

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ricky L. Akins, :
Petitioner :
 :
v. : No. 1506 C.D. 2007
 : Submitted: December 21, 2007
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: February 27, 2008

Ricky L. Akins (Claimant) petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) that denied his claim for unemployment compensation benefits. The Board found that Claimant failed to prove he had a necessitous and compelling reason to leave his employment, rendering him ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law).¹

The facts as found by the Board are as follows. Claimant was employed by Marcor Remediation (Employer), a construction company, as a

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(b). Pursuant to Section 402(b), “[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).

supervisor of a construction crew from June 19, 2006, through October 4, 2006. Claimant expected to be assigned to a new work location on the following day, October 5, 2006; however, the assignment was cancelled, leaving him idle until Tuesday, October 10, 2006. Claimant believed he had been lied to by Employer, but he never addressed this concern to Employer directly. Instead, on October 5, 2006, Claimant dropped off his phone, his keys, and his gas credit card, and advised the office manager that he was quitting. Claimant then spoke to Employer's general manager, explaining he could not work like this and that he was going to get another job. Continuing work was available to Claimant from Employer.

Claimant applied for unemployment compensation benefits, and they were denied. At a hearing before a Referee, Claimant testified that he was hired to work full time and had worked full time up to the week in question. Believing he was about to be laid off or have his work hours reduced when the job assignment for October 5, 2006, was cancelled, Claimant turned in his phone, his gas credit card and keys. Claimant denied that he ever said he quit, but confirmed that he did tell Employer that "I can't afford to work for two and three days a week. I need full-time employment." Reproduced Record at 30a; 35a. (R.R.____).

Employer's office manager testified that Claimant came into the office on October 5, 2006, handed her his gas card and his phone and said he was quitting. Claimant walked into the general manager's office where the office manager could clearly hear Claimant say he couldn't work like this, and "I'm getting another job." R.R. 35a. Employer's general manager corroborated the testimony of the office manager, testifying that Claimant came into his office, and

stated he could not work part time and that he was going to look for other employment.

Employer's operation manager testified that at the time Claimant quit, work was "hit and miss." R.R. 36a. He explained that the assignment for Claimant that was cancelled "was not an intentional thing ... it happened, but it was not an intentional thing." R.R. 36a. He testified that no one had told Claimant that there was no continuing work available as of the morning of October 5, 2006. Although Claimant had left a phone message for him, he was not able to contact Claimant "before [Claimant] came in and did what he felt he had to do." R.R. 37a. He nonetheless explained that "[s]omething could've come up with me ... things come up all the time" and stated that Employer would have had work for Claimant because Claimant was one of their top employees in a supervisory position and would have been one of the first to be put to work. R.R. 37a.

After considering the evidence, the Referee resolved the conflicting testimony in favor of Employer, concluding that Claimant had voluntarily quit and did not prove a necessitous and compelling reason for doing so. Claimant appealed to the Board, which also resolved the conflicts in testimony in favor of Employer; the Board adopted and affirmed the Referee's decision.² Claimant now petitions this Court to review the Board's order.³

² In an unemployment compensation case the Board is the ultimate fact finder and is empowered to make credibility determinations. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 276-277, 501 A.2d 1383, 1388-1389 (1985). Questions of credibility and the resolution of evidentiary conflicts are within the discretion of the Board and are not subject to reevaluation on judicial review. *Id.*

³ Our review of an unemployment compensation case is limited to determining whether constitutional rights were violated, errors of law were committed, or whether findings of fact are supported by substantial evidence. *Johnson v. Unemployment Compensation Board of Review*, 744 A.2d 817, 820 n.2 (Pa. Cmwlth. 2000).

Before this Court, Claimant maintains that the Board erred in concluding that he voluntarily quit. He contends that the evidence of record establishes that he never intended to completely sever the employment relationship.

