unemployment Compensation Board of Review, 632 A.2d 1014 (Pa. Cmwlth. 1993), the claimant was not definitively told that he would be laid off and testified that there was only a possibility that he would be laid off. Id. at 1018. This Court determined that the claimant was disqualified from receiving benefits because his purely speculative belief that a layoff was imminent created a voluntary choice to leave his employment in order to avoid the possibility of being laid off in the future. Id.

Here, claimant analogizes his situation to that of Eby and tries to distinguish his situation from Peoples. We disagree and find this case to be more like Peoples and distinguishable from Eby. Similar to the claimant in Peoples, and discernible from the claimant in Eby, in the instant case Claimant testified that he was neither informed directly that his job would be in jeopardy if he did not accept the incentive package nor could Employer determine if they “would come up that high in [his] department.” (Referee Hr’g Tr. at 5.) In fact, Claimant testified that he was notified that the “junior man in the department would have been laid off,” not that he would have been laid off. (Referee Hr’g Tr. at 4.) Because Claimant’s departure to accept a voluntary retirement incentive package was based on speculation and to avoid the mere possibility of being laid off in the future, he was properly denied benefits under section 402(b) of the Law. Peoples, 632 A.2d at 1018.

The sole issue that Claimant preserved for this Court's consideration is whether the Board abused its discretion in denying Claimant's request for reconsideration.<sup>7</sup> An agency abuses its discretion if the agency's decision shows evidence of fraud, bad faith, capricious action, or an abuse of power. Georgia-Pacific Corp. v. Unemployment Compensation Board of Review, 630 A.2d 948, 951 (Pa. Cmwlth. 1993). The Board may grant a request for reconsideration and rehearing when good cause to do so exists with the subsequent ruling to be made part of the record and subject to review by this Court. 34 Pa. Code § 101.111(b). In determining if good cause exists, the Board considers if the party requesting the reconsideration "has presented new evidence or changed circumstances or whether it failed to consider relevant law." Ensle v. Unemployment Compensation Board of Review, 740 A.2d 775, 779 (Pa. Cmwlth. 1999) (citing Georgia-Pacific Corp., 630 A.2d at 952-53). If the evidence presented in the request for reconsideration was not available at the time of the initial hearing, good cause is found, and a request for reconsideration is generally granted. Myers v. Unemployment Compensation Board of Review, 442 A.2d 28, 29-30 (Pa. Cmwlth. 1982).

Here, Claimant requested reconsideration for purposes of correcting the record by changing the status of his termination from "voluntary" to "involuntary," claiming that his previous use of the "word 'voluntary' was misrepresented." (Request for Reconsideration, November 23, 2009.) Claimant fails to offer new evidence to the Board or a change in circumstances in his request for reconsideration. Additionally,

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<sup>7</sup> A court's review of a matter of administrative discretion, such as a request for reconsideration, is limited to determining whether the Board abused its discretion. Ensle v. Unemployment Compensation Board of Review, 740 A.2d 775, 779 (Pa. Cmwlth. 1999).

he does not suggest that the Board failed to consider relevant law. Claimant only offers additional information that was available to him at the time of his hearing before the Referee and requests a chance to modify statements he made that proved to be less advantageous to him than he initially anticipated. Claimant also sets forth, for the first time in his brief, that if he would have stayed employed and not taken the incentive package, his benefits would have been unilaterally reduced by Employer. (Claimant's Brief at 4.) However, Claimant failed to mention this potential reduction in benefits in his prior testimony or in his request for reconsideration. This Court's scope of review is limited to review of the record made before the Board and, with few exceptions not applicable here, this Court shall not hear or consider an issue that was not raised before the Board.<sup>8</sup> Pa. R.A.P. 1551(a). A claimant's failure to raise an issue before the Referee or the Board results in waiver of the issue. Dehus v. Unemployment Compensation Board of Review, 545 A.2d 434, 436 (Pa. Cmwlth.

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<sup>8</sup> Pa. R.A.P. 1551(a) provides:

Appellate jurisdiction petitions for review. Review of quasijudicial orders shall be conducted by the court on the record made before the government unit. No question shall be heard or considered by the court which was not raised before the government unit except:

- (1) Questions involving the validity of the statute.
- (2) Questions involving the jurisdiction of the government unit over the subject matter of the adjudication.
- (3) Questions which the court is satisfied that the petitioner could not by the exercise of due diligence have raised before the government unit. If, upon hearing before the court, the court is satisfied that any such additional question within the scope of this paragraph should be so raised, it shall remand the record to the government unit for further consideration of the additional question.

Pa. R.A.P. 1551(a).



1988); see also Simpson v. Unemployment Compensation Board of Review, 469 A.2d 733, 734-35 (Pa. Cmwlth. 1984). As such, Claimant's assertion that his benefits would have been reduced has no impact on our review of the Board's decision and is waived. As a result, the Board did not abuse its discretion in denying Claimant's request for reconsideration because good cause did not exist for the Board to grant such reconsideration.

Accordingly, we are constrained to affirm the Board's December 14, 2009 order denying reconsideration.

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**RENÉE COHN JUBELIRER, Judge**

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**ORDER**

**NOW**, June 30, 2010, the December 14, 2009 order of the Unemployment Compensation Board of Review (Board) in the above-captioned matter is hereby **AFFIRMED**.

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**RENÉE COHN JUBELIRER, Judge**