

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael J. Donnelly,	:	
Petitioner	:	
	:	
v.	:	No. 2496 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 Michael J. Donnelly (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, had he not done so, he would not have been laid off based on his years of seniority.

¹ Before this Court are four other related cases: Lawrence v. Unemployment Comp. Bd. of Review, (Dkt. No. 2313 C.D. 2009, filed September 20, 2010); Bixler v. Unemployment Comp. Bd. of Review, (Dkt. No. 2314 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 decision, the Board found the following facts. Claimant worked for ESAB Group, Inc. (Employer) for approximately 40 years at a final rate of pay of approximately \$20.00 per hour. Claimant’s last day of employment was February 9, 2009.

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

Employer offered certain employees an early retirement package in order to avoid layoffs. The early retirement package provided some compensation and insurance benefits. Claimant was eligible for the retirement package and was aware that if he accepted the package, it would allow a younger employee with less seniority to remain employed.

In late-2008, Employer issued a memorandum listing employees that would be affected if there was a layoff. Claimant's name was not on the list.

Had Claimant not accepted the retirement package, he would not have been laid off because of his years of seniority. Claimant voluntarily retired and accepted the package.

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 him 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.

Initially, the Board issued a decision incorporating and adopting the referee's findings and conclusions and affirming the referee's decision. Because of a problem with delivery of its order, the Board subsequently vacated its initial order. About a month later, the Board issued a "clarifying decision and reissued

order,” in which it reinstated its initial denial of benefits. Bd. Order, 11/25/09.³ Claimant’s appeal to this Court followed.

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 he sought.

³ The referee and 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 did not even reference the VLO proviso in its decision.

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, we determined that 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 the 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 we should award benefits on the ground that such a decision 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 where Claimant accepted an early retirement incentive package. Also, for the reasons more fully expressed in Diehl, we 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, "[t]he claimant was eligible for the retirement package and was aware if he accepted the package, it would allow a younger employee with less seniority to remain employed." Referee's Op., 7/31/09, Finding of Fact (F.F.) No. 4. It also found, "[h]ad the claimant not accepted the retirement package, he would not have been laid off, due to his years of seniority." F.F. No. 7 (emphasis added). Additionally, the Board found, "[t]he

claimant did voluntarily retire accepting the package” F.F. No. 8.⁵ These findings, which are supported by Claimant’s testimony and documentary evidence, see Referee’s Hearing of 7/28/09, Notes of Testimony, at 3, 7-9; Ex. C-2, in turn, support the Board’s determination that there were no necessitous and compelling reasons forcing Claimant to retire early.

Finally, for the same reasons expressed in Diehl, we reject Claimant’s undeveloped 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

⁵ In a footnote, Claimant takes issue with the Board’s finding that “the [retirement] package provided some compensation and insurance benefits.” Referee’s Op., 7/31/09, Finding of Fact No. 3 (emphasis added). Claimant asserts there is no record evidence that the retirement package included anything other than medical benefits. While we agree with Claimant that the record is not as clear on the specifics of the incentive package as was the record in Diehl, we note that, in addition to medical benefits, Claimant testified his last day of work was February 9, 2009, and, as in Diehl, it appears Employer paid him through the end of March. Referee’s Hearing of 7/28/09, Notes of Testimony, at 8. As noted in Diehl, the additional seven weeks of pay is a financial incentive. In any event, we believe payment for medical benefits, by itself, constitutes a tangible financial incentive.

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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