IN THE COMMONWEALTH COURT OF PENNSYLVANIA

KK Fit, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 349 C.D. 2008
	:	
Unemployment Compensation Board of Review,	:	Submitted: August 15, 2008
	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: October 22, 2008**

KK Fit, Inc. (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed a decision by an Unemployment Compensation Referee (Referee) granting benefits to Genevia Crites (Claimant) pursuant to Section 402(b) of the Unemployment Compensation Law (Law).[1]

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

Claimant quit her job with Employer and was granted unemployment compensation benefits by the Lancaster Unemployment Compensation Service Center (Service Center). Employer appealed that determination and an evidentiary hearing was held before the Referee, who made the following findings of fact:

> 1. Claimant last worked for KK Fit, Inc. as the director of the children's gym from March 1, 2005, until October 1, 2007, in a full-time position at a final rate of pay of $11 an hour.
> 2. Claimant voluntarily resigned her job because of her dissatisfaction with the employer's failure to correct certain problems connected with the gym.
> 3. In May 2007, after the claimant observed that there were torn spots in upholstery in the gym and that infants were pulling stuffing out of furniture and eating pieces of the stuffing, the claimant requested that the employer replace the upholstery.
> 4. The employer agreed to put duct tape on the torn upholstery as a temporary measure, but the employer never replaced it prior to the time that the claimant resigned.
> 5. The claimant also noticed that there were wiring problems in the gymnasium because several of the outlets did not work, and in one of them that the claimant needed for vacuuming, the wires were loose and would occasionally spark.
> 6. The claimant also requested in the spring or thereabouts that the wiring be corrected, but this was also not done by the time that the claimant resigned.
> 7. The employer was undertaking renovations in other rooms in the employer's facility, but the renovations had not yet taken place in the children's gym.
> 8. The final straw for the claimant was that the claimant requested that the employer take measures against spiders because on September 26, 2007, one of the infants in the gym received a bad reaction to what appeared to have been a spider bite, and the claimant requested that the employer take immediate measures to get rid of spiders.
> 9. The employer indicated to the claimant that it would take care of the matter and that an exterminator would be there on or by October 1, 2007.
> 10. On October 1, 2007, the claimant learned that the exterminator had not been scheduled, so the claimant informed her supervisor that she was resigning.

11. The employer did not take care of the spider problem until approximately ten days after the claimant resigned her job.
12. Continuing work was available.

(Referee's Decision, Findings of Fact (FOF) ¶¶ 1-12.)

The Referee determined that Claimant quit her job for necessitous and compelling reasons pursuant to Section 402(b) of the Law. Specifically, the Referee stated that "[Claimant] made three complaints related to her job: the upholstery, the wiring, and the spiders." (Referee's Decision at 2.) The Referee noted that Employer did not rectify the upholstery and wiring problems on a permanent basis by the time Claimant quit her job. With regard to the spider problem, the Referee noted that little time elapsed between when Claimant brought the matter to the attention of Employer and Claimant's resignation. The Referee noted that, if he were to determine whether Claimant had necessitous and compelling reason to quit only on the basis of the spider problem, "[Claimant] would probably be ineligible because of the short time span which the employer had to correct the problem. On the other hand, [Claimant's] actions must be viewed in relation to the totality of circumstances in which [Employer] had failed to correct two other serious problems . . . ." (Referee's Decision at 2.) The Referee concluded that Claimant "acted as a reasonable person in inferring that [Employer] probably did not intend to take care of the problem immediately, as had been the case with the upholstery and the wiring." (Referee's Decision at 2.) Accordingly, the Referee affirmed the Service Center's determination. Employer appealed the Referee's decision to the Board. On appeal, the Board adopted and incorporated the Referee's findings and conclusions, resolved the conflicts in testimony in favor of Claimant, and concluded that Employer "did not make timely

and reasonable efforts to correct the serious safety issues present in the children's gym." (Board Order.) Thus, the Board affirmed the Referee's decision granting Claimant unemployment compensation benefits.

On February 26, 2008, Employer filed a Petition for Review with this Court. As its statement of objections, Employer asserted that:

> 3. Petitioner believes, and therefore avers, that the UCBR's Decision and Order are incorrect based on the facts as applied to the applicable law.
> 4. More specifically, Petitioner believes, and therefore avers, that the facts relied upon by the Referee (and, subsequently, the UCBR) were incorrect or not incomplete [sic], such that any Decision based on same is incorrect.

(Employer's Petition for Review ¶¶ 3-4.) On March 17, 2008, the Board filed its Motion to Strike. Relying on Deal v. Unemployment Compensation Board of Review, 878 A.2d 131 (Pa. Cmwlth. 2005), the Board asserted that Employer failed to state its objections with sufficient specificity as required by Rule 1513(d) of the Pennsylvania Rules of Appellate Procedure.[2] On April 23, 2008, oral argument was conducted before the undersigned, as a single judge on this Court,

[2] Rule 1513(d) requires an appellate jurisdiction petition for review to contain, in relevant part, "a general statement of the objections to the order or other determination." Pa. R.A.P. 1513(d). Further, Rule 1513(d) provides that "[t]he statement of objections will be deemed to include every subsidiary question fairly comprised therein." Pa. R.A.P. 1513(d). In addition, the note to Rule 1513 provides that a petition for review must state its objections with "sufficient specificity to permit the conversion of an appellate document to an original jurisdiction pleading and vice versa should such action be necessary to assure proper judicial disposition." Pa. R.A.P. 1513, Explanatory Note – 2004.

via telephonic conference in which both counsel for Employer and the Board participated.

On April 29, 2008, the undersigned entered an order and opinion granting, in part, the Motion to Strike Employer's Petition for Review because Employer failed to state, with sufficient specificity, its statement of objections in its Petition for Review. Even though Employer did not request leave to amend its Petition for Review and argued that its statement of objections was specific enough to comply with the requirements of Pa. R.A.P. 1513(d), this Court, sua sponte, ordered that Employer was permitted to file an Amended Petition for Review within five days of the date of this Court's order and that, if Employer failed to do so, Employer's Petition for Review would be dismissed as a matter of course. Employer complied with this Court's order and, on May 1, 2008, filed an Amended Petition for Review.[3]

[3] The Board argues in its brief that this Court should reconsider its prior single-judge decision, which sua sponte allowed Employer leave to file an Amended Petition for Review. Relying on Smithfield Café v. Unemployment Compensation Board of Review, 660 A.2d 248 (Pa. Cmwlth. 1995), the Board contends that the previous decision issued by the undersigned, as a single judge, abrogates the requirement of Rule 1513(d) and allows an impermissible *nunc pro tunc* petition for review. We disagree.

Employer's Amended Petition for Review does not contain an additional cause of action outside of what was originally pled in its initial Petition for Review. This Court merely permitted Employer to more specifically allege which facts relied on by the Referee were "incomplete" or "incorrect" in the Referee's decision. In doing so, this Court did not allow Employer to enlarge the basis for the appeal and, at the same time, addressed the Board's concern of not being able to adequately respond to Employer's Petition for Review as filed. The Board does not argue that it continues to be impaired in responding to the Amended Petition for Review. As such, we decline to reconsider our previous decision.

On appeal,[4] Employer argues that Claimant did not prove that she had a necessitous and compelling reason to quit her employment because Claimant failed to act reasonably in quitting when she did. Essentially, Employer contends that Claimant failed to reasonably communicate with Employer as to the status of Employer's correction measures, and Claimant did not give Employer enough time to permanently fix the three issues of faulty electrical sockets, upholstery, and the presence of spiders in the children's gym before quitting her employment.

Where a claimant has voluntarily quit employment, in order to obtain benefits under Section 402(b) of the Law, she must show that she left her employment for necessitous and compelling cause. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). In order to show a necessitous and compelling cause to quit, the claimant must show that: "1) circumstances existed which produced real and substantial pressure to terminate employment; 2) like circumstances would compel a reasonable person to act in the same manner; 3) she acted with ordinary common sense; and 4) she made a reasonable effort to preserve her employment." Comitalo v. Unemployment Compensation Board of Review, 737 A.2d 342, 349 (Pa. Cmwlth. 1999) (quoting Fitzgerald v. Unemployment Compensation Board of Review, 714 A.2d 1126, 1129 (Pa. Cmwlth. 1998)). An employee has a necessitous and compelling reason for terminating employment when the job jeopardizes her health or safety, or when the work results in a violation of the law. See Fleeger v. Unemployment

[4] Our review in an unemployment compensation case is limited to whether the findings of facts are supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Walton v. Unemployment Compensation Board of Review, 797 A.2d 437, 438 n.2 (Pa. Cmwlth. 2002).

Compensation Board of Review, 528 A.2d 264 (Pa. Cmwlth. 1987) (holding that a truck driver was justified in voluntarily terminating his employment when the employer jeopardized the driver's safety and violated federal safety regulations by requiring him to drive excessive hours).

In determining whether an employee made a reasonable effort to preserve her employment in order to establish that she had a necessitous and compelling reason for quitting her job, this Court has considered whether the employee made reasonable attempts to notify her employer of her complaints or concerns before quitting so that the employer could address the complaints and concerns. See, e.g., Rapid Pallet v. Unemployment Compensation Board of Review, 707 A.2d 636, 638 (Pa. Cmwlth. 1998) (granting claimant benefits and finding claimant credible that he informed employer orally on several occasions and through written repair requests that his work truck was faulty and unsafe); Moskovitz v. Unemployment Compensation Board of Review, 635 A.2d 723, 724 (Pa. Cmwlth. 1993) (denying claimant benefits finding that claimant failed to notify his supervisor or any other management person of his dissatisfaction with his supervisor's conduct towards him); and Fleeger, 528 A.2d at 267-68 (remanding the matter to the Board to make factual findings as to the particular people that claimant complained to regarding unsafe work conditions). "Whether an employee has cause of a necessitous and compelling nature to quit employment is a legal conclusion subject to appellate review." Brown v. Unemployment Compensation Board of Review, 780 A.2d 885, 888 (Pa. Cmwlth. 2001).

Here, the record establishes that three unsafe conditions existed within Claimant's employment. The first unsafe condition that directly affected Claimant's health and safety was the faulty electrical outlets located in the children's gym. Claimant brought this safety concern to Employer's attention in May 2007. Claimant explained that most of the outlets in the children's gym did not work, and the one that did work, which she was forced to use in order to vacuum the area, was loose and "would spark quite often." (WCJ Hr'g Tr. at 5.) Claimant stated that she actually showed the defective electrical wiring to her "boss" and also sent an e-mail to her immediate supervisor and General Manager, Amy Yohe. (WCJ Hr'g Tr. at 5; Claimant Ex. No. 5, Record Item 10.) Claimant testified that a gentleman that was working on the renovations to the gym was supposed to fix the electrical outlets in the children's gym, but that never occurred. This is also consistent with an e-mail that Ms. Yohe sent to another employee for Employer inquiring about repairs to the electrical sockets. (Claimant Ex. No. 5, Record Item 10.) As of October 1, 2007, the electrical outlets in the children's gym had yet to be addressed or corrected.

The second unsafe condition that directly affected the children under Claimant's care was the torn upholstery located in the children's gym. Claimant testified that, in May 2007, "[t]here were spots [on the children's climbing apparatus] that were tor[n] that the kids were catching themselves on . . . [, and] the infants [were] pulling the stuffing out -- or the toddlers [were] pulling the stuffing out and chewing on [it] . . . [which was] a huge choking hazard." (WCJ Hr'g Tr. at 4-5.) Claimant testified that she notified Employer about the upholstery issue in May 2007 and that Employer instructed her to secure the torn areas with duct tape.

Claimant stated that such instruction was "okay, you know, it's a good temporary fix but with all the children we had in there running back and forth it did not hold long." (WCJ Hr'g Tr. at 5.) Claimant went on to testify that she tried to contact several different places to inquire about repair work, but to no avail. She also stated that Employer instructed her to contact Prime Play Systems, the company from which the climbing apparatus was purchased. When Claimant contacted Prime Play Systems, she was told that the apparatus needed to be brought up to code. (WCJ Hr'g Tr. at 7; Claimant Ex. No. 1, Record Item 10.) Prime Play Systems also confirmed via e-mail to Claimant that it was available to fix the apparatus for a fee, which e-mail Claimant forwarded to Ms. Yohe, and the Senior Vice President of Operations for Employer, Carol Deiuliis. (WCJ Hr'g Tr. at 7-8; Claimant Ex. No. 1, Record Item 10.) As of October 1, 2007, the upholstery issue still had not been permanently addressed or corrected.

The third unsafe condition that directly affected both Claimant and the children under her care was the presence of spiders in the children's gym area. Claimant testified that, on September 26, 2007, she e-mailed her supervisor, Ms. Yohe, informing her about the spiders and advising her that anyone bitten by a spider, especially a child, could get sick. (WCJ Hr'g Tr. at 6; Claimant Ex. No. 4, Record Item 10.) In fact, Claimant testified that a child was bitten by a spider and that she believed the child was taken to the emergency room for treatment. (WCJ Hr'g Tr. at 8-9.) Claimant stated that Ms. Yohe was instructed by Employer to apply bug spray around the perimeter of the children's gym, but Claimant stated it would be useless because the bug spray would wash off when the children's gym was cleaned. (WCJ Hr'g Tr. at 6-7.) Claimant testified that she spoke to Ms.

Yohe "daily and, you know, I just told her this is crazy, something needs to be done and that things shouldn't take so long to be taken care of in a kid's area." (WCJ Hr'g Tr. at 9.) Claimant went on to state that she, herself, "couldn't okay anybody to come in and work," explaining "that's not my position, my position is to report it." (WCJ Hr'g Tr. at 9.) About 1.5 weeks before Claimant quit, Claimant explained that she went to her boss, Ms. Yohe, to inform her that she was going to resign because she felt the safety issues were "being put on the back burner" by Employer. (WCJ Hr'g Tr. at 8.) Ms. Yohe asked Claimant to "hang in there" because an exterminator was scheduled to take care of the spider issue on October 1, 2007. (WCJ Hr'g Tr. at 8.) Claimant continued with her employment until October 1, 2007, when she was notified one half-hour before the exterminator's appointment that "the exterminator was cancelled." (WCJ Hr'g Tr. at 8.) Claimant also submitted a letter from the exterminator confirming that, on the day of the scheduled service, the exterminator received a call canceling the service and was called about one week later to come back to exterminate the premises. The service was completed on October 12, 2007, 12 days after Claimant had resigned. (Claimant Ex. No. 3, Record Item 10.)

On cross-examination, Claimant stated that she was not informed that an electrician came to the gym to look at the outlets, nor was she informed of the reason why the exterminator was cancelled on October 1, 2007. (WCJ Hr'g Tr. at 12.) Claimant explained that she could not "keep doing this. The parents keep asking me, you know, they all come down on me, which as a director I understand but nothing was being done, it kept being put on the back burner and I felt that was

quite a long time to try to fight that." (WCJ Hr'g Tr. at 8.) Thus, when Claimant was notified on October 1, 2007 that the exterminator was cancelled, she quit.

Employer does not contest that the faulty conditions existed, but argued instead that the problems were being looked into in order to be corrected. Employer argued that the entire gym was being renovated, which Claimant did not contest; however, Claimant testified that she did not understand "how the renovations throughout the rest of the gym, as well as putting the big flat screen TV in the kitchen helps with the safety issues, helps with the reupholstery or any of the other issues that were asked to be fixed." (WCJ Hr'g Tr. at 15.)

Employer contends that Claimant failed to: (1) follow Employer's instructions to temporarily fix the safety issues; (2) request updated information from Employer as to the status of a permanent fix; and (3) communicate with Employer on the reasons that the exterminator was cancelled. However, these arguments are without merit. The Board, as the ultimate fact finder, Greif v. Unemployment Compensation Board of Review, 450 A.2d 229, 230 (Pa. Cmwlth. 1982), resolved the conflicts in testimony in favor of Claimant and found that Claimant notified Employer of two serious safety issues present in the children's gym in May 2007, which were not permanently addressed or corrected before Claimant quit on October 1, 2007. (Referee Findings of Fact (FOF) ¶¶ 3-7.) The Board also found that Claimant notified Employer of the spider issue on September 26, 2007, and Employer assured Claimant an exterminator would be scheduled for October 1, 2007 to permanently address this safety concern. However, on October 1, 2007, the day of the scheduled appointment, Claimant was informed that the

exterminator had been cancelled. (FOF ¶¶ 8-11.) "Although there may be record evidence to the contrary, findings of fact if supported by substantial evidence are conclusive on appeal." Duquesne Light Co. v. Unemployment Compensation Board of Review, 648 A.2d 1318, 1320 (Pa. Cmwlth. 1994).

Here, the Board's findings of fact are amply supported by the credited testimony of Claimant and the evidence she presented.[5] Moreover, the factual findings sufficiently satisfy the legal criteria for Claimant to be awarded unemployment compensation benefits. Claimant acted reasonably in terminating her employment when she did. Claimant brought to Employer's attention two serious safety issues regarding the electrical and upholstery defects which went unaddressed on a permanent basis for nearly five months that Claimant continued with her employment. Not only did Claimant physically show Employer where the electrical issues were, but she also followed up her concerns with an e-mail to Employer. Likewise, in addition to informing Employer of the upholstery issue, she also placed duct tape on the torn spots for a temporary fix, and forwarded an e-mail to Employer from a business that could be hired to reupholster the climbing apparatus. The electrical and upholstery issues went permanently unaddressed for nearly five months before another safety issue arose, i.e., the problem with the spiders, at which time Claimant approached Employer about her decision to resign. Claimant opted to trust Employer that the spider issue would be taken care of in a timely manner and, when she found out that Employer had cancelled the exterminator, she quit her employment. Employer did not address the safety issues

[5] We note that the record does not show that Claimant failed to follow through with Employer's instructions to temporarily fix the upholstery.

in a timely manner and, when Employer did not address the spider issue when it said it would, it was not unreasonable for Claimant to believe said safety condition would continue to go unaddressed.

Claimant acted with ordinary common sense and made a reasonable effort to preserve her employment by taking proactive measures to address the safety concerns, while timely notifying both her immediate supervisor and the Vice President of Operations of the various safety concerns. A reasonable person would act in the same manner both out of concern for her own safety from the faulty electrical wiring, as well as the lingering safety hazards to the children that were under her care. Based on the totality of the circumstances, and the gravity of the complaints that were not addressed, we cannot conclude that the Board erred as a matter of law in granting Claimant benefits.

Accordingly, we affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

KK Fit, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 349 C.D. 2008
	:	
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

O R D E R

NOW, October 22, 2008, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby affirmed.

_____

RENÉE COHN JUBELIRER, Judge