

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark Small,	:	
	:	Petitioner
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 1109 C.D. 2012
	:	Respondent
	:	Submitted: December 14, 2012

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE COVEY

FILED: January 9, 2013

Mark Small (Claimant) petitions this Court for review of the Unemployment Compensation Board of Review's (UCBR) May 14, 2012 order affirming the Referee's decision denying him unemployment compensation (UC) benefits under Section 402(b) of the Unemployment Compensation Law (Law).<sup>1</sup> There are essentially four issues before this Court: (1) whether there was substantial evidence to support the UCBR's finding that Claimant voluntarily quit his employment with Charles Jacquin et Cie, Inc. (Employer); (2) whether the Referee erred by prohibiting certain cross-examination of Employer's witness; (3) whether the UCBR erred by refusing to consider the alternative argument that Claimant had a necessitous and compelling reason to quit his job; and (4) whether the UCBR erred by denying Claimant's request for a remand hearing. 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. § 802(b).

Claimant was Employer's chief financial officer for a total of 31 years.<sup>2</sup> On August 23, 2011, Claimant was called into Employer's conference room, where Employer's President and Chief Executive Officer Norton J. Cooper (Cooper), his son John Cooper, and forensic accountant Leon LaRosa (LaRosa) had been meeting. Cooper introduced Claimant to LaRosa and asked Claimant to work with LaRosa to clarify transactions involving \$7,000,000.00 the company had received from an affiliate. Claimant became upset because he believed Employer was accusing him of stealing the money. Claimant left the meeting, stating that perhaps he should seek legal advice. After Claimant left the conference room, he removed his briefcase from his office and left the building as Cooper held the door open for him. By August 24, 2011 letter, Cooper notified Claimant, in pertinent part:

As a result of your actions and statements at the meeting in our Philadelphia conference room on Tuesday afternoon[,] August 23, 2011, your employment resignation . . . is accepted as of August 23, 2011.

We are shocked at your hostile attitude towards myself and our company simply because we wanted an outside audit of our finances. During your hostile tirade, you stated you no longer wanted to work for our company. Accordingly, all compensation and related employment benefits terminates [as] of August 23, 2011.

Certified Record (C.R.) Item 8. By August 26, 2011 letter, Claimant stated, in pertinent part: "To set the record straight, I did not resign on Tuesday – you terminated my employment. After the termination, you instructed me to leave the building and then escorted me to the door." C.R. Item 8.

Claimant subsequently applied for UC benefits. On his questionnaire, Claimant marked that he was "Discharged." Reproduced Record (R.R.) at 5a. On Employer's notice of application form, Employer marked that the reason for

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<sup>2</sup> Claimant worked for Employer twice, totaling 31 years. The second term was from September 1993 through August 23, 2011.

Claimant's separation from employment was due to his "Voluntary Quit." C.R. Item 2. On October 7, 2011, the Philadelphia UC Service Center mailed its determination granting Claimant UC benefits pursuant to Section 402(e) of the Law.<sup>3</sup> Employer appealed.

A telephone hearing was held on December 14, 2011 before a Referee at which Cooper, LaRosa and Claimant testified. On December 16, 2011, the Referee reversed the UC Service Center's determination because he found Claimant voluntarily quit without a necessitous and compelling reason. Claimant appealed to the UCBR. On January 3, 2012, Claimant requested a remand hearing in order to cross-examine and introduce evidence to impeach Employer's witnesses. On May 14, 2012, the UCBR affirmed the Referee's decision and denied Claimant's request for a remand hearing. Claimant appealed to this Court.<sup>4</sup>

Claimant argues that the UCBR's credibility findings and the findings pertaining to the events following the August 23, 2011 meeting were not supported by substantial evidence. Claimant asserts that his employment was terminated, however, Employer claims that he quit. The purpose of UC is to protect against "the hazards of unemployment" by providing "compensation for loss of wages by

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<sup>3</sup> 43 P.S. § 802(e) (relating to ineligibility for UC benefits when unemployment is due to discharge from work for willful misconduct connected to work). The UC Service Center's findings reflect that "Claimant was discharged for alleged dishonesty." R.R. at 8. Claimant was granted benefits because Employer failed to prove that Claimant was discharged for willful misconduct.

<sup>4</sup> This Court's review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Brunswick Hotel & Conference Ctr., LLC v. Unemployment Comp. Bd. of Review*, 906 A.2d 657 (Pa. Cmwlth. 2006).

On May 29, 2012, Claimant filed a request for the UCBR to reconsider its decision on the bases that the UCBR refused to consider new vital evidence submitted with his appeal, and improperly found that Claimant stormed out of his office and abandoned his job on August 23, 2011. By order issued July 13, 2012, the UCBR denied Claimant's reconsideration request. Pursuant to Pa.R.A.P. 1512(a)(1) and 1701(b)(3), and Section 35.241(e) of the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.241(e), once the 30-day appeal period expired, the UCBR no longer had jurisdiction to consider a reconsideration motion.

employees during periods when they become unemployed through **no fault of their own.**” 43 P.S. § 752 (emphasis added). Further, Section 402(b) of the Law provides, in relevant part, that a claimant shall be ineligible for benefits 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) (emphasis added). In this case, the UCBR found in Employer’s favor. The record evidence supports the UCBR’s findings.

At the hearing, Cooper testified that he called the August 23, 2011 meeting with John Cooper and LaRosa in order to track money Employer had received. Three years before, Cooper lent \$3,000,000.00 of his personal funds to help an affiliate in France. The affiliate repaid Employer \$7,000,000.00 within the year before the meeting, but Cooper had not yet received any of his money back. Cooper testified that approximately one week before the meeting, he asked Claimant where the money had gone. Cooper stated that “he still did not have a clear understanding of what happened to the [money].” R.R. at 38a. “[T]he answers he gave me were not sufficiently clear to me. That made me concerned.” R.R. at 34a. Cooper called his banker, who suggested he contact LaRosa. He met with LaRosa and asked him to “come in just like somebody from Anderson or McKenzie[,] . . . [and] meet [Claimant] and [instructed] . . . the two of [them to] sort out what happened to the funds.” R.R. at 34a.

Cooper testified that after he first met with LaRosa and John Cooper on August 23, 2011, he called Claimant into the conference room. He explained to Claimant that he was confused about why his personal loan had not been repaid, so he asked LaRosa to assist as a new set of eyes and work with Claimant in tracing the money. Cooper stated that he never before had reason to question Claimant about Employer’s finances, and any of Employer’s previous audits had been standard. When LaRosa told Claimant he was ready to begin the following week, Claimant

“blew up,” and said “you’re accusing me of stealing from the company. I’m quitting. I’m getting an attorney,” then left the conference room. R.R. at 36a, 43a. Cooper testified that as Claimant left the conference room, he asked him why he was so afraid to work with LaRosa. Cooper stated that he never accused Claimant of stealing anything, and he was surprised by Claimant’s reaction.

LaRosa testified that he was hired by Cooper to assist Claimant in preparing a cash flow analysis to see where Employer’s money came from and where it went. According to LaRosa, after Cooper explained this to Claimant, Claimant said that a cash flow statement would be difficult to prepare. When Cooper reinforced the importance of working with LaRosa, Claimant “slammed on the table, stood up, [and] in a ruckus tone of voice started yelling at [Cooper].” R.R. at 45a. Cooper and John Cooper attempted to calm Claimant and explain LaRosa’s purpose, but “[Claimant] was unwilling to listen . . . . He then yelled to [Cooper] you’re accusing me of stealing. There’s an inference here that I’m stealing. . . . Claimant then again . . . yelled to [Cooper] I’m out of here, I’m getting a lawyer,” then left the room in a rant. R.R. at 45a-46a. LaRosa testified that no one asked Claimant if he was resigning his employment.

Claimant testified that on Friday, August 12, 2011, Employer’s French affiliate emailed a list of payments totaling \$7,000,000.00 that the affiliate had made to Employer. Cooper called Claimant and asked about the money. Claimant stated that he

started to explain to [Cooper] that some of the [money] was a reimbursement of funds that Jacquin’s had laid out for the French affiliate and the balance was funds that could be used to pay for operations of Charles Jacquin. Mr. Cooper told me that I was wrong about the reimbursements[;] I must be taking his funds and hung up.

R.R. at 50a. Thereafter, Claimant received a memo from Cooper, wherein he inquired about Employer's Wells Fargo banking arrangements. Claimant responded to Cooper's inquiries, and also to a call from Employer's bank regarding Cooper's request for information. On August 23, 2011, Claimant was called into the conference room, where he was introduced to LaRosa. He testified:

It became very clear to me when they started asking me questions and started badgering me could I have certain documents tomorrow[,] . . . I got up because I was outraged. It was clear to me he accused me of being a thief on the telephone . . . . He started an investigation on me immediately Monday morning with one of our internal employees. He called the bank. He also asked me for our commercial insurance information.

R.R. at 52a. He further testified:

[A]fter telling him I was outraged at being accused of being a thief, I said if you think I'm dishonest, then maybe I shouldn't continue working here[,] at which point [Cooper] jumped up . . . and said are you resigning, are you resigning, are you resigning[,] at which point I calmed myself down and I said I am not resigning. I am going to get legal advice about my rights and I was going to seek, you know, advice from a lawyer[,] and [Cooper] responded well we're going to talk to a lawyer too.

R.R. at 53a. Claimant said he left the conference room, and Cooper caught up with him in Employer's cafeteria area. Claimant recalled:

He said to me that my reaction to bringing this accountant in proved his suspicions[,] at which point I repeated . . . I can't believe that you truly believe I would steal money from you[,] at which point he got outraged at me and told me to get out and I walked to the front door and he opened the door as I left the building.

R.R. at 53a.

“Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *City of*

*Pittsburgh, Dep't of Pub. Safety v. Unemployment Comp. Bd. of Review*, 927 A.2d 675, 676 n.1 (Pa. Cmwlth. 2007) (quotation marks omitted). This Court has held:

In deciding whether there is substantial evidence to support the [UCBR's] findings, this Court must examine the testimony in the light most favorable to the prevailing party, in this case, the Employer, giving that party the benefit of any inferences which can logically and reasonably be drawn from the evidence.

*Sanders v. Unemployment Comp. Bd. of Review*, 739 A.2d 616, 618 (Pa. Cmwlth. 1999). Moreover,

[I]t is well settled that the [UCBR] is the ultimate finder of fact in unemployment compensation proceedings. Thus, issues of credibility are for the [UCBR] which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings.

*Chapman v. Unemployment Comp. Bd. of Review*, 20 A.3d 603, 607 (Pa. Cmwlth. 2011) (citations omitted).

Whether the claimant's separation from employment is the result of a voluntary resignation is a question of law subject to our review and must be determined from the facts of the individual case. A voluntary quit requires a finding that the claimant had a conscious intention to leave employment. In determining the claimant's intent, this Court must consider 'the totality of the circumstances surrounding the incident.'

*Procyson v. Unemployment Comp. Bd. of Review*, 4 A.3d 1124, 1127 (Pa. Cmwlth. 2010) (citations omitted). Having specifically found Cooper's testimony of the events credible, the UCBR held that Claimant quit and, therefore, Section 402(b) of the Law was applicable.

The principle of law which has been attached as the test for decision in this class of case is that of whether the language employed by the employer possesses the immediacy and

finality of a firing; if it does, the employee has been discharged; if it does not, and the offended employee leaves, the case is one of voluntary quit.

*Keast v. Unemployment Comp. Bd. of Review*, 503 A.2d 507, 509 (Pa. Cmwlth. 1986). Based upon the totality of the circumstances surrounding the incident and Cooper's testimony that before Claimant left the premises, Claimant said he was quitting, we hold that there is substantial evidence to support the UCBR's conclusion.

