



**I.**

Claimant has worked for Employer since 2012 as the Senior Vice President of Real Estate. Pursuant to the terms of his employment agreement, he received a base salary as well as a commission for retail leases executed after the beginning date of his employment.<sup>2</sup> Specifically, the agreement stated that “A tenant, who has an existing lease with or without a pre-negotiated lease extension or renewal, shall not qualify as a new lease.” (R.R. at 41a.) It further provided, “No Commission shall be paid for any existing retail leases signed” and then enumerated a non-exclusive list of such transactions. (R.R. at 41a–42a.) Nonetheless, Claimant worked with the tenants specifically listed under the agreement because he had been authorized to do so by Employer.

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**(continued...)**

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(b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature, irrespective of whether or not such work is in “employment” as defined in this act . . . .

43 P.S. §802(b).

<sup>2</sup> The agreement clarified that Claimant and Employer’s relationship was “for an unspecified term,” was “considered at will,” that “[n]o employment contract [wa]s created by the existence of this agreement,” and that the employment “can be terminated at will” by either Claimant or Employer with or without cause or advance notice. (Reproduced Record [R.R.] at 43a.)

From the fall of 2012 through the summer of 2013, Claimant approached Employer regarding commissions he believed he was owed. When the matter was not resolved to Claimant's satisfaction, he tendered his resignation by letter dated July 15, 2013, stating:

I have enjoyed my time here in working with you both and your team, but I am looking forward to pursuing other opportunities.

\* \* \*

In addition, during this time I am also requesting confirmation that we will resolve the outstanding commissions due and owed to me in accordance with my employment letter and memorandum of April 27, 2013.

(*Id.* at 52a.)<sup>3</sup>

In response, Employer advised Claimant that he would be paid for commissions earned during his tenure, and that “[e]arned commissions are based on fully executed new leases” but “excluded deals that were in progress” when Claimant’s employment began. (*Id.* at 53a.) Employer attached a spreadsheet indicating that although the Chick-fil-A (Sanatoga), Hair Cuttery (Sanatoga), and Regal Cinemas (Sayreville) leases were excluded under the agreement, “through

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<sup>3</sup> As per Claimant’s demand letter, he contended that he was owed commissions with regard to the following leases: Bass Pro Shop, Regal Cinema and Wawa at Sayreville; Chick Fil-A and Hair Cuttery at Sanatoga; and Chipotle, Hair Cuttery and Red Robin at Worthington. (R.R. at 82a–84a.)

verbal modification, it is agreed that you will be paid a commission for [these] transaction[s].” (*Id.* at 57a–58a.)

## II.

Claiming that he resigned because he was not paid the commissions that he was owed, Claimant filed a claim for benefits which the Unemployment Compensation Service Center denied, finding that Claimant did not satisfy his burden of proving that he had a necessitous and compelling reason for voluntarily quitting because he failed to show that he “had a definite job offer prior to voluntarily quitting.” (Certified Record [C.R.] Notice of Determination at 1.) Claimant appealed.

Before the Referee, Claimant testified that pursuant to his employment agreement, he earned a base salary and a commission of \$2 per square foot for each lease executed after his employment began, with the exception of those leases which were executed prior to his employment and were specified in the agreement. However, he explained that the leases specified in the agreement “were never executed, and then, [Claimant] was asked subsequent to joining the company to take on the responsibility of getting those leases negotiated and executed, which [he] did” after the start of his employment. (R.R. at 25a.) Claimant further stated:

I think it was very clear. Certainly the documents certainly [*sic*] show that I facilitated the negotiations and execution of the leases that were in question, certainly with the correspondence from the retailers, the cover letters that were addressed to me, submitting for the landlord’s execution those documents in question. So,

clearly without any question, I certainly facilitated those documents.

*(Id. at 27a.)*

He testified that on 11 separate occasions, he advised Employer that he was owed commissions for the period of August 2012 through July 2013. Specifically, he stated that he repeatedly spoke to three of Employer's executives: James Savard twice in August, Brian O'Neil, Jr. once, and Brian O'Neil, Sr. the remainder of the times.

