IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anita M. Espinosa,	:	
Petitioner	:	
	:	No. 862 C.D. 2010
v.	:	
	:	Submitted: November 12, 2010
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: February 28, 2011

Anita M. Espinosa (Claimant) appeals from the April 8, 2010, order of the Unemployment Compensation Board of Review (Board), which denied her claim for benefits pursuant to section 402(b) of the Unemployment Compensation Law (Law).[1]

Claimant was employed as an administrator for customer engineering by BOC Linde (Employer) and earned a salary of approximately $36,000 to $37,000 per year. (Findings of Fact Nos. 1, 2.) Effective September 28, 2009, Employer relocated its workplace from Bethlehem, Pennsylvania, to a new location in Stewartsville, New

[1] Act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(b). Section 402(b) of the Law provides that an employee shall be ineligible for compensation for any week in which his or her unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.

Jersey. (Finding of Fact No. 3.) The new location is approximately twenty-six miles from Claimant's home in Allentown, Pennsylvania. (Finding of Fact No. 9.) Claimant accepted the relocation and commuted to New Jersey for seven weeks; however, the relocation increased the time of Claimant's commute from approximately fifteen to twenty minutes to about forty-five minutes and she was having difficulty with childcare. (Findings of Fact Nos. 4, 6, and 7.) Claimant voluntarily resigned from her employment due to her increased commuting distance and difficulty with childcare arrangements. (Finding of Fact No. 10.) Her last day of work was November 20, 2009. (Finding of Fact No. 1.)

Claimant applied for unemployment compensation benefits, which were denied by the local service center pursuant to section 402(b) of the Law. Claimant appealed that decision to the referee, who conducted a hearing. Claimant appeared at the hearing *pro se* and was the only witness to testify. Employer did not appear, despite receiving notice of the hearing.

Claimant testified that she has a one and one-half year old daughter and a nine year old son. (Notes of Testimony (N.T.) at 10, 16.) When Claimant was working, Claimant's mother, who lives in Bethlehem, Pennsylvania, cared for her daughter. (N.T. at 11.) Claimant testified that she never had her children in daycare, that she never looked for a childcare provider closer to her home or her workplace in New Jersey and that she preferred to have her mother care for her child. (N.T. at 11, 13.) Claimant also testified that the cost of daycare was one of the reasons that her mother cares for her daughter (N.T. at 15); however, Claimant did not introduce evidence showing the cost of commercial daycare or babysitting services.

Regarding her commute, Claimant testified that it took her

approximately forty-five minutes to get to work at the new location. (N.T. at 13.) However, Claimant stated that this time period included the time it took to drive to her mother's home. (Id.) Claimant explained that, if she were able to go directly to work, her commute "probably wouldn't have been much of a problem, but I had to drop off my daughter at my mom's." (N.T. at 10.) Furthermore, Claimant stated that Employer gave her a $1,000 payment to reimburse her for commuting costs and tolls. (N.T. at 9-10.) Claimant testified that she commuted to Employer's workplace for approximately seven weeks before she resigned from her employment. (N.T. at 8.)

In addition, Claimant testified that she asked Employer for a flex-time arrangement, but Employer would not be flexible with her hours. (N.T. at 14.) Claimant owns a home encumbered by a $1,400 per month mortgage, and she testified that she would lose money if she sold it and relocated to an area closer to New Jersey. (N.T. at 16-17.) In any event, Claimant does not want to relocate because her entire family is in the Lehigh Valley. (N.T. at 17.)

During the hearing, the referee utilized a MapQuest report,[2] which showed the route from Claimant's home to Employer's facility in New Jersey. (Exhibit 1.) The report reflected that Claimant's commute was approximately twenty-six miles each way and that the estimated commuting time was twenty-eight minutes.

After reviewing the evidence, the referee denied benefits pursuant to section 402(b) of the Law for the following reasons:

> [T]he referee notes that the claimant initially accepted the increased commuting distance and costs, particularly with the employer's payment of a $1,000 flat sum to reimburse her for same. Aside from the initial acceptance of these

[2] MapQuest is a free online mapping service.

> changed conditions as suitable, the referee does not find that the increased commuting distance was such a substantial change in working conditions as to give the claimant a compelling cause to voluntarily leave employment and thereby award her unemployment benefits.

(Referee's Decision at 2.)

Claimant appealed to the Board, which affirmed the referee's decision and adopted his findings of fact and conclusions of law.

On appeal to this Court,[3] Claimant contends that she established a necessitous and compelling reason to terminate her employment due to Employer's unilateral relocation and her childcare problems. Claimant also contends that the referee erred by taking judicial notice of the MapQuest report regarding commuting distance and time.

Under Section 402(b) of the Law, a claimant is not eligible for unemployment compensation benefits if the claimant's unemployment is due to "voluntarily leaving work without cause of necessitous and compelling nature…." 43 P.S. § 802(b). "Necessitous and compelling cause" occurs under circumstances where there is a real and substantial pressure to terminate one's employment that would compel a reasonable person to do so. Smithley v. Unemployment Compensation Board of Review, 8 A.3d 1027 (Pa. Cmwlth. 2010). When an employee voluntarily terminates his or her employment, the burden is on the employee to prove that the reason for the termination was necessitous and compelling. Id. The question of whether a claimant has a necessitous and compelling reason to terminate employment

[3] Our scope of review is limited to determining whether the Board committed an error of law, whether constitutional rights were violated, or whether necessary findings of fact were supported by substantial evidence. Pitt Chemical and Sanitary Supply Co. v. Unemployment Compensation Board of Review, 9 A.3d 274 (Pa. Cmwlth. 2010).

is a question of law reviewable by this Court. Dopson v. Unemployment Compensation Board of Review, 983 A.2d 1282 (Pa. Cmwlth. 2009).

Claimant first argues that she established a necessitous and compelling reason to terminate her employment because Employer's unilateral relocation to New Jersey caused her to be unable to care for her child. We disagree.

In certain situations, childcare problems may constitute a necessitous and compelling reason for leaving employment. Dopson. However, the general rule is that a claimant must establish that he or she exhausted all other alternative childcare arrangements, such as making a concerted effort to find another baby-sitter or locate a suitable day care center. Shaffer v. Unemployment Compensation Board of Review, 928 A.2d 391 (Pa. Cmwlth. 2007). In Shaffer, we denied benefits to a claimant who failed to make such a concerted effort:

> The record here reveals that Claimant investigated only *one* daycare facility for her daughter, which she determined was not a cost effective alternative, but Claimant did not offer evidence that she looked into any *other* childcare arrangements. (O.R., N.T. at 5-6.) Moreover, Claimant offered no evidence that she explored alternative arrangements for her son's before and after school care. Under these circumstances, we conclude that Claimant did not establish that she made a concerted effort to find alternative childcare arrangements. Therefore, the UCBR did not err in holding that Claimant failed to meet her burden of proving that she had cause of a necessitous and compelling reason to voluntarily terminate her employment.

Id., at 394 (emphasis in the original).

Here, the Board found as fact that Claimant, due to personal election, did not want to use commercial daycare, and Claimant testified that she never looked for a childcare provider near her home or her workplace in New Jersey. Claimant stated

that the cost of childcare was an issue, but she introduced no evidence to show the cost of daycare or babysitting services or that she made any effort to investigate the cost of such care. Although she preferred to have her mother care for her child, Claimant was required to establish that she made a concerted effort to find alternative childcare arrangements. Claimant failed to do so.

Claimant also argues that her long commute to Employer's new workplace rendered her job unsuitable. However, although insurmountable commuting problems may constitute a necessitous and compelling reason for terminating employment, Speck v. Unemployment Compensation Board of Review, 680 A.2d 27 (Pa. Cmwlth. 1996), a claimant must demonstrate that he or she took reasonable steps to remedy or overcome the transportation problems prior to severing the employment relationship. Musguire v. Commonwealth, Unemployment Compensation Board of Review, 415 A.2d 708 (Pa. Cmwlth. 1980). Moreover, we have previously held that a commute to work in the range of fifty, sixty, or even 100 miles, without more, does not rise to the level of a necessitous and compelling reason to terminate employment. Kieley v. Unemployment Compensation Board of Review, 471 A.2d 1345 (Pa. Cmwlth. 1984) (holding that, where claimant had a fifty mile commute, a reasonable person would not have terminated his or her employment simply because it is located fifty miles away); Musguire (stating that a sixty mile commute to work does not automatically require a finding of a necessitous and compelling reason to terminate employment); Shaw v. Unemployment Compensation Board of Review, 406 A.2d 608 (Pa. Cmwlth. 1979) (holding that a 100 mile, two hour, one-way commute did not constitute a necessitous and compelling reason to leave employment, where the claimant had a well-paying job and a possibility of

relocating).

The WCJ found that Claimant's home is twenty-six miles from Employer's new location. Claimant's one way commute is therefore substantially shorter than the fifty to 100 mile commutes at issue in Kieley, Musguire, and Shaw, none of which constituted a necessitous and compelling reason to terminate employment. Furthermore, Claimant testified that her forty-five minute commuting time included driving to her mother's home for childcare purposes, (N.T. at 13); and she indicated that, but for that detour, her commute may not have been much of a problem. (N.T. at 10.). As we stated previously, Claimant admittedly made no effort to remedy her commuting difficulties by finding other childcare arrangements. In addition, Claimant accepted the position in New Jersey and commuted to Employer's workplace for seven weeks before resigning, creating a presumption that the job was suitable. Fontana v. Unemployment Compensation Board of Review, 454 A.2d 678 (Pa. Cmwlth. 1983).[4] Accordingly, Claimant failed to establish that the additional

[4] In Fontana, we stated:

> We understand that the claimant's initial acceptance of a job offer raises a presumption of the suitability of the job. Spinelli v. Unemployment Compensation Board of Review, 63 Pa. Commonwealth Ct. 358, 437 A.2d 1320 (1981). And mere dissatisfaction with working conditions neither rebuts that presumption nor justifies voluntary termination. Id. The claimant must prove deception as to the conditions, Hazzard v. Unemployment Compensation Board of Review, 50 Pa. Commonwealth Ct. 620, 413 A.2d 478 (1980), or a substantial unilateral change in the employment agreement. National Aluminum Corp. v. Unemployment Compensation Board of Review, 59 Pa. Commonwealth Ct. 359, 429 A.2d 1259 (1981).

Fontana, 454 A.2d at 679.

time involved in her commute constituted a necessitous and compelling reason to quit her employment.

Claimant also argues that the referee erred by taking judicial notice of the MapQuest report regarding commuting distance and time. However, our review of the record reveals that Claimant did not object to this report at the hearing (N.T. at 4-5) and did not raise the issue in her appeal to the Board or in her petition for review to this Court. Therefore, because this question is being raised for the first time in Claimant's brief, we conclude that it is waived. Murdy v. Bureau of Blindness & Visual Services, 677 A.2d 1280 (Pa. Cmwlth. 1996).

Accordingly, we affirm.

PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 28th day of February, 2011, the April 8, 2010, order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

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PATRICIA A. McCULLOUGH, Judge