

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carmen James,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 535 C.D. 2011
	:	
Unemployment Compensation	:	Submitted: October 7, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: December 1, 2011

Carmen James (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board) that denied her claim for benefits under Section 402(b) of the Unemployment Compensation Law (Law) (voluntary quit).¹ Claimant contends the referee denied her due process because she was unable to testify or submit evidence at the referee’s hearing, which was held in her absence. Moreover, Claimant asserts she would have submitted sufficient evidence to establish a necessitous and compelling cause to terminate her employment if she not missed her hearing due to unexpected car trouble. Upon review, we vacate and remand.

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

Claimant worked as a sales consultant for Verizon (Employer) starting in January 2004. After six years, Employer offered a large segment of its employees, including Claimant, an “Enhanced Income Security Plan” and a “One-Time Enhanced Voluntary Separation Incentive Offer” (collectively, the Offer) in an attempt to downsize its workforce without instituting layoffs. Around the same time, the union representing Claimant’s interests and Employer issued a memorandum summarizing an agreement which insulated employees like Claimant from being laid off prior to May 2011.

Thereafter, Claimant accepted the Offer and terminated her employment as of July 2010. Subsequently, Claimant applied for unemployment benefits, which were initially denied. Claimant appealed, and a referee hearing ensued.

On the day of the hearing, Claimant telephoned the referee to notify him she would be approximately 10 minutes late. In response, the referee delayed the hearing and waited for Claimant to arrive. After 25 minutes, Claimant was still absent, and she did not call again to request a further delay. The referee opened the hearing, and he received testimony from Employer.

After the hearing, the referee affirmed the initial determination denying Claimant benefits under Section 402(b) of the Law.² The referee reasoned

² The referee also considered whether Claimant was liable for fault-based overpayment pursuant to Section 804(b) of the Law, 43 P.S. §874(b). Finding no impropriety on Claimant’s behalf, the referee determined the overpayment could only be recouped on a non-fault overpayment basis. Neither party appealed this determination.

Claimant failed to explain how her decision to accept the Offer and terminate employment was based on an imminent fear of losing her job. Furthermore, in light of the agreement between Employer and the union, Claimant's employment was guaranteed for the foreseeable future. In sum, the referee concluded the circumstances confronting Claimant did not produce necessitous and compelling cause for Claimant to terminate her employment. Therefore, Claimant was ineligible for benefits. Claimant appealed.

Based on a review of the record, the Board affirmed, adopting the referee's findings and conclusions. The Board also determined Claimant was approximately 30 minutes late for the hearing, and did not request another hearing pursuant to 34 Pa. Code §101.24. Now, for the first time represented by counsel, Claimant petitions for review.³

Claimant raises two contentions. First, Claimant asserts the referee denied her due process when he did not permit her to testify or submit evidence at the hearing due to her absence. Second, Claimant argues she had necessitous and compelling cause to leave her employment. Specifically, Claimant offered to testify about her belief that if she did not accept the Offer she would be laid off.

³ Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Oliver v. Unemployment Comp. Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010) (en banc).

Generally, in unemployment cases, to satisfy due process, parties must be afforded notice and an opportunity to present argument, produce evidence, and rebut the same. Vann v. Unemployment Comp. Bd. of Review, 508 Pa. 139, 494 A.2d 1081 (1985). Pursuant to 34 Pa. Code §101.51, a referee is permitted to hold a hearing in a party's absence, if that party failed to appear after being properly notified of the hearing. Gadsden v. Unemployment Comp. Bd. of Review, 479 A.2d 74 (Pa. Cmwlth. 1984); Torsky v. Unemployment Comp. Bd. of Review, 474 A.2d 1207 (Pa. Cmwlth. 1984) (holding a referee does not abuse his discretion by opening a hearing after waiting a reasonable time for the absent party to arrive).

If the referee holds a hearing in the absence of one of the parties, the matter may be reopened pursuant to 34 Pa. Code §101.24.⁴ In order to reopen the hearing, the absent party must file a written request to reopen, which states proper cause for not appearing at the scheduled time. Lee v. Unemployment Comp. Bd. of Review, 458 A.2d 629 (Pa. Cmwlth. 1983). A party's failure to allege proper

⁴ In pertinent part 34 Pa. Code §101.24 states:

(a) If a party who did not attend a scheduled hearing subsequently gives written notice ... and it is determined by the tribunal that his failure to attend the hearing was for reasons which constitute 'proper cause,' the case shall be reopened. Requests for reopening, whether made to the referee or Board, [1] shall be in writing; [2] shall give the reasons believed to constitute 'proper cause' for not appearing; and [3] they shall be delivered ... at the address

...

