

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Elliott Company, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1938 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: October 21, 2011
Board of Review,	:	
	:	
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 John F. Fetsko, Jr., (Claimant) is ineligible to receive unemployment compensation (UC) benefits under Section 402(b) of the Unemployment Compensation Law (Law),<sup>1</sup> 43 P.S. § 802(b), because he voluntarily quit his employment without cause of a necessitous

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended.

and compelling nature. The Board found Claimant eligible for UC benefits after determining that Employer's change to its retirement health care plan constituted a necessitous and compelling reason for Claimant to quit his employment.

Claimant began working for Employer on April 2, 1967. (Referee Hr'g Tr. at 3, R. Item 8.) On January 31, 2010, Claimant voluntarily quit because, "[h]ad we stayed beyond [January 31, 2010], our retirement healthcare [would have been] reduced." (Referee Hr'g Tr. at 4, R. Item 8.) Claimant applied for UC benefits and, on April 8, 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 Claimant did not sustain his burden of proof. (Notice of Determination at 1, R. Item 4.)

Claimant timely appealed and a Referee held a hearing at which Claimant testified and Employer presented two witnesses. 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 he had necessitous and compelling reasons to quit his employment that resulted from circumstances that were both real and substantial. The Referee stated that he 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 determined that Claimant "failed to meet his burden of proof to establish he voluntarily left work due to cause of [a] necessitous and compelling nature." (Referee Decision/Order at 2.) Accordingly, the Referee

concluded that Claimant was ineligible for UC benefits under Section 402(b) of the Law. (Referee Decision/Order at 2.)

Claimant appealed to the Board, maintaining that his health care costs would have increased significantly had he not retired. (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 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 to 65 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.) Employer's policy for retiree health care coverage provides for Employer to pay 100% of the premiums for retirees aged 60 to 65. (Referee Hr'g Tr. at 7-8, R. Item 8.) The benefit ends at age 65 when retirees become eligible for Medicare. (Referee Hr'g Tr. at 7-8, R. Item 8.)

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 his 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 him a

necessitous and compelling reason to leave his employment and, therefore, Claimant was eligible for benefits under Section 402(b) of the Law.

Employer petitioned this Court for review.<sup>2</sup> 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<sup>3</sup> 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).

This Court issued an opinion in the lead case, Elliott Company, Inc. v. Unemployment Compensation Board of Review, 29 A.3d 881, 887-89 (Pa. Cmwlth.

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<sup>2</sup> 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).

<sup>3</sup> 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).

2011) (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).<sup>4</sup> In doing so, we noted that the claimant in Elliott I presented no evidence that he ever negotiated his own health care plan as a

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<sup>4</sup> 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.

material element of his employment relationship with Employer before being hired or that he ever obtained benefits beyond those possessed by the other employees. Elliott I, 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.<sup>5</sup>

Section 402(b) provides that a claimant shall be ineligible for benefits for a period “[i]n which his 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 his 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:

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)

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<sup>5</sup> We have consolidated and re-ordered Employer’s arguments for ease of resolution.

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 his burden to prove that his desire to maintain his retirement health care benefits pursuant to the pre-2008 plan gave him a necessitous and compelling reason to voluntarily terminate his 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 him 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 his burden of proof here.

As in Elliott I, there is a lack of evidence in this case. Claimant presented little evidence of his costs under the pre-2008 plan and the 2008 plan, and did not prove or testify regarding what his actual expenses were during the two years before retiring when he was covered by the 2008 plan as his primary health care plan. Given this

two-year trial period, Claimant could have presented actual evidence of his specific costs under the pre-2008 plan and 2008 plan; however, he did not do so. Claimant testified that he “would lose the \$5 co-pays for everything and go to a[n] inpatient, outpatient responsibility up to \$1,000 per person, [\$]2,000 [per] family, and the doctor[']s visits go to [\$]20 and then the prescriptions go from anywhere from [\$]10 to [\$]50.” (Referee Hr’g Tr. at 6, R. Item 8.) Claimant did not otherwise provide any evidence or proof that the change in health care plans impacted his pay or retirement income, beyond the somewhat higher costs that all employees were facing, such that we can determine whether the impact of the change was substantial. Claimant did not prove the costs of the 2008 plan were so consequential and substantial to him and, therefore, he did not meet his burden of proof.

“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, we cannot evaluate whether retiring after the expiration of the window under the 2008 plan would have caused a substantial reduction to Claimant’s retirement income or, had he 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.<sup>6</sup> Therefore, Claimant has not sustained his burden of proving that he had cause of a necessitous and compelling nature to voluntarily terminate his 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 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. Therefore, for these reasons, we do not accept the Board's premise that McCarthy<sup>7</sup> or Steinberg Vision require a different result.

In summary, Claimant has not met his burden of proving that the changes in health care plans were so substantial to him that he had cause of a necessitous and compelling nature to voluntarily terminate his employment and, therefore, Claimant

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<sup>6</sup> 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.

<sup>7</sup> 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 current matter, however, because a total elimination of post-retirement health care benefits is not involved here.

is not eligible for UC benefits pursuant to Section 402(b) of the Law.<sup>8</sup> Accordingly, we must reverse the Order of the Board.

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**RENÉE COHN JUBELIRER, Judge**

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<sup>8</sup> 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.

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Elliott Company, Inc.,	:	
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v.	:	No. 1938 C.D. 2010
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

**ORDER**

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

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**RENÉE COHN JUBELIRER, Judge**