

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronald E. Dehoff,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 275 C.D. 2010
	:	
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 Ronald E. Dehoff (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, continuing work was available to him.

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, Donnelly v. Unemployment Comp. Bd. of Review, (Dkt. No. 2496 C.D. 2009, 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.

The Board found the following facts. Claimant worked for ESAB Group, Inc. (Employer) for over 39 years. Claimant’s last day of work was March 23, 2009.

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 high seniority employees, including Claimant, as an incentive to reduce its work force and therefore minimize company-wide layoffs. The early retirement package provided for payment of unused vacation days and fully paid health insurance for three years following retirement and at 50-percent for the remaining years until Claimant reached the age of 65.

In late-2008, Employer issued a memorandum listing employees who would be laid off. Claimant's name was not on the list.

Claimant was in no danger of being laid off by Employer because continuing work would have been available to him as a high seniority employee. After considering Employer's incentive offer for several weeks, Claimant accepted it. By agreeing to elect the early retirement incentive, Claimant saved a job for one of Employer's low seniority employees.

Claimant subsequently applied for unemployment benefits, which were initially denied. Claimant appealed. A referee held 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 appealed to the Board.

Initially, the Board ordered a remand hearing for the sole purpose of addressing a possible issue regarding the timeliness of Claimant's appeal to the

Board. Claimant, assisted by counsel, also filed a brief with the Board. The Board subsequently issued a decision and order in which it determined Claimant timely filed his appeal; however, the Board affirmed the referee's denial of benefits. Claimant's appeal to this Court followed.

On appeal,³ 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 "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.

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, for the reasons more fully expressed in Diehl, we again decline to overrule or factually distinguish Renda.

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 an early retirement package to high seniority workers, including the claimant, as an incentive to reduce its work force and therefore minimize company-wide layoffs.
4. The early retirement package provided for payment for unused vacation days and fully paid health insurance for 3 years following retirement, and at 50 percent for the remaining years until the claimant reaches age 65.
5. The employer provided the union with a memo ... listing employees who were to be laid off
6. The claimant's name was not on the list.
7. The claimant was in no danger of being laid off by the employer because continuing work would have been available to him as a high-seniority employee.
8. After considering the employer's incentive offer for several weeks, the claimant accepted it.

9. By agreeing to elect the early retirement incentive, the claimant saved a job for one low seniority employee of the employer.

Bd. Op., 1/21/10, Findings of Fact (F.F.) Nos. 3-9. These findings, which are supported by Claimant's testimony and documentary evidence, see Referee's Hearing of 7/7/09, Notes of Testimony, at 4-6 and Ex. C-3, 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 arguments concerning the alleged representations made by the local UC office personnel,⁴ 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

⁴ We note that, unlike in Diehl, at the referee's hearing in this case, Claimant's union president identified by name the local UC office employee who allegedly made the representation. However, that fact does not compel a different result on this issue for two reasons.

First, as in Diehl, Claimant did not raise this issue in his petition for review and does not develop the issue in his brief. Thus, as in Diehl, the issue is waived.

In addition, as explained more fully in Diehl and as summarized above, the Unemployment Compensation Law does not entitle Claimant to unemployment benefits based on the facts presented here; any representation by a UC service center employee to the contrary could not bind the Board to a different result.

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Board of Review,	:	
	:	
Respondent	:	

ORDER

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

ROBERT SIMPSON, Judge