

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin McGinnis,	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 449 C.D. 2011
Respondent	:	Submitted: August 12, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: September 13, 2011

Kevin McGinnis (Claimant) challenges the order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's decision that Claimant was ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law).¹

The facts, as initially found by the referee and confirmed by the Board, are as follows:

1. The claimant was last employed by the Delaware Water Gap, Pocono Mountain Coop [sic] from September 4, 2009 until June 10, 2010.
2. The claimant worked as a maintenance person at the rate of \$8 per hour and worked full-time.

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

3. The claimant voluntarily left his employment on June 10, 2010 giving no reason.

4. Continuing work was available.

Referee's Decision, November 8, 2010, (Decision), Findings of Fact Nos. 1-4 at 1.

The referee determined:

The claimant although duly notified of the telephone hearing was unavailable.

The owner testified that the claimant was hired as a year round employee in September of 2009. On June 10, 2010, the claimant's parents who also worked at the site resigned. As they were leaving, the parents called for their son to join them, which he did. The claimant walked off the job and gave no reason.

Based on the testimony presented, the claimant is ineligible for unemployment compensation benefits under Section 402(b) of the Law.

Decision at 2.

Claimant appealed to the Board which affirmed. The Board stated:

Additionally, the Board notes that, at the time of the hearing on November 2, 2010, the Referee attempted to call the claimant at the telephone number he provided, 215-514-5374. The claimant did not answer, and the Referee left a voicemail message. The hearing notice informed the parties that they should wait by the telephone line at least fifteen minutes before the scheduled hearing time. As such, the Board determines that the claimant has failed to demonstrate proper cause for its [sic] nonappearance. Further, the claimant has attempted to present additional written testimony on appeal to the Board. However, the Board cannot consider evidence or testimony that was not before the Referee at the time of the hearing.

Board Opinion, January 14, 2011, at 1.

Claimant contends that his separation from employment was not voluntary, that the referee did not call him, that the Board erred when it did not accept the “additional written testimony” he provided, and that continuing work was not available for Claimant.² Claimant’s Brief at 5.

Initially, Claimant contends that he left his employment with Delaware Water Gap, Pocono Mountain KOA (Employer) because “of Employer letting his parents go he had no choice as he had no car and no place to live.” Claimant’s Brief at 9. He also contends that continuing work was not available, and Employer did not offer him housing. Claimant asserts that he and his parents were hired as a “unit” and were asked to leave as a “unit.” He also asserts that Employer did not pay him his overtime and asked him to work on his scheduled days off.

Whether a termination of employment is voluntary is a question of law subject to this Court’s review. The failure of an employee to take all reasonable steps to preserve employment results in a voluntary termination. Westwood v. Unemployment Compensation Board of Review, 532 A.2d 1281 (Pa. Cmwlth. 1987). An employee who voluntarily terminates employment has the burden of proving that such termination was necessitous and compelling. The

² This Court’s review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

question of whether a claimant has a necessitous and compelling reason to terminate employment is a question of law reviewable by this Court. Willet v. Unemployment Compensation Board of Review, 429 A.2d 1282 (Pa. Cmwlth. 1981). Good cause for voluntarily leaving one's employment results from circumstances which produce pressure to terminate employment that is both real and substantial and which would compel a reasonable person under the circumstances to act in the same manner. Philadelphia Parking Authority v. Unemployment Compensation Board of Review, 654 A.2d 280 (Pa. Cmwlth. 1995). Mere dissatisfaction with one's working conditions is not a necessitous and compelling reason for terminating one's employment. McKeown v. Unemployment Compensation Board of Review, 442 A.2d 1257 (Pa. Cmwlth. 1982).

A review of the transcript of the hearing before the referee reveals that Claimant did not present any evidence because he was not present and failed to participate by telephone. Elisa Prato (Prato), owner of Employer, corroborated that Claimant's parents also worked for Employer. Prato testified that Claimant's parents resigned on June 10, 2010, and Claimant terminated his employment on that date as well. Notes of Testimony, November 2, 2010, (N.T.) at 3. Prato read from an email from Sheri Michael (Michael), the new manager of the campground, addressed to her concerning the resignations. The email was part of the record and was submitted when Employer appealed the Unemployment Compensation Service Center's determination that Claimant was eligible for benefits. The email stated that when Claimant's parents resigned, Claimant's "mother said go get your things, we're packing up and leaving today. And he went and packed up and left." Email

from Sheri Michael, August 18, 2010, at 1.³ Further, Prato testified that “nobody fired him at any time” and that continuing work was available. N.T. at 3.

The Board accepted this testimony as credible. In unemployment compensation proceedings, the Board is the ultimate fact-finding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence. Unemployment Compensation Board of Review v. Wright, 347 A.2d 328 (Pa. Cmwlth. 1975). Findings of fact are conclusive upon review provided that the record, taken as a whole, provides substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). The Board may not consider evidence which was not presented to the referee. Lock Haven

³ Michael did not testify before the referee. Hearsay is defined in the Pennsylvania Rules of Evidence as “a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Pa.R.E. 801(c). Michael’s email statement appears to be hearsay at first glance. However, Pa.R.E. 803(g), Hearsay Exceptions, Availability of Declarant Immaterial, Records of Regularly Conducted Activity, provides:

A memorandum, report, record, or data compilation, in any form, or acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness The term ‘business’ as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Michael, an employee of Employer, emailed the circumstances of Claimant’s resignation to Prato, the owner of Employer. A description of a resignation of an employee fits within the classification of Pa.R.E. 803(g). Consequently, the email qualified as an exception to the hearsay rule.

University of the Pennsylvania State System of Higher Education v. Unemployment Compensation Board of Review, 559 A.2d 1015 (Pa. Cmwlth. 1989).

Next, Claimant contends that he was precluded from presenting evidence because the referee did not call him as he “dutifully sat by the phone” on the scheduled date of the hearing. Claimant’s Brief at 9. The Board accepted as fact that at the hearing the referee telephoned Claimant at his stated number and left a voicemail message. See Eat’n Park Hospitality Group, Inc. v. Unemployment Compensation Board of Review, 970 A.2d 492 (Pa. Cmwlth. 2008).⁴

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

⁴ Claimant did not address the issue of whether the Board should have accepted his written testimony in the argument section of his brief. Consequently, this issue was waived. See Pa.R.A.P. 2116(a); Van Duser v. Unemployment Compensation Board of Review, 642 A.2d 544 (Pa. Cmwlth. 1994). (Issues not briefed are waived).

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ORDER

AND NOW, this 13th day of September, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

BERNARD L. McGINLEY, Judge

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HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**DISSENTING OPINION
BY JUDGE COHN JUBELIRER**

FILED: September 13, 2011

I respectfully disagree with the Majority and would remand the matter to the Unemployment Compensation Board of Review (Board) to consider Kevin McGinnis' (Claimant) telephone records in determining whether he had good cause for failing to attend the telephone hearing. The Board refused to consider Claimant's telephone records on the ground that "the Board cannot consider evidence or testimony that was not before the Referee at the time of the hearing." (Board Op.) The Board's assertion that it cannot consider evidence or testimony that was not before the Unemployment Compensation Referee is incorrect.

The Board's own regulations state that:

[i]n connection with the consideration of an appeal to the Board from the decision of a referee, the Board may review both the facts and the law pertinent to the issues involved on the basis of the evidence previously submitted, *or direct the taking of additional testimony*. In any case the Board may limit the parties to oral argument or the filing of a written argument or both.

34 Pa. Code § 101.106 (emphasis added). Indeed, when the Board must determine whether a party had good cause for failing to attend a hearing, the Board often appoints a referee to take new evidence on the issue of good cause for failure to attend. See, e.g., Rock v. Unemployment Compensation Board of Review, 6 A.3d 646, 647-48 (Pa. Cmwlth. 2010) (“Claimant appealed to the UCBR, which remanded the matter to the Referee to determine if Claimant had good cause for missing the March 30, 2009 hearing The Referee, acting as the UCBR's hearing examiner, conducted a hearing on June 30, 2009 at which Claimant demonstrated what the UCBR deemed was good cause for missing the March hearing.”) In this case, I believe the Board erred as a matter of law in its statement that it could not consider the evidence offered by Claimant to show that he had good cause for failing to attend the telephone hearing. As a matter of due process, I believe this matter must be remanded to the Board.

RENÉE COHN JUBELIRER, Judge