

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kovalchick Corporation, :
 Petitioner :
 :
 v. :
 :
Unemployment Compensation Board of :
Review, :
 Respondent :

No. 896 C.D. 2009
Submitted: September 11, 2009

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE JOHNNY J. BUTLER, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: October 30, 2009

Kovalchick Corporation (Employer) petitions this court for review of the April 7, 2009, order of the Unemployment Compensation Board of Review (UCBR) holding that Jim Battestilli (Claimant) was not ineligible for benefits under section 402(b) of the Unemployment Compensation Law (Law).¹ We affirm.

The UCBR found as follows. Claimant worked for Employer from November 1996 to September 11, 2008. He last worked as a full-time watchman/security guard at a pay rate of \$7.50 per hour; Claimant worked in an outside guard shack, and he did not carry a weapon. Two weeks before Claimant's

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b). Section 402(b) provides that a claimant is ineligible for benefits for any week that his unemployment is due to his voluntarily leaving work without cause of a necessitous and compelling nature. Because section 402(b) is the only section of the Law involved in this appeal, we do not refer to any other statutory section previously at issue in this case.

last day of work, the alarm sounded, and Claimant saw a person running from Employer's site. Claimant called police, who could not catch the suspect. The next day, Claimant's manager told him that he was supposed to come out of the shack and chase the suspects himself instead of calling the police. On September 11, 2008, Claimant saw a woman attempting to break into Employer's office. Claimant called the police, who apprehended the woman. When Claimant's manager refused Claimant's request to press charges against this woman, Claimant became upset because he believed, based on previous incidents as well as the present situation, that Employer would never press charges against criminals whom Claimant helped to catch. Claimant believed that his job was dangerous. (UCBR's Findings of Fact Nos. 1-9.)

On September 14, 2008, Claimant called his manager at home and asked to speak to him. Because the manager was not available, Claimant informed the manager's wife that he was quitting. On September 15, 2008, Claimant was hospitalized for mental health concerns. Several days later, Claimant phoned Employer and spoke to a counter person, asking to return to work; the next day, Claimant spoke to the manager about returning to work. On September 22, 2008, Claimant was released from the hospital, and he was able and available for suitable work as of October 13, 2008. (UCBR's Findings of Fact Nos. 10-15).

After Claimant's employment ended, he applied for unemployment compensation benefits, which the local job center denied under section 402(b). On appeal, the referee affirmed the denial of benefits under this section of the Law.

However, on further appeal, the UCBR reversed.² In doing so, the UCBR reasoned that, although Claimant had not successfully rescinded his resignation, he had proven that he had necessitous and compelling reason to voluntarily quit his employment. In reaching this determination, the UCBR noted that it found Claimant's testimony credible and resolved any conflicts in the testimony in Claimant's favor. The UCBR explained in pertinent part:

The [UCBR] finds that the claimant's job duties were dangerous and that the employer did not take steps to protect the claimant when it ordered the claimant to apprehend suspects himself rather than call the police, and then refused to file charges against the criminals he helped apprehend. Therefore, the claimant has proven that he had a necessitous and compelling reason to quit his employment.

(UCBR's op. at 3.)

On appeal,³ Employer argues that the UCBR erred by deciding that Claimant had a necessitous and compelling reason to quit his employment. Employer first asserts that the UCBR should have viewed the referee's findings of fact as conclusive because they were supported by substantial evidence. Relying on the principles set forth in *Brunswick Hotel & Conference Center, LLC v. Unemployment Compensation Board of Review*, 906 A.2d 657 (Pa. Cmwlth. 2006), Employer further argues that the UCBR's findings of fact do not support its legal conclusion that

² The UCBR denied Employer's request for reconsideration.

³ Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Claimant had sufficient reason for resigning his employment. After considering Employer's arguments, we are not persuaded.

First, the law is clear that the UCBR is the ultimate fact finder in unemployment compensation cases. *Bell v. Unemployment Compensation Board of Review*, 921 A.2d 23 (Pa. Cmwlth. 2007). Moreover, questions regarding credibility and resolution of conflicting evidence are within the UCBR's discretion and are not subject to judicial review. *Id.* For this reason, Employer's assertion that the UCBR should not have substituted its findings for those of the referee on this record is utterly unavailing.

Second, we disagree with Employer that the UCBR's factual findings are insufficient to support its legal conclusion that Claimant had necessitous and compelling reason to resign from his job. This court stated in *Brunswick*, 906 A.2d at 661 (citation omitted):

Although the Law does not define the terms "necessitous and compelling," case law has. An employee who claims to have left employment for a necessitous and compelling reason must prove that: (1) circumstances existed which produced real and substantial pressure to terminate employment; (2) such circumstances would compel a reasonable person to act in the same manner; (3) the claimant acted with ordinary common sense; and, (4) the claimant made a reasonable effort to preserve [his] employment.

Here, Claimant testified that, on several occasions, he helped to apprehend suspects who were attempting to break into Employer's premises, but Employer did not pursue any legal action against the suspects. (R.R. at 27a.)

Claimant also stated that his manager became angry with him, and told him not to call the police but to pursue any suspects himself, even though his manager knew that Claimant did not have a weapon. (R.R. 31a.) Claimant further testified that he told his manager he was afraid for his safety during this conversation, which occurred approximately two weeks before Claimant quit. (R.R. 31a-32a.) As previously explained, the UCBR found Claimant's testimony to be credible and resolved any conflicts in testimony in Claimant's favor.

