IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

BEVERLY J. THORPE,	)
	) C.A. No.: K10A-09-013 JTV
Appellant,	)
	)
v.	)
	)
J & R BEENE, INC.,	)
	)
Appellee.	)

Submitted: August 5, 2011
Decided: November 30, 2011

Beverly J. Thorpe, Pro Se.

H. Cubbage Brown, Jr., Esq., Brown, Shiels & O'Brien, Dover, Delaware.
Attorney for Appellee.

Upon Consideration Appellee's
Appeal From Decision of
Unemployment Insurance Appeal Board
REMANDED

VAUGHN, President Judge

Thorpe v. J.R. Beene, Inc.
C.A. No.: K10A-09-013 JTV
November 30, 2011

ORDER

Upon consideration of the parties' briefs and the record of the case, it appears that:

1. This is an appeal from a decision of the Unemployment Insurance Appeal Board. Beverly Thorpe, the appellant or claimant, was employed at J & R Beene, Inc., the appellee or employer, as a package store attendant/bar maid. On or about September 4, 2009, she was injured in a non-work related motorcycle accident. Injuries from the accident rendered her unable to work. On or about November 12, 2009 her doctor released her for medium duty work, defined as lifting no more than 50 pounds and carrying no more than 20 pounds. The claimant met with her employer on November 11 or 12 to discuss her return to work. In the meantime, the employer had hired a temporary replacement worker in the claimant's place. Mr. Beene, one of the owners of the employer, testified both before the Appeals Referee and the Board. He testified that he explained to the claimant that he had no work available that fit within medium duty work; that the parties discussed the fact that the claimant was scheduled for surgery in January, but hoped to have it done in December; that once it was done she should be able to return to work without the restriction to medium duty work; that he said that was fine; that he never heard from the claimant after the November 11 or 12 meeting; and that he did not discharge the claimant. Ms. Beene, the other owner, testified at the hearing before the Board. Her testimony was that she had work for the claimant if the anticipated surgery restored her to full health; that she never heard back from the claimant after November 11 or 12 and never discharged her. Ms. Thorpe testified at the hearing before the Appeals

Referee that she saw Ms. Beene on November 12; that Ms. Beene told her on that date that the schedule was full; that two days later the claimant saw Ms. Beene again and informed her that if she could have a letter stating that she could not be scheduled for work until December 1, she could receive other benefits in the interim; that she was under the impression she would be brought back; that on November 19 or 20 she spoke with Mr. Beene; that he gave her several reasons why she couldn't be brought back to work; that those reasons were that he had no medium duty work, that business had slowed down, and that he needed to have his daughter work to make enough money for a tax return; that he showed her paperwork of the company's slow down in business; that she was never asked to get back to them about whether she was having surgery or not; that she was not asked to contact them further; that she didn't see the doctor again until December 15; that she had a cortisone shot but no surgery; that after the shot she was released from medical care fully recovered; that on December 14 she took a verification of employment form to Ms. Beene that she needed for food stamps; that Ms. Beene signed the form; that the form stated that the claimant was terminated December 1 because business slowed down; and that a copy of the form had been faxed to the Appeals Referee. Mr. Beene denied that he or his wife had received anything from social services saying that the claimant had applied for food stamps and denied that he had signed anything as far as food stamps.

2. The Claims Deputy determined that the claimant was not discharged for just cause and was entitled to unemployment benefits. The Appeals Referee affirmed the Claims Deputy's decision. In his decision, he finds that the claimant met with Ms. Beene on November 12; that Ms. Beene informed the claimant that the schedule was

full and that she would not be rescheduled for work until December 1; that the claimant had the impression at that time that she would be brought back to work; and that at the end of November 2009 the claimant met with the employer's representative who informed her that she could not return to work because the business had slowed and the employer could not accommodate her. He concluded that the claimant was constructively discharged from her employment when she returned from her medical leave of absence and was informed that there was no work available for her.

3. The Board reversed the Appeals Referee. It accepted the employer's testimony that the claimant never contacted the employer again after November 11 or 12. It concluded that the claimant's failure to contact the employer after November 11 or 12 to keep the employer informed of the status of her medical condition or anticipated surgery provided the employer with just cause to conclude that she had abandoned her employment which justified termination of her employment. At the hearing before the Board, Mr. and Ms. Beene testified, as mentioned, but the claimant did not appear.

4. On this appeal, the claimant contends that the Board committed error because it proceeded with the hearing despite her absence; that she faxed verification to the Board's office that she would be unable to attend the hearing for medical reasons; that she was hospitalized on the day of the hearing; that it was therefore impossible for her to present her side and evidence; and that she had a verification of employment form from the Department of Health and Social Services signed by Ms. Beene stating that she was terminated December 1, 2009.

5. In reviewing decisions from the Board, the court is limited to consideration

of the record which was before the administrative agency.[1] The court must determine whether the findings and conclusions of the Board are free from legal error and are supported by substantial evidence in the record.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] The court does not weigh the evidence, determine questions of credibility of the witnesses, the weight to be given to their testimony, or make its own factual findings.[4] The reviewing court merely determines if the evidence is legally adequate to support the agency's factual findings.[5] Where a party bearing the burden of proof fails to convince the Board below, the resulting finding of fact can be overturned by the court "only for errors of law, inconsistencies, or capricious disregard for competent evidence."[6]

6. As mentioned above, the claimant refers in this appeal to a Delaware Health

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[1] *Hubbard v. Unemployment Ins. Appeal Bd.*, 352 A.2d 761, 763 (Del. 1976).

[2] *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265, 1266 (Del. 1981); *Pochvatilla v. United States Postal Serv.*, 1997 WL 524062, at *2 (Del. Super. June 9, 1997); 19 *Del. C.* § 3323(a) ("In any judicial proceeding under this section, the findings of the [UIAB] as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law.").

[3] *Oceanport Ind. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986).

[4] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[5] *Majaya v. Sojourners' Place*, 2003 WL 21350542, at *4 (Del. Super. June 6, 2003); *see* 19 *Del. C.* § 3323(a) (providing that, absent fraud, the factual findings of the Board shall be conclusive and the jurisdiction of a reviewing court shall be confined to questions of law).

[6] *Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del. Super. 1979).

and Social Services verification of employment form. The record does contain such a form. It appears to bear the signature of Ms. Beene, as owner, dated December 14, 2009, stating that the claimant's employment ended December 1, 2009 because business slowed down, but also stating that re-employment was likely. The form also appears to bear the signature of the claimant, also dated December 14, 2009, giving permission for release of that information. Although the form was mentioned by the claimant at the hearing before the Appeals Referee, he did not mention it at the hearing and it is not mentioned in his decision. It was not mentioned at the Board hearing and was not mentioned in the Board's decision. Although the form does not seem to have any stamp or notation of date of receipt by the Department of Labor, data at the bottom of the form appears to indicate that it was faxed from one location to another location on the same day that the Appeals Referee held his hearing.

7. The verification of employment form is potentially important evidence. After carefully considering the record below, I have concluded that the Board's decision is incomplete because this evidence does not appear to have been considered by the Board in reaching it's decision. Pursuant to 19 *Del. C.*§ 3323, providing for judicial review, I am remanding this case to the Board for an additional hearing. At that hearing, the Board should give both sides an opportunity to present testimony and/or other evidence concerning the verification of employment form. The Board may also consider or reconsider any other evidence. The Board should then make additional findings of fact and conclusions of law taking into account the verification of employment form.

8. Therefore, the decision of the Board is ***remanded*** for further proceedings

in accordance with this order.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File