Claimant further testified that even though four of the leases were specifically excluded under the agreement, Employer later agreed that he was due commissions with regard to those leases but failed to pay them. Regarding other leases for which he claimed commissions, Claimant stated that in June 2013, he spoke to Brian O'Neil, Sr., who advised Claimant that he needed to discuss the leases with his son, but neither contacted Claimant.

When the matter was not resolved by mid-June 2013, Claimant testified that he addressed it again with Mr. Savard and Brian O'Neil, Sr., who advised that they would follow up with Claimant. Despite three attempts to schedule follow-up meetings, Brian O'Neil, Sr. never responded to Claimant, and Claimant tendered his resignation via letter dated July 15, 2013.

On cross-examination, Claimant did not dispute that some of the leases for which he sought commissions were specifically excluded under the

agreement, but testified that Mr. Savard assured him that he would be paid for all of the leases. Claimant further acknowledged that after his departure, Employer sent him a letter indicating which commissions it agreed to pay and explaining why it refused to pay the others. In response, Claimant stated that he attempted to contact Mr. Savard three times, to no avail. He also conceded that his resignation letter did not assert that he was quitting due to unpaid commissions, but rather to pursue new opportunities.

In opposition to Claimant's appeal, Employer presented the testimony of its Human Resources Manager, Sharon Slusarski, who stated that at the time of Claimant's departure, he "was paid everything he was owed." (*Id.* at 33a.) She further testified that she did not learn of the dispute regarding outstanding commissions until after Claimant resigned.<sup>4</sup>

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<sup>4</sup> Employer also presented evidence in support of its argument that Claimant was self-employed and, therefore, ineligible for benefits under Section 402(h) of the Law, which provides that an employee is ineligible for compensation benefits for any week:

In which he is engaged in self-employment: Provided, however, That an employe who is able and available for full-time work shall be deemed not engaged in self-employment by reason of continued participation without substantial change during a period of unemployment in any activity including farming operations undertaken while customarily employed by an employer in full-time work whether or not such work is in "employment" as defined in this act and continued subsequent to separation from such work when such activity is not engaged in as a primary source of livelihood. Net earnings received by the employe with respect to such activity shall be deemed remuneration paid or payable with respect to such period as shall be determined by rules and regulations of the department.

43 P.S. §802(h).

The Referee admitted as exhibits the employee agreement, Claimant's letter of resignation, and Employer's letter in response to Claimant's resignation. He also took judicial notice of an August 2013 action Claimant filed against Employer in the Court of Common Pleas of Montgomery County for breach of contract, violation of the Wage Payment and Collection Act,<sup>5</sup> constructive discharge, and unjust enrichment as evidence "that [Claimant] has a perceived grievance of some sort against the Employer, that he's filed a lawsuit in that regard, and that he's going to attempt to prove those allegations." (R.R. at 22a.)

Based on the testimony and evidence presented at the hearing, the Referee affirmed the Service Center's determination that Claimant was ineligible for benefits under Section 402(b) of the Law because he did not show that he was entitled to any of the claimed commissions and because Claimant did not threaten to resign from his employment if the commission dispute was not resolved to his satisfaction, but rather, resigned first and then advised that he wished to continue discussions. The Referee noted that because Claimant was ineligible under Section 402(b) of the Law, his eligibility under Section 402(h)'s self-employment provision need not be addressed.

Claimant appealed to the Board, which credited his testimony and found that although the agreement excluded the specified "existing retail leases," Claimant learned that several tenants listed did not have existing leases and went on to negotiate and execute new leases with them. As such, the Board held that

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<sup>5</sup> Act of July 14, 1961, P.L. 637, *as amended*, 43 P.S. §§260.1–260.12.