This court has stated that an employee has good cause for resigning from his job where his work jeopardizes either his health or safety. *Fleeger v. Unemployment Compensation Board of Review*, 528 A.2d 264 (Pa. Cmwlth. 1987). However, as previously stated, the job pressures leading to a voluntary termination of employment must be real and substantial, compelling any reasonable person to act in a similar manner. *Sol Neft Sports v. Unemployment Compensation Board of Review*, 610 A.2d 539 (Pa. Cmwlth. 1992). In this case, Claimant informed Employer of his safety concerns, which were reasonable given Claimant's lack of a weapon, Employer's instruction to Claimant to apprehend suspects without the aid of police, and Employer's unwillingness to press charges against suspects apprehended by Claimant. Because it is apparent that Employer was unresponsive to Claimant's legitimate concerns, we are satisfied that Claimant had necessitous and compelling reason to quit his watchman job. In other words, despite Employer's protestations to the contrary, Claimant's testimony supports the UCBR's findings, which, in turn, undergird its legal conclusion that Claimant is eligible for benefits.

For these reasons, we now affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

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ORDER

AND NOW, this 30th day of October, 2009, the order of the Unemployment Compensation Board of Review, dated April 7, 2009, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge

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**DISSENTING OPINION
BY JUDGE COHN JUBELIRER**

FILED: October 30, 2009

I must respectfully dissent because I do not believe the Board's finding that Claimant quit because his watchman/security guard position was dangerous is supported by substantial evidence. Therefore, I believe this Court must reverse the order of the Board granting Claimant benefits because Claimant failed to show a necessitous and compelling reason for quitting.

The majority states that:

In this case, Claimant informed Employer of his safety concerns, which were reasonable given Claimant's lack of a weapon, Employer's instruction to Claimant to apprehend suspects without the aid of police,

and Employer's unwillingness to press charges against suspects apprehended by Claimant. Because it is apparent that Employer was unresponsive to Claimant's legitimate concerns, we are satisfied that Claimant had necessitous and compelling reason to quit his watchman job.

Kovalchick Corp. v. Unemployment Compensation Board of Review, No. 896 C.D. 2009, slip op. at 5 (Pa. Cmwlth. Oct. 30, 2009). I disagree with the majority's conclusion because the credible evidence of record establishes that Claimant quit after an incident in which there was no objective evidence of danger:

CL [Claimant's Lawyer] Okay. So what happened on the 11th *that caused you to leave?*

C [Claimant] Okay it was my last day of work and I was *in our guard shack* and I saw a woman and it very well looked to me that she was trying to get in the side entrance to our office She kept going to her bag, up to the lock, going to her bag, up to the lock. I was even *looking through the binoculars*. At the same time I notified the police. *So I called the police, they were down there immediately*. So I left the shack, got in my car and went over and the police had her and I called [Mr. Kovalchick] and . . . I said we got somebody here and it really looks like she was trying to get into this office some way or another. I said would you like to come down and file charges and he told me no. So this kind of - - this initially I don't know it just kind of upset me because on a couple more incidences the same thing happened. Once with a guy that had worked for [Employer] for four or five years, I caught him two times. The second time I don't believe there was any charges filed on him at all. And there were two gentlemen trying to break in or trying to get in the real estate office at one time. I was in the truck at that time, wasn't in the shack. But . . . the police apprehended [them] and there wasn't anything filed on them either.

CL So this had happened on several occasions?

C Right.

CL Were you concerned about your safety when you w[ere] on duty?

C Well yes I was very much.

C Did you inform Mr. Kovalchick of your concerns?

CL I think he knew. Yes.

CL So how was it that you informed your Employer that you were leaving?

C I called [Mr. Kovalchick's] wife and I told her, I said, I explained to her that *I can't understand why we cannot file charges on these people when I'm catching them.*

(Hr'g Tr. at 7-8 (emphasis added).)

Claimant's credible testimony does not establish that Claimant was in actual danger leading up to his resignation: Claimant was in the guard shack when the trespasser entered onto Employer's property; Claimant was far enough away from the trespasser so as to need the assistance of binoculars to view the incident; Claimant called the police, who immediately arrived at the scene; and the police successfully apprehended the suspect. (Hr'g Tr. at 7-8.) Moreover, the Board's findings that Claimant's job was dangerous, (Board Op. at 3), and that Claimant believed his job was dangerous, (Board Finding of Fact (FOF) ¶ 9), are undercut by the Board's factual findings that Claimant contacted Employer and requested reinstatement of his position. (FOF ¶¶ 12-13¹; Hr'g Tr. at 10.) Thus, Claimant could not even subjectively think that his job was dangerous at that point.

¹ Finding of fact 12 states that a few days after Claimant quit his job, "the claimant called the employer and spoke to a counter salesperson and asked about coming back to work." (FOF ¶ 12.) Further, finding of fact 13 states that one day later, "the claimant spoke to the manager about coming back to work." (FOF ¶ 13.)

Although there is substantial evidence to support the Board’s findings that Claimant became upset after he asked Mr. Kovalchick to come down and press charges and Mr. Kovalchick refused, (FOF ¶¶ 7-8²), Claimant failed to connect his displeasure with Employer's failure to press charges against trespassers to his belief that it caused his job to be dangerous.

Therefore, I do not believe that Claimant’s concerns about the dangers of his job would have compelled a reasonable person in similar circumstances to quit when Claimant did. Accordingly, I believe this Court should reverse the Board’s order finding Claimant eligible for benefits under Section 402(b) of the Law.

RENÉE COHN JUBELIRER, Judge

² The Board’s finding of fact 7 states that “[t]he claimant asked [Mr. Kovalchick] to come down and press charges against the woman, but he refused.” (FOF ¶ 7.) Further, finding of fact 8 states that “[t]he claimant became upset because, based on prior incidents as well as the current one, he believed that the employer would never press charges against criminals he helped apprehend.” (FOF ¶ 8.)