The intent of the claimant determines whether that individual has voluntarily severed an employment relationship. *Monaco v. Unemployment Compensation Board of Review*, 523 Pa. 41, 46, 565 A.2d 127, 129 (1989). (“In all cases, the totality of the circumstances surrounding the incident must be considered when determining the intent to quit.”) The issue of whether one has voluntarily left work is one of law, although its resolution is dependent upon the underlying facts as found by the Board. *Roberts v. Unemployment Compensation Board of Review*, 432 A.2d 646, 648 (Pa. Cmwlth. 1981). It is the claimant’s burden of proving that he did not leave employment voluntarily. *Bell v. Unemployment Compensation Board of Review*, 921 A.2d 23, 26 (Pa. Cmwlth. 2007).

In the instant case, the record shows that Claimant went into Employer’s office on October 5, 2006, to speak with Employer’s general manager and turned in his phone, keys and gas credit card because there was no work. Although Claimant now asserts he did not intend to permanently sever the employment relationship,⁴ Employer’s witnesses testified that Claimant stated he could not work like this, that he was quitting and that he was going to look for

⁴ Claimant references facts outside the certified record, *i.e.*, that contacts were maintained and that he was called back to work for Employer two months later. An appellate court is limited to considering only those facts which have been duly certified in the record on appeal. *Berninger v. Workers' Compensation Appeal Board (East Hempfield Township)*, 761 A.2d 218, 222 n.5 (Pa. Cmwlth. 2000). Thus, the facts and the argument relating thereto cannot be considered because they are not part of the certified record.

other employment. The Board resolved the conflict in testimony in favor of Employer. Employer's testimony supports the Board's finding that Claimant left his employment voluntarily.

We must also determine whether Claimant's evidence proved a necessitous and compelling reason for his leaving his job. Claimant asserts that Employer's substantial, unilateral change in the terms of his employment, which he contends was the absence of "any work," was cause of a necessitous and compelling nature entitling him to unemployment compensation benefits. Claimant's Brief at 11.

A claimant who asserts that he has terminated his employment for necessitous and compelling reasons has the burden of establishing the existence of such reasons. *Taylor v. Unemployment Compensation Board of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). Necessitous and compelling reasons for leaving one's job must result 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." *Id.* at 359, 378 A.2d at 832-833. This Court has long recognized that a reduction in compensation, if substantial enough, will constitute the requisite cause to quit employment contemplated by Section 402(b). *Naylon v. Unemployment Compensation Board of Review*, 477 A.2d 912, 914 (Pa. Cmwlth. 1984). There is no talismanic percentage for determining a change so substantial as to warrant necessitous cause for terminating employment; rather, each case must be examined under its own attendant circumstances, with the inquiry focused on the impact that compensation modifications have upon an employee. *Steinberg Vision Associates*

v. Unemployment Compensation Board of Review, 624 A.2d 237, 239-240 (Pa. Cmwlth. 1993).

Here, prior to the cancellation of Claimant's assignment on October 5, 2006, Claimant had worked full time for Employer. Although Claimant believed that he was going to work reduced hours or be laid off, Claimant did not confirm these beliefs with Employer prior to terminating the employment relationship. Accordingly, his fears that his hours and wages were going to be cut were only speculative. Claimant presented no evidence on which it could be determined whether the cancelled assignment would lead to a change in employment so substantial as to warrant a necessitous cause for leaving. In the absence of this evidence, we must conclude that Claimant did not meet his burden of establishing a substantial change in the terms and conditions of his employment. *Kaolin Mushroom Farms, Inc. v. Unemployment Compensation Board of Review*, 669 A.2d 438, 442 (Pa. Cmwlth. 1995). Thus, Claimant failed to sustain his burden of proving that he had necessitous and compelling reasons for leaving work.

For all these reasons, we affirm the Board.

MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 27th day of February, 2008, the order of the Unemployment Compensation Board of Review dated July 10, 2007, in the above captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge