IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Elliott Company, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1937 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	Submitted: October 21, 2011
	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: December 6, 2011**

Elliott Company, Inc., (Employer) petitions for review of the Order of the Unemployment Compensation Board of Review (Board), which reversed the Unemployment Compensation Referee's (Referee) determination that Patty A. Serwonski (Claimant) is ineligible to receive unemployment compensation (UC) benefits under Section 402(b) of the Unemployment Compensation Law (Law),[1] 43 P.S. § 802(b), because she voluntarily quit her employment without cause of a necessitous and compelling nature. The Board found Claimant eligible for UC

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended.

benefits after determining that Employer's change to its retirement health care plan constituted a necessitous and compelling reason for Claimant to quit her employment.

Claimant began working for Employer on February 24, 1969. (Referee Hr'g Tr. at 4, R. Item 8.) On January 29, 2010, Claimant voluntarily quit. Claimant applied for UC benefits and, on March 1, 2010, the Indiana UC Service Center (Service Center) determined Claimant to be ineligible for UC benefits under Section 402(b) of the Law, stating that the burden was on Claimant to show that she had a necessitous and compelling reason for leaving the job and that Claimant did not sustain her burden of proof. (Notice of Determination at 1, R. Item 4.)

Claimant timely appealed, and a Referee held a hearing at which Claimant and Employer's two witnesses testified. Claimant testified that she voluntarily quit because of the changes to the medical benefits. (Referee Hr'g Tr. at 5, R. Item 8.) The Referee issued a decision affirming the Service Center's denial of UC benefits under Section 402(b) of the Law. The Referee concluded that the burden was on Claimant to prove that she had necessitous and compelling reasons to quit her employment that resulted from circumstances that were both real and substantial. The Referee stated that she understood Claimant's "dissatisfaction with a health plan having deductibles after years of limited employee costs," but reasoned that Employer "provided competent evidence that both economic conditions and soaring medical costs led to the negotiated health plan established in 2008 [(2008 Plan)]." (Referee Decision/Order at 2.) Additionally, the Referee did "not find the health plan to be so burdensome or substantial that it establishes a necessitous and compelling reason to quit." (Referee Decision/Order at 2.) Accordingly, the Referee

concluded that Claimant "failed to meet her burden in this case" and denied UC benefits under Section 402(b) of the Law. (Referee Decision/Order at 2.)

Claimant timely appealed to the Board. In her Petition for Appeal, Claimant maintained that she had to retire in order to keep the pre-2008 plan,[2] asserting that there was a big difference in the 2008 plan with its higher co-pays and deductibles from the pre-2008 plan. She stated that she did not want to retire and would have worked until age 62, or beyond, had it not been for the change to the pre-2008 plan. (Petition for Appeal at 3, R. Item 10.) The Board made its own findings of fact, including that a new contract between Employer and its unionized employees was ratified in 2008, i.e., the 2008 plan, which included negotiated changes to health care benefits. (Board Decision, Findings of Fact (FOF) ¶ 5.) These changes included larger co-pays and deductibles. (FOF ¶ 7.) "The deductibles included a [co-pay of] $10.00, $20.00 or $35.00 for prescriptions, $20.00 co-pay for doctor visits and an out of pocket maximum of $1,000.00 per year for an individual and $2,000.00 per family." (FOF ¶ 8.) Under the pre-2008 plan, there were $5.00 co-pays and no deductibles. (FOF ¶ 3.) Prescriptions under the pre-2008 plan cost $5.00 and hospital expenses were covered 100% for both inpatient and outpatient services. (FOF ¶ 4.) "All active employees were placed on the" 2008 plan as of March 1, 2008, (FOF ¶ 6); however, the "employees had an approximate two-year window from March 1, 2008 through February 1, 2010 to choose to retire" with the pre-2008 plan. (FOF ¶ 9.) Employees who retired after February 1, 2010 would retire with the

[2] We note, however, that Claimant did not, at least initially, maintain the pre-2008 plan upon her retirement stating that "I'm on my husband's [insurance] until I'm 60 and then I transfer over May 1st." (Referee Hr'g Tr. at 8, R. Item 8.)

2008 plan. (FOF ¶¶ 9, 12.) These options were "available for employees who were eligible to retire at 58 years of age with 30 years of service or" 60 years of age with 20 years of service. (FOF ¶ 10.) Claimant elected to retire under the pre-2008 plan. (FOF ¶ 13.)

In sum, the two-year window provided an employee with the opportunity to try the 2008 plan while retaining the option to maintain the pre-2008 plan should he or she retire, if otherwise eligible, before February 2, 2010. The 2008 plan had some differences from the pre-2008 plan. (Employer's Exs. E-1, E-2, Summaries of PPO Benefits.) The 2008 plan included increases in co-payments from $5.00 to $20.00 for in-network doctor visits and from $5.00 for a 60-day supply to $10.00, $20.00 or $35.00 for a 30-day supply of generic, formulary, or non-formulary prescription drugs, respectively. Additionally, the mail order program for maintenance prescription drugs that formerly permitted a 60-day supply of either generic or brand name drugs with a $5 co-payment was changed to a $20 co-payment for generic, $40 co-payment for brand formulary, and $70 co-payment for brand non-formulary for a *90*-day supply. There were also new out-of-pocket maximums of $1,000 for an individual or $2,000 for a family. (Employer's Exs. E-1, E-2, Summaries of PPO Benefits.)

Based on these findings, the Board analogized this case to McCarthy v. Unemployment Compensation Board of Review, 829 A.2d 1266 (Pa. Cmwlth. 2003), concluding that, like the claimant in McCarthy, Claimant here was faced with a substantial reduction to her retirement health care benefits. (Board Decision at 3.) The Board further noted that Claimant had "a *vested* right to these benefits by virtue

of the most recent CBA" and that "[C]laimant's actions were not based upon mere speculation." (Board Decision at 3 (emphasis in original).) The Board determined that the substantial change in Claimant's retirement health care benefits gave her a necessitous and compelling reason to leave her employment and, therefore, Claimant was eligible for benefits under Section 402(b) of the Law.

Employer petitioned this Court for review.[3] Thereafter, the Board filed an Application for Relief in the Form of a Motion for Consolidation of Cases (Application to Consolidate), for the instant case and seven related cases[4] involving Employer, alleging common questions of fact and law. (Board's Motion for Consolidation of Cases at 1-2, Elliott Company v. Unemployment Compensation Board of Review, No. 1787 C.D. 2010.) This Court denied the Application to Consolidate by Order dated October 19, 2010, but granted the Board permission to file a lead brief and reproduced record, relevant portions of which could be adopted by reference in the briefs and reproduced records of the remaining cases, of which the instant case is one. Elliott Company, Inc. v. Unemployment Compensation Board of Review, (Nos. 1783-1787, 1914, 1937, 1938 C.D. 2010, filed October 19, 2010).

[3] Our review is limited to determining whether the Board's adjudication is in violation of constitutional rights, whether an error of law was committed, or whether the factual findings are supported by substantial evidence. Nolan v. Unemployment Compensation Board of Review, 797 A.2d 1042, 1045 n.4 (Pa. Cmwlth. 2002). Substantial evidence is that evidence which "a reasonable mind, without weighing the evidence or substituting its judgment for that of the fact finder, might accept as adequate to support the conclusion reached." Centennial School District v. Department of Education, 503 A.2d 1090, 1093 n.1 (Pa. Cmwlth. 1986).

[4] The eight related, but unconsolidated, cases are: Elliott Company, Inc. v. Unemployment Compensation Board of Review, Nos. 1783-1787, 1914, 1937, 1938 C.D. 2010. An en banc panel of this Court issued a published opinion in Elliott Company, Inc. v. Unemployment Compensation Board of Review, 29 A.3d 881 (Pa. Cmwlth. 2011).

This Court issued an opinion in the lead case, Elliott Company, Inc. v. Unemployment Compensation Board of Review, 29 A.3d 881, 887-89 (Elliott I), reversing the Board's decision finding the claimant eligible for benefits because the claimant failed to present substantial evidence to support his assertion that the changes in his retirement health care benefits were so substantial as to give him cause of a necessitous and compelling nature to voluntarily quit his employment. Additionally, we rejected the Board's argument that this case was analogous to Steinberg Vision Associates v. Unemployment Compensation Board of Review, 624 A.2d 237 (Pa. Cmwlth. 1993).[5] In doing so, we noted that the claimant in Elliott I

[5] In Steinberg Vision, the claimant, a diabetic, had specifically "negotiated a full employer reimbursement for" a particular health insurance plan "as a fringe benefit." Steinberg Vision, 624 A.2d at 238. The employer's cost of this reimbursement continued to rise along with increasing premiums and, several years later, after being notified of another premium increase, the employer informed the claimant "that it would no longer be reimbursing her for" this coverage. Id. at 239. The employer offered the claimant several alternatives, including providing the claimant with the same health care benefits it provided to its other employees or a partial reimbursement for the policy she had originally negotiated. Id. After the claimant refused these alternative proposals, she voluntarily quit her employment due to the termination of employer's reimbursement for this coverage. Id. After the Board concluded that the employer's action was a "substantial unilateral alteration of the conditions of [the c]laimant's employment sufficient to provide cause of a necessitous and compelling nature to quit," the employer petitioned this Court for review. Id. Although the employer argued, among other things, that "the reduction in compensation at issue was not so substantial as to justify [the c]laimant's quitting," this Court disagreed, concluding that *the full reimbursement* "was negotiated by the parties as a material element of the employment relationship, with a special significance to the [c]laimant, who relied upon the coverage for treatment of her diabetic condition and its attendant health consequences." Id. at 240. This Court noted that the claimant "would be required to incur an additional outlay of $170.68 per month in order to keep the negotiated coverage," *which sum represented a 14.2% reduction in her earnings*. Id. We explained that "a 14.2% wage reduction is at the cusp of what is considered to be a substantial impact," but that the loss involving a specific negotiation by a particular claimant for a special benefit, before being hired, that was different from the health care benefits provided to other employees, meant more than the "measurable dollar value to the [c]laimant." Id. For these reasons, the employer's unilateral discontinuation of reimbursement of the claimant's health insurance benefits was determined to be cause of a necessitous and compelling nature pursuant to Section 402(b) of the Law. Id.

presented no evidence that he ever negotiated his own health care plan as a material element of his employment relationship with Employer before being hired or that he ever obtained benefits beyond those possessed by the other employees. 29 A.3d at 889. We, therefore, concluded that the pre-2008 plan did not have the same kind of intrinsic value for the claimant in Elliott I as the plan in Steinberg Vision had for that claimant. Id.

On appeal, Employer argues, as it did in Elliott I, that the Board erred in finding Claimant eligible for UC benefits pursuant to Section 402(b) because: (1) Claimant failed to produce substantial evidence that the change from the pre-2008 plan to the 2008 plan resulted in a substantial change to Claimant's retirement benefits; and (2) Claimant merely took advantage of an enhanced retirement benefit and this case is, therefore, similar to Diehl v. Unemployment Compensation Board of Review, 4 A.3d 816 (Pa. Cmwlth. 2010), appeal granted, __ Pa. __, 20 A.3d 1192 (2011), rather than McCarthy.[6]

Section 402(b) provides that a claimant shall be ineligible for benefits for a period "[i]n which [her] unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature." 43 P.S. § 802(b). The claimant who voluntarily terminates her employment has the burden of proving that a necessitous and compelling cause existed. Petrill v. Unemployment Compensation Board of Review, 883 A.2d 714, 716 (Pa. Cmwlth 2005). It is well settled that:

[6] We have consolidated and re-ordered Employer's arguments for ease of resolution.

> an employee who claims to have left employment for a necessitous and compelling reason must prove 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 her employment.

Brunswick Hotel & Conference Center, LLC v. Unemployment Compensation Board of Review, 906 A.2d 657, 660 (Pa. Cmwlth. 2006). The circumstances producing pressure to leave must be *both* real and substantial. PECO Energy Co. v. Unemployment Compensation Board of Review, 682 A.2d 49, 51 n.1 (Pa. Cmwlth 1996) (citing Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 358-59, 378 A.2d 829, 832-33 (1977)). "An employer's unilateral imposition of a substantial change in the terms and conditions of employment provides a necessitous and compelling reason for an employee to leave work." McCarthy, 829 A.2d at 1270.

We first address Employer's argument that Claimant did not meet her burden to prove that her desire to maintain her retirement health care benefits pursuant to the pre-2008 plan gave her a necessitous and compelling reason to voluntarily terminate her employment. Employer asserts that Claimant failed to produce evidence that the change from the pre-2008 plan to the 2008 plan resulted in a substantial change to Claimant's retirement benefits, that the change from the pre-2008 plan to the 2008 plan impacted her in both a real and substantial manner, or would have prompted a reasonable person to retire. We agree with Employer that Claimant did not meet her burden of proof here.

As in Elliott I, there is a lack of evidence in this case. Claimant presented little evidence of her costs under the pre-2008 plan and the 2008 plan, and did not prove or

testify to what her actual expenses were during the two years before retiring when she was covered by the 2008 plan as her primary health care plan. Given this two-year trial period, Claimant could have presented actual evidence of her specific costs under the pre-2008 plan and 2008 plan; however, she did not do so. Claimant did not present any evidence regarding whether she was taking any prescription drugs. Claimant did not otherwise provide any evidence or proof that the change in health care plans impacted her pay or retirement income beyond the somewhat higher costs that all employees were facing. Therefore, there is no evidence in the record from which we can determine whether the impact of the change was substantial for Claimant. Thus, Claimant did not prove that the costs of the 2008 plan were consequential and substantial to her so as to provide her with a necessitous and compelling reason to voluntarily quit her employment.

"Although this Court recognizes no talismanic percentage figure governing reductions in pay," the percentage by which a claimant's pay or retirement income is unilaterally reduced is a significant factor in determining whether the claimant had necessitous and compelling cause to quit employment. Pacini v. Unemployment Compensation Board of Review, 518 A.2d 606, 608-09 (Pa. Cmwlth. 1986) (stating that a 5.9% reduction in pension income was not "a substantial figure sufficient to establish necessitous and compelling cause"). Because of the lack of evidence here, including no evidence of Claimant's annual pay,[7] retirement income or actual medical costs under either the pre-2008 plan or 2008 plan, we cannot evaluate whether

[7] Claimant testified about her hourly rate, but did not testify regarding the number of hours she worked or her annual pay. (Referee Hr'g Tr. at 4-5, R. Item 8.)

retiring after the expiration of the window under the 2008 plan would have caused a substantial reduction to Claimant's retirement income or, had she not retired, would have caused a substantial reduction to Claimant's employment income or what the approximate percentage reduction under either scenario would have been.[8] Therefore, Claimant has not sustained her burden of proving that she had cause of a necessitous and compelling nature to voluntarily terminate her employment under Section 402(b) of the Law.

The Board argues, as it did in Elliott I, that this case is analogous to McCarthy and Steinberg Vision. However, Claimant's evidence on this issue suffers from the same defects as the claimant's evidence in Elliott I, 29 A.3d at 889. Like the claimant in Elliott I, Claimant here also presented no evidence that she ever negotiated her own health care plan as a material element of her employment relationship with Employer before being hired or that she ever obtained benefits beyond those possessed by the other employees. Therefore, for the reasons set forth in Elliott I, we do not accept the Board's premise that McCarthy[9] or Steinberg Vision require a different result.

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[8] In Steinberg Vision there was evidence that the claimant, in order to keep the negotiated coverage, would be required to incur an additional expense that represented a 14.2% reduction in her earnings. We explained that this reduction was "at the cusp of what is considered to be a substantial impact." Steinberg Vision, 624 A.2d at 240.

[9] We note that this case is distinguishable from McCarthy, in which the employer unilaterally eliminated all post-retirement health care benefits for employees who had worked for fifteen years and had reached the age of fifty-five before any post-retirement health care benefits would become effective. McCarthy, 829 A.2d at 1269. The claimant, who had already reached age fifty-five and had fifteen years of service, (and thus was fully eligible for post-retirement health care benefits under the previous plan), and who earned $20,000 per year, was compelled to retire within the very short window approximately two months from the date of the change in the plan in order to retain eligibility for any post-retirement health care benefits. Id. McCarthy is inapposite to the

(Continued…)

In summary, Claimant has not met her burden of proving that the changes in health care plans were so substantial to her that she had cause of a necessitous and compelling nature to voluntarily terminate her employment and, therefore, Claimant is not eligible for UC benefits pursuant to Section 402(b) of the Law.[10] Accordingly, we must reverse the Order of the Board.

RENÉE COHN JUBELIRER, Judge

current matter, however, because a total elimination of post-retirement health care benefits is not involved here.

[10] Because of our disposition of this case on this issue, we do not reach Employer's remaining argument regarding whether Claimant retired pursuant to enhanced retirement benefits similar to Diehl.

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	:	
Respondent	:	

O R D E R

NOW, December 6, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **REVERSED**.

RENÉE COHN JUBELIRER, Judge