

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Glenn E. Bixler,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2314 C.D. 2009
	:	
Unemployment Compensation	:	Submitted: July 2, 2010
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: September 20, 2010

In this appeal,¹ Glenn E. Bixler (Claimant) asks whether the Unemployment Compensation Board of Review (Board) erred in denying him unemployment benefits. The Board denied Claimant benefits on the grounds Claimant voluntarily quit his employment to accept an early retirement incentive and, at the time he did so, he was not in jeopardy of losing his job.

¹ Before this Court are four other related cases: Donnelly v. Unemployment Comp. Bd. of Review, (Dkt. No. 2496 C.D. 2009, filed September 20, 2010); Lawrence v. Unemployment Comp. Bd. of Review, (Dkt. No. 2313 C.D. 2009, filed September 20, 2010); Diehl v. Unemployment Comp. Bd. of Review, ___ A.3d ___ (Pa. Cmwlth., Dkt. No. 2421 C.D. 2009, filed September 20, 2010); and, Dehoff v. Unemployment Comp. Bd. of Review, (Dkt. No. 275 C.D. 2010, filed September 20, 2010). This Court issued orders permitting the Petitioners in those cases to proceed *seriatim* with this appeal.

The petitioners in all five cases are joined by the Pennsylvania AFL-CIO as *amicus curiae*.

Claimant adopts by reference the arguments made by the petitioner/claimant in Diehl v. Unemployment Compensation Board of Review, ___ A.3d ___ (Pa. Cmwlth., Dkt. No. 2421 C.D. 2009, filed September 20, 2010). There, the claimant primarily argued the Board’s decision ignored the clear and unambiguous language of the “voluntary layoff option” proviso (VLO proviso) contained in Section 402(b) of the Unemployment Compensation Law² (Law) (“no otherwise eligible claimant shall be denied benefits for any week in which his unemployment is due to exercising the option of accepting a layoff, from an available position pursuant to a labor-management contract agreement). The claimant in Diehl also asked this Court to overrule, or, alternatively, distinguish on its facts, our *en banc* decision in Renda v. Unemployment Compensation Board of Review, 837 A.2d 685 (Pa. Cmwlth. 2003), appeal denied, 581 Pa. 685, 863 A.2d 1151 (2004), which held the VLO proviso is inapplicable where a claimant accepts an early retirement incentive package. The claimant in Diehl also argued the Board capriciously disregarded evidence that he had good cause to voluntarily leave his employment. Based on our rejection of these and other assertions in Diehl, we affirm the Board’s decision.

Adopting the referee’s findings, the Board found the following facts. Claimant worked for ESAB Group, Inc. (Employer) for approximately 39 years at a final rate of pay of approximately \$20.06 per hour. Claimant last worked for Employer as a “weight up person.” Referee’s Op., 7/17/09, Finding of Fact (F.F.) No. 1.

² Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(b).

Employer offered an early retirement package to hourly employees as part of an overall reduction in force. Claimant was not targeted for layoff and was not on the list of employees who would be affected by the layoff as communicated through a memorandum issued by Employer.

Claimant chose to accept the early retirement incentive because of his years of service, in order to allow a person with less seniority to remain employed. At the time Employer offered the incentive, Claimant was not in jeopardy of losing his job. Claimant voluntarily retired effective February 9, 2009.

Claimant subsequently applied for unemployment benefits, which were initially denied. Claimant appealed. A referee conducted a hearing at which Claimant testified. Claimant was unrepresented at the hearing; however, the president of Claimant's union assisted Claimant and also testified as a witness. Employer did not appear at the hearing. Ultimately, the referee affirmed the initial denial of benefits. Claimant, assisted by counsel for the first time, appealed to the Board.

The Board issued a decision in which it adopted and incorporated the referee's findings and conclusions. In addition, in its decision, the Board specifically rejected Claimant's contention that he had good cause to voluntarily quit his employment on the ground that Employer assigned him to a new, more onerous position prior to his acceptance of the early retirement incentive package. To that end, the Board determined that Claimant did not establish he voluntarily

quit because of working conditions. Thus, the Board affirmed the referee's denial of benefits.³ Claimant now appeals to this Court.

On appeal,⁴ Claimant adopts by reference the arguments set forth in the brief of the petitioner/claimant in Diehl. The claimant there essentially raised four issues. First, he asserted the Board erred in denying benefits under Section 402(b) of the Law where he exercised an option of accepting a layoff from an available position pursuant to an agreement between Employer and his labor union. Next, he argued the Board capriciously disregarded evidence that he had good cause for leaving his employment. Additionally, the claimant maintained, prior to leaving his employment, he received assurances from the local UC service center that he would qualify for benefits. Finally, the claimant asserted that awarding benefits would be "revenue neutral" for the unemployment compensation fund because, had he not accepted a layoff, Employer would have laid off another employee who would be receiving the benefits the claimant sought.

³ The Board also determined Claimant received a non-fault overpayment of unemployment benefits. The overpayment issue is not addressed by the parties in this appeal.

⁴ "Our review is limited to determining whether the findings of fact are supported by substantial evidence and whether there was a violation of the constitution or agency procedure of law." Caterpillar, Inc. v. Unemployment Comp. Bd. of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 n.5 (1997).

As fact finder, the Board determines the weight assigned to the evidence. Tapco, Inc. v. Unemployment Comp. Bd. of Review, 650 A.2d 1106 (Pa. Cmwlth. 1994). Credibility determinations are exclusively within the Board's province. Melomed v. Unemployment Comp. Bd. of Review, 972 A.2d 593 (Pa. Cmwlth. 2009).

Unchallenged findings are conclusive on appeal. Campbell v. Unemployment Comp. Bd. of Review, 694 A.2d 1167 (Pa. Cmwlth. 1997). In addition, the Board's findings are conclusive on review if supported by substantial evidence in the record, taken as a whole. Tapco.