Claimant next argues that the Referee erred by prohibiting certain cross-examination of Employer's witness. We acknowledge that "[u]nder the provisions of the Administrative Agency Law, an administrative agency must afford a party various procedural protections before an adjudication affecting the party's legally protected rights can be validly issued. For example . . . . [t]he opportunity for reasonable examination and cross-examination must be permitted." *McKean Pub. Sewer Ass'n v. Pa. Infrastructure Inv. Auth.*, 796 A.2d 379, 382 n.4 (Pa. Cmwlth. 2002) (citations omitted). However, as the presiding officer in an administrative hearing, a referee has the authority and responsibility to regulate the course of the hearing and to take any action necessary or appropriate in the discharge of the duties of the referee. 1 Pa. Code § 35.187. Here, the Referee deemed irrelevant cross-examination as to whether LaRosa ultimately identified wrongdoing by Claimant, and how much LaRosa was compensated for his work. Since those questions were not reasonably calculated to establish whether Claimant quit or whether his employment was terminated, answers thereto were not relevant. Thus, we hold that the Referee did not err by prohibiting such cross-examination of Employer's witness.

Claimant next argues that the UCBR erred by refusing to consider the alternative argument that he had a necessitous and compelling reason to quit his job. Claimant's position is without merit. In order to establish eligibility for benefits, a claimant who asserts that he left employment for a necessary and compelling reason has the burden of proving that: "(1) circumstances existed which produced real and



substantial pressure to terminate employment; (2) such circumstances would compel a reasonable person to act in the same manner; (3) the claimant acted with ordinary common sense; and (4) the claimant made a reasonable effort to preserve his employment.” *Phila. Hous. Auth. v. Unemployment Comp. Bd. of Review*, 29 A.3d 99, 101 (Pa. Cmwlth. 2011).

Here, the record evidence is clear, and Claimant admitted in his brief that he “testified in no uncertain terms that he was fired, and that he has maintained that position at all times.” Claimant Br. at 21. The UCBR expressly considered Claimant’s post-hearing alternative argument, and concluded that because Claimant maintained throughout the proceedings that his employment was terminated, he “obviously failed to carry his burden of . . . proving a necessitous and compelling cause to quit.” R.R. at 171a. Thus, the UCBR did not refuse to consider Claimant’s alternative argument that he had a necessitous and compelling reason to quit his job.

Claimant finally argues that the UCBR erred by denying Claimant’s request for a remand hearing so that he could conduct the cross-examination of LaRosa as to his findings and fees, and so he could present new evidence in the form of an email that he claims would have established that Cooper’s testimony was not truthful. We disagree. It is well established that “[t]he UCBR cannot review evidence that was not submitted to the Referee, unless it directs the taking of additional evidence.” *Umedman v. Unemployment Comp. Bd. of Review*, 52 A.3d 558, 564 (Pa. Cmwlth. 2012). “Moreover, ‘[t]his Court may not consider any evidence that is not part of the certified record on appeal.’” *Id.* at 564 (quoting *Pennsylvania Turnpike Comm’n v. Unemployment Comp. Bd. of Review*, 991 A.2d 971, 974 (Pa. Cmwlth. 2009)). As a result, the UCBR expressly declined to consider the extra-record evidence. The UCBR stated that it would not consider remand because Claimant did not indicate “how and when he obtained the additional

documentation that he wishe[d] to introduce[,]” and it could not determine that the Referee erred by limiting LaRosa’s testimony. R.R. at 171a.

“Under Pennsylvania law, the [UCBR] has the discretion to decide whether to grant a request for remand. Section 504 of the Law, 43 P.S. § 824. Therefore, we will not reverse a decision denying a request for remand absent an abuse of discretion.” *Fisher v. Unemployment Comp. Bd. of Review*, 696 A.2d 895, 897 (Pa. Cmwlth. 1997). “An abuse of discretion occurs if the agency decision demonstrates evidence of bad faith, fraud, capricious action or abuse of power. The party asserting such abuse of discretion has the burden of proving that it occurred.” *Georgia-Pacific Corp. v. Unemployment Comp. Bd. of Review*, 630 A.2d 948, 951 (Pa. Cmwlth. 1993) (citation omitted). Here, Claimant failed to demonstrate that the UCBR denied his request for a remand hearing on the basis of bad faith, fraud, capricious action or abuse of power. Accordingly, the UCBR did not err by denying Claimant’s request for a remand hearing.

For all of the above reasons, the UCBR’s order is affirmed.

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ANNE E. COVEY, Judge

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ORDER

AND NOW, this 9<sup>th</sup> day of January, 2013, the Unemployment Compensation Board of Review's May 14, 2012 order is affirmed.

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ANNE E. COVEY, Judge