Claimant had necessitous and compelling cause for quitting his position due to the non-payment of wages in excess of \$100,000.00, particularly since “he met with the [E]mployer on many occasions over the course of several months in an effort to obtain the commissions owed” and, therefore, “made a good faith effort to preserve the employment relationship before quitting.” (*Id.* at 17a.) The Board reversed the Referee’s decision under Section 402(b) of the Law and granted benefits but noted: “The Department may wish to investigate the claimant’s eligibility for benefits under Section 402(h) of the Law.” (*Id.*) This appeal followed.<sup>6</sup>

### III.

Employer initially contends that the Board’s finding that Claimant satisfied his burden of proving that he had necessitous and compelling cause to resign due to the non-payment of wages is not supported by substantial evidence. Specifically, Employer argues that the only evidence Claimant adduced was his testimony stating that Employer agreed to pay him with regard to three unspecified commissions, that he expended substantial effort in securing the disputed leases, and acknowledging that the commissions sought were barred by his employment agreement.

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<sup>6</sup> Our review is limited to determining whether the Board’s findings of fact are supported by substantial evidence in the record, whether errors of law were committed, whether agency procedure was violated, or whether constitutional rights were violated. *Gillins v. Unemployment Compensation Board of Review*, 633 A.2d 1150, 1153 (Pa. 1993). We have defined “substantial evidence” as such “relevant evidence that a reasonable mind might consider adequate to support a conclusion.” *Palladino v. Unemployment Compensation Board of Review*, 81 A.3d 1096, 1100 n.3 (Pa. Cmwlth. 2013), *appeal denied*, 95 A.3d 278 (Pa. 2014).



Ignoring that Employer's response to Claimant's termination letter specifically stated that Employer agreed to pay certain commissions even though they were excluded, Employer argues that Claimant admits the sought commissions are barred under the agreement. To the contrary, Claimant emphasized that the agreement precluded commissions for "existing retail leases," including those on the enumerated properties. However, he went on to clarify that the leases at issue were not "existing" as of the date his employment began because they had not been negotiated or executed. Therefore, Claimant explained that pursuant to Employer's direction, he negotiated and secured those leases. He further testified that Employer's executives assured him numerous times that he would be paid for these transactions.

Nonetheless, Employer contends that Claimant's testimony is contradicted by his resignation letter which cites his desire to pursue other opportunities rather than the non-payment of commissions as his reason for leaving, Claimant's failure to threaten to resign if he was not paid the subject commissions, and Employer's course of conduct in consistently failing to pay him the commissions. However, each of these issues was explored during Claimant's cross-examination and did not render his testimony unbelievable. In essence, Employer invites us to reject the Board's credibility determination and subscribe to its theory of events, but as we have stated repeatedly, questions of credibility and evidentiary weight are within the sole discretion of the Board. *See Eduardo v. Unemployment Compensation Board of Review*, 434 A.2d 215, 217 (Pa. Cmwlth. 1981). Based on Claimant's testimony and the language of the employment agreement, the Board's finding that Claimant had necessitous and compelling

reason to resign due to non-payment of the disputed commissions is supported by substantial evidence.

Finally, Employer contends that the Board's conclusion is contrary to law because the subject commissions were specifically excluded under Claimant's employment agreement. As discussed above, the plain language of the agreement dictates that "A tenant, who has an *existing* lease with or without a pre-negotiated lease extension or renewal, shall not qualify as a new lease.... No Commission shall be paid for any *existing* retail leases signed including but not limited to" transactions involving the subject tenants. (R.R. at 41a-42a (emphasis added.)) Claimant testified credibly that the commissions at issue were based on retail leases negotiated and executed *after* his start date; they did not exist at the time his employment commenced. Therefore, the Board's finding that the commissions were not excluded under the agreement likewise has ample support.

Accordingly, because substantial evidence supports the finding that Claimant made a good faith effort to preserve the employment relationship and that he had necessitous and compelling cause for quitting his position due to the non-payment of wages, the Board's decision that Claimant is not ineligible for benefits pursuant to Section 402(b) of the Law is affirmed.

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DAN PELLEGRINI, President Judge