As a further point, Claimant notes that here, unlike in Diehl, the Board's decision did not even reference the VLO proviso.

In Diehl, we rejected all of the claimant's arguments. Specifically, after a review of the long line of cases addressing the VLO proviso, we reiterated our prior holdings that the VLO proviso does not apply where a claimant accepts an early retirement incentive package.

Also, for several reasons, we rejected the claimant's argument that Renda conflicts with the plain language of the VLO proviso, as well as the claimant's attempts to factually distinguish Renda.

We further rejected the claimant's assertion that the Board capriciously disregarded evidence that he left work for a necessitous and compelling reason. In particular, the record adequately supported the Board's findings that the claimant was in no danger of being laid off because continuing work was available to him as a high seniority employee, and the claimant voluntarily quit to help the company and to receive early retirement incentives. Additionally, we indicated the claimant offered no specific, direct evidence of communications or actions by Employer that his job was imminently threatened. In short, we concluded, because the Board's findings were adequately supported and because those findings, in turn, supported the Board's determination that there were no necessitous or compelling reasons forcing the claimant in Diehl to retire early, the Board did not capriciously disregard evidence.

Finally, we deemed waived the claimant's undeveloped arguments that he was entitled to benefits based on an alleged representation by a local UC office employee, and that a grant of benefits would be revenue neutral to the unemployment compensation fund. We also explained these arguments failed on their merits.

Our decision in Diehl controls here. More specifically, the facts presented here are virtually identical to those presented in Diehl. Thus, as in Diehl, we conclude the VLO proviso is inapplicable here, and we again decline to overrule or factually distinguish Renda. Further, we reject Claimant's contention that the Board's failure to specifically reference the VLO proviso in its decision compels a different result. We reiterate our repeated holdings, discussed at length in Diehl, that the VLO proviso is inapplicable where, as here, a claimant accepts an early retirement incentive package. Thus, the Board's failure to specifically mention the VLO proviso does not warrant reversal.

In addition, as in Diehl, we discern no capricious disregard of evidence on the issue of necessitous and compelling cause. More particularly, similar to Diehl, the Board here found:

3. The employer offered a retirement package to hourly employees as part of an overall reduction of force.
4. The claimant was not targeted for layoff and was not on the list of persons that would be affected by layoff [as communicated through a memorandum issued by Employer].

5. The claimant chose to take the early retirement incentive because of his years of service, in order to allow a person with less seniority to remain employed.

6. At the time the incentive was offered, the claimant was not in jeopardy of losing his job.

7. The claimant voluntarily retired effective February 9, 2009.

F.F. Nos. 3-7. These findings, which are supported by Claimant's testimony and documentary evidence, see Referee's Hearing of 7/7/09, Notes of Testimony, at 3-5, 8; Ex. C-2, in turn, support the Board's determination that there were no necessitous and compelling reasons forcing Claimant to retire early.

Nevertheless, Claimant argues his situation includes an issue in addition to those presented in Diehl. Specifically, Claimant asserts that prior to his acceptance of the retirement package, Employer assigned him to a new, onerous job, and the conditions of this new assignment provided him with necessitous and compelling cause to leave work. Claimant contends that shortly before he accepted the retirement package, Employer abolished his "sit down" job that permitted him to sit, rather than stand all day, and which permitted him to work first shift. In contrast, Claimant maintains, his new assignment was physically demanding, on the midnight shift, and required mandatory 12 hour shifts. Claimant asserts this forced job change constitutes separate grounds for awarding him unemployment benefits. We disagree.

First, Claimant did not raise this issue in his petition for review to this Court; therefore, it is waived. See Jimoh v. Unemployment Comp. Bd. of Review,

902 A.2d 608 (Pa. Cmwlth. 2006) (issues not contained in petition for review or fairly comprised therein are deemed waived).

Also, this argument fails on the merits. Rejecting Claimant's assertions on this point, the Board stated (with emphasis added):

While the claimant argues that he had cause of a necessitous and compelling nature for voluntarily quitting because his dayshift, front end inspector job had been abolished, the claimant accepted a new assignment on a weigh-up job and worked it for three weeks prior to accepting the employer's voluntary separation package. The claimant has not demonstrated that he voluntarily quit because of the working conditions. The claimant admits that continuing employment was available to him, but he accepted a layoff to let someone else have his job. While the claimants desire to let someone else have his job is laudable, it does not amount to cause of a necessitous and compelling nature for leaving his employment. ...

Bd. Op., 10/26/09 at 1. No error is apparent in the Board's determination.

More specifically, contrary to the assertions in Claimant's brief, before the referee Claimant did not testify that he chose to retire because of the change in job assignment. Rather, when asked why he accepted the early retirement package, Claimant responded, "I took it to give another younger employee the chance to stay plus the little bit of other incentives." N.T. at 4. Of further note, Claimant testified he accepted the new job assignment three months before he accepted the early retirement package. N.T. at 8. Thus, even if Claimant properly preserved this issue, we discern no error in the Board's determination that Claimant did not voluntarily quit based on the change in job assignment.

Finally, for the same reasons expressed in Diehl, we reject Claimant's arguments concerning the alleged representations made by the local UC office personnel, and the revenue neutral effect of an award of benefits on the UC Fund. As in Diehl, Claimant waived these issues by failing to raise them in his petition for review or fully develop them in his brief to this Court. Further, for the reasons set forth in Diehl, these arguments fail on their merits.

Accordingly, for the reasons more fully expressed in Diehl, we affirm.

ROBERT SIMPSON, Judge

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Board of Review,	:	
	:	
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ORDER

AND NOW, this 20th day of September, 2010, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge