

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Randall S. Tilia,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1170 C.D. 2008
	:	SUBMITTED: November 26, 2008
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: October 28, 2009

Randall S. Tilia (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) that denied him unemployment benefits under Section 402(b) of the Unemployment Compensation Law (Law).¹ The Board has filed a motion to quash Claimant's *pro se* petition for review, alleging that his general statement of objections to the Board's order in the petition for review fails to fairly embrace the issues raised in his brief filed by his attorney.

Claimant worked for Keystone Spring Service (Employer) from July to November 27, 2007 first as a mechanic and then as a delivery driver. The Bureau of UC Benefits and Allowances (Bureau) denied Claimant's application for benefits, determining that Claimant was ineligible for benefits under Section 402(b) of the

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, in pertinent part, that an employee 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”

Law. On appeal, the referee held a hearing, at which president of Employer, Jason Valant, and Claimant, proceeding *pro se*, testified regarding the circumstances of Claimant's separation from employment.

Valant testified that he became aware of Claimant's unsatisfactory performance of the mechanic position and safety concerns with his work. Valant then offered Claimant the delivery driver position. While working in that position, Claimant experienced difficulty in following driving directions and disappeared for hours at a time. Valant was again dissatisfied with Claimant's job performance and, on November 26, 2007, offered him a position in the brake reline department. Claimant stated that he did not want to work with brakes containing asbestos. The next day, Claimant, without stating a reason for his decision, informed Valant that he was refusing to accept the offered position.

Claimant testified that he was concerned about working in the brake room because there were old machines without guards and no ventilation there. He claimed that he previously experienced irritation of his eyes and skin while working in the brake room. The referee affirmed the Bureau's determination and denied benefits under Section 402(b) of the Law.

Accepting Valant's testimony as credible, the Board found that Claimant initiated his separation from employment by refusing to accept the job offer and that Employer had work available for Claimant when he left employment. The Board further found that Claimant never communicated his reason for refusing the job offer and that as a result, Employer did not have an opportunity to address his concerns. Concluding that Claimant voluntarily left employment without a necessitous and compelling reason, the Board affirmed the referee's decision and denied benefits under Section 402(b) of the Law. Claimant's appeal to this Court followed.

In his *pro se* petition for review, Claimant states the following objections

to the Board's order:

The Order of the Unemployment Compensation Board of Review should be reversed because:

- a. The decision of the Board was not supported by substantial evidence; and
- b. The decision of the Board was erroneous as a matter of law; and
- c. The decision of the Board constituted an abuse of the Board's discretion.

Petition for Review, ¶ 3.

In the motion to quash, the Board seeks dismissal of the petition for review, relying on *Deal v. Unemployment Compensation Board of Review*, 878 A.2d 131 (Pa. Cmwlth. 2005). The Board argues that Claimant's statement of objections merely states this Court's scope of review, which fails to preserve any issue for appellate review under *Deal*.² An attorney from the Neighborhood Legal Services Association entered his appearance for Claimant and filed an answer to the motion to quash. Claimant argues that we should view his *pro se* statement of objections as a challenge to the evidentiary support for the Board's findings regarding the circumstances of his separation from employment, as the Court did in *Pearson v. Unemployment Compensation Board of Review*, 954 A.2d 1260 (Pa. Cmwlth. 2008). By order dated August 28, 2008, the Court ordered the motion to quash to be decided with the merits of the appeal and directed the parties to address in briefs whether *Deal* or *Pearson* should control the sufficiency of the statement of objections or whether the two cases can be reconciled.

This issue has now been addressed in *Maher v. Unemployment*

² Rules of Appellate Procedure 1513(d), Pa. R.A.P. 1513(d), provides in relevant part: "An appellate jurisdiction petition for review shall contain: ... (5) a general statement of the objections to the order or other determination The statement of objections will be deemed to include every subsidiary question fairly comprised therein."

Compensation Board of Review (Pa. Cmwlth., No. 1843 C.D. 2008, filed October 27, 2009), in which this court, en banc, reaffirmed our decision in *Deal* and overruled *Pearson*. In *Maher*, the court again stated that “more than a restatement of our standard of review is required.” Slip op. at 4. As in *Maher* and *Deal*, Claimant’s petition for review simply restates our scope of review. Accordingly, based on *Maher*, we quash the petition for review.³

³ We note that even if we were to decide the merits, Tilia could not prevail. He argues that the Board erred in concluding that he voluntarily quit his employment without a necessitous and compelling reason. He claims that he was discharged for unsatisfactory job performance and, therefore, eligible for benefits. See *Rung v. Unemployment Comp. Bd. of Review*, 689 A.2d 999 (Pa. Cmwlth. 1997) (incompetence, inexperience or inability does not rise to the level of willful misconduct). In support, he relies on the Bureau's documents admitted into evidence, which contain statements made by him and Employer that he was discharged or let go.

A claimant has the burden of proving that his or her separation from employment was a discharge. *Pa. Liquor Control Bd. v. Unemployment Comp. Bd. of Review*, 648 A.2d 124 (Pa. Cmwlth. 1994). The claimant, who alleges that he or she was discharged, must demonstrate that the employer's actions had the immediacy and finality of a firing. *Bell v. Unemployment Comp. Bd. of Review*, 921 A.2d 23 (Pa. Cmwlth. 2007). Whether the claimant's separation from employment was a result of a voluntary resignation or a discharge is a question of law to be determined based on the Board's findings regarding the totality of circumstances surrounding the separation. *Id.*

Valant testified that he tried to preserve Claimant's employment despite his poor job performance in the previous positions by offering him another position. Valant thought that Claimant "deserved another chance somewhere else." Certified Record (C.R.) Item No. 9, Notes of Testimony (N.T.) at 11. On November 27, 2007, Claimant told Valant: "I don't want to work ... in [the brake line] department. I'm quitting." *Id.* at 10. Claimant stated to the referee that "if I didn't work out [in the delivery driver position] why he [Valant] didn't let me go," which corroborates Valant's testimony that Claimant was not discharged. *Id.* at 12. As the ultimate fact-finder, the Board is empowered to weigh evidence and make credibility determinations. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363 (Pa. Cmwlth. 2008). Valant's testimony, credited by the Board, supports the Board's conclusion that Claimant's separation from employment was due to his refusal to accept the offered position, not due to a discharge. Employer's inconsistent statements appearing in the Bureau's record go to the weight and credibility to be accorded the evidence. It is irrelevant whether the record contains evidence which might support findings contrary to those made by the Board. *Duckmate Indus., Inc. v. Unemployment Comp. Bd. of Review*, 949 A.2d 338 (Pa. Cmwlth. 2008). Rather, the relevant inquiry is whether substantial evidence in the record supports the Board's findings. *First Fed. Sav. Bank v. Unemployment Comp. Bd. of Review*, 957 A.2d 811 (Pa. Cmwlth. 2008), *appeal denied*, ___ Pa. ___, 970 A.2d 1148 (2009).

(Footnote continued on next page...)

BONNIE BRIGANCE LEADBETTER,
President Judge

(continued...)

Because Claimant voluntarily terminated his employment by refusing to accept the offered position, he was required to prove that he had a necessitous and compelling reason, which placed a real and substantial pressure upon him to terminate employment. *Empire Intimates v. Unemployment Comp. Bd. of Review*, 655 A.2d 662 (Pa. Cmwlth. 1995). In addition, he was required to demonstrate that he acted with ordinary common sense by making a reasonable effort to preserve employment, but had no other real choice than terminating employment. *Carter v. Unemployment Comp. Bd. of Review*, 629 A.2d 212 (Pa. Cmwlth. 1993). Whether the termination of employment was for a necessitous and compelling reason is a legal question subject to our review. *Cent. Dauphin Sch. Dist. v. Unemployment Comp. Bd. of Review*, 893 A.2d 831 (Pa. Cmwlth. 2006).

To support a necessitous and compelling reason, Claimant relies on his own testimony that there were no guards on the old machines and no ventilation in the brake room and that he previously experienced irritation of his eyes and skin while working in the brake room. Valant denied the presence of asbestos at the workplace and testified that Employer complied with all OSHA standards and provided its employees with respirators, gloves, eyewear and uniforms. When the referee asked him if he discussed his concerns with Valant before refusing to accept the offered position, Claimant stated, "No, ... I didn't." N.T. at 12. Valant testified: "I got tons of stuff that could have been done if he didn't want to work ... inside the reline department for whatever reason. I have other people that are fine with it." *Id.* at 10. The Board accepted Valant's testimony that "[Claimant] could have completed work within the reline department that was not located in the brake room." Board's Decision at 3. Because Claimant did not discuss his concerns with Valant before refusing the job offer, Employer did not have an opportunity to accommodate his concerns. The record thus establishes that Claimant failed to make a reasonable effort to preserve his employment.