(c) A request for reopening the hearing which is not received before the decision was mailed, but is received or postmarked on or before the 15th day after the decision of the referee was mailed to the parties shall constitute a request for further appeal to the Board and a reopening of the hearing

...

cause in its request to reopen results in the denial of the opportunity to submit evidence. McNeill v. Unemployment Comp. Bd. of Review, 510 Pa. 574, 511 A.2d 167 (1986). The crux of a request to reopen is the assertion of proper cause for the party's failure to appear at the initial hearing. See id.

Here, Claimant contacted the referee prior to the hearing and informed the tribunal of her likely tardiness. However, Claimant then exceeded her estimated tardiness by over 15 minutes, totaling over a 25 minute delay. Therefore, as a result of Claimant's tardiness and additional delay, the referee did not err in opening the hearing without Claimant present. See Torsky.

Contrary to the Board's conclusion, however, Claimant's filing before the Board constituted a request to reopen. See Miller v. Unemployment Comp. Bd. of Review, 505 Pa. 8, 13, 476 A.2d 364, 366 (1984) (recognizing our Supreme Court has "long refused to give overly technical, restrictive readings to procedural rules, particularly when remedial statutes such as the [Law] are involved.").

To that end, in McNeill, our Supreme Court considered whether a letter addressed to the Board, which in pertinent part stated, "We do not agree with the decision rendered ... [w]e want to appeal and have a further hearing," constituted a request to reopen. Id. at 576-77, 511 A.2d at 168. Ultimately, our Supreme Court noted the filing did constitute a timely written request to reopen, but ultimately held the filing was deficient as it failed to allege just cause for the party's absence. Id.

Here, Claimant, representing herself, filed her notice of appeal and supporting brief to the Board within 15 days of the mailing of the referee's decision. Original Record (O.R.), Item Nos. 10-11. In her filings, Claimant explained why she was absent from the hearing, and she asked to submit to the Board the evidence she originally planned to present at the hearing. O.R., Item No. 11 at 5-6. Specifically, Claimant explained she was absent from the hearing because of unforeseen car trouble, and she wished to introduce testimony regarding the specific facts that caused her to fear for her job. Id.; see Finney v. Unemployment Comp. Bd. of Review, 472 A.2d 752 (Pa. Cmwlth. 1984) (citing Perry v. Unemployment Comp. Bd. of Review, 459 A.2d 1342 (Pa. Cmwlth. 1983)) (holding automobile problems constituted good cause to allow a party to file an appeal nunc pro tunc).

Therefore, we conclude Claimant complied with the essential requirements of 34 Pa. Code §101.24 to request to reopen her hearing. Specifically, Claimant timely filed a written letter to the Board asserting a rationale for her absence at her initial hearing, and requesting the opportunity to file a statement of facts. See McNeill. While Claimant's filing does not include precise language asking the Board to reopen the hearing, it would be an unjust application of form over substance not to remand this matter to allow Claimant to appear at a fact-finding hearing. See Miller.

With respect for Claimant's due process rights, we remand to the Board for it to decide whether Claimant had proper cause for her failure to appear at the referee hearing. See Stop-N-Go of Western Pennsylvania, Inc. v.

Unemployment Bd. of Review, 707 A.2d 560 (Pa. Cmwlth. 1998) (demonstrating the applicable remand procedure); Cannady v. Unemployment Comp. Bd. of Review, 487 A.2d 1028 (Pa. Cmwlth. 1985) (remand is required when the Board has not determined whether a claimant's absence was for proper cause). As such, we need not address the merits of Claimant's appeal, namely, that she had necessitous and compelling cause to terminate her employment at this time.

Accordingly, we vacate the Board's order and remand to the Board to hold a hearing to determine whether Claimant had proper cause for her absence at the initial hearing, and if finding so, to hear evidence on the merits of her claim.

ROBERT SIMPSON, Judge

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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 1st day of December, 2011, the order of Unemployment Compensation Board of Review is **VACATED**, and this matter is **REMANDED** to the Unemployment Compensation Board of Review for further proceedings consistent with the foregoing opinion. Jurisdiction is relinquished.

ROBERT SIMPSON, Judge