

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

January 17, 2012

Alexander C. Miller
33188 West Chesapeake Street
Lewes, Delaware 19958

Re: *Miller v. Unemployment Insurance Appeal Board*;
C.A. No. S11A-06-005

On Appeal from the Unemployment Insurance Appeal Board: AFFIRMED

Date Submitted: December 20, 2011

Date Decided: January 17, 2012

Dear Mr. Miller;

Alexander Miller appeals the decision of the Unemployment Insurance Appeal Board (“the Board”) that affirmed an Appeals Referee’s determination that Mr. Miller was ineligible for receipt of unemployment benefits because Mr. Miller was not an unemployed individual as defined by law. The Board’s decision is affirmed for the reasons stated below.

Nature and Stage of the Proceedings

Mr. Miller filed for unemployment benefits after losing his job at Decrane Aerospace as a result of a reduction in force. On September 1, 2010, Mr. Miller opened a business, Rendermill, LLC. On December 2, 2010, Mr. Miller filled out a “Self-

Employment Questionnaire” for the Department of Labor. On that form, Mr. Miller answered the “Time spent in the business each week” question with the notation “40+.” On December 7, 2010, a Claims Deputy referred the matter to an Appeals Referee for a hearing and determination as to whether Mr. Miller was a self-employed individual and, therefore, disqualified from the receipt of benefits. The Appeals Referee held a hearing on January 12, 2011.

At the hearing, Mr. Miller testified he had been employed as a draftsman for Decrane Aerospace from September of 2008 through November of 2009. Mr. Miller established Rendermill LLC on September 1, 2010. Rendermill LLC is in the business of providing computer-aided design services to its customers. After the business is incorporated, Mr. Miller will be president thereof and own 100% of the stock. Rendermill LLC does not have any employees and is run out of Mr. Miller’s home. Rendermill LLC has a business license and, at the time of the hearing, two clients. Mr. Miller testified he spends at least forty hours per week developing the business. He was careful to qualify that the forty hours were not all billable time. Mr. Miller testified that he had sent an invoice for \$500 to one client but had not yet been paid. Mr. Miller was also waiting on a deposit for another contract at the time of the hearing. Pursuant to a written decision mailed January 13, 2011, the Appeals Referee found Mr. Miller was not considered an unemployed individual because he was performing services on behalf of his business. Mr. Miller appealed this decision to the Board.

The Board held a hearing on March 22, 2011. At the hearing, Mr. Miller clarified that he does not work specifically on the business for forty hours a week. Rather, Mr. Miller testified he spends half of the time searching for employment, ten or so hours developing the business and the last ten or so bettering himself with the skills needed for the business. Upon questioning by the Board, Mr. Miller stated that he incorrectly filled out the Department of Labor's Self-Employment Questionnaire to indicate he spent in excess of forty hours a week in the new business. Mr. Miller told the Board the business was started in order to bring in some income while he looked for a full-time job.

By way of written decision mailed May 16, 2011, the Board affirmed the Appeals Referee's decision. Mr. Miller filed a timely appeal to this Court.

Discussion

When reviewing the decisions of the Board, this Court must determine whether the Board's findings and conclusions of law are free from legal error and are supported by substantial evidence in the record.¹ "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² The Court's

¹ *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265 (Del. 1981); *Pochvatilla v. U.S. Postal Serv.*, 1997 WL 524062 (Del. Super.); 19 Del. C. § 3323(a) ("In any judicial proceeding under this section, the findings of the [Board] 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.").

² *Gorrell v. Division of Vocational Rehab.*, 1996 WL 453356, at *2 (Del. Super.).

review is limited: “It is not the appellate court’s role to weigh the evidence, determine credibility questions or make its own factual findings, but merely to decide if the evidence is legally adequate to support the agency’s factual findings.”³

Section 3302(17) of Title 19 of the Delaware Code provides, in relevant part,

“Unemployment” exists and an individual is “unemployed” in any week during which the individual performs no services and with respect to which no wages are payable to the individual, or in any week of less than full-time work if the wages payable to the individual with respect to such week are less than the individual’s weekly benefit amount plus whichever is the greater of \$10 or 50% of the individual’s weekly benefit amount....

On appeal, Mr. Miller argues the Board incorrectly concluded Mr. Miller was a self-employed individual. He notes that Rendermill, LLC brought in only \$500 in payments. Moreover, Mr. Miller points to the fact that he has since found full-time employment as evidence that the business was not intended as a full-time job.

The Board held:

The law is clear that a claimant is not an “unemployed individual” unless the claimant performs no services *and* collects no wages during any week in which the claimant seeks to collect unemployment benefits. [Mr. Miller] testified that he is not collecting any income, but he is performing services on a regular basis in an effort to develop the business. Additionally, [Mr. Miller] testified that he continues to try to get his business up and running, while looking for other work. Delaware courts have repeatedly held that “self-employment acts as a bar to unemployment benefits. ‘Once an individual engages in a self-employed business or practice on a full-time basis... the individual is no longer unemployed nor available for work’ ... the General Assembly has not authorized unemployment benefits for the

³ *McManus v. Christiana Serv. Co.*, 1197 WL 127953, at *1 (Del. Super.).

purpose of supporting the early states of a new business.” *Weeraratne v. Unemployment Ins. App. Bd.*, 1995 WL 840722, at *2 (Del. Super.). The Board finds that [Mr. Miller] is a self-employed individual. Therefore, [Mr. Miller] is not an “unemployed individual” within the plain meaning of 19 *Del. C. § 3302(17)*. As a result, [Mr. Miller] is currently ineligible for the receipt of unemployment benefits.

Mr. Miller essentially argues a claimant is entitled to benefits when he is self-employed but remains ready, willing and able to work and actively seeks employment outside of the business. Judge William Carpenter recently summarized the state of Delaware law as it pertains to the definition of “self-employment”:

What constitutes self-employment has not been clearly defined by the General Assembly or by the Delaware courts. The cases addressing the issue suggest that self-employment exists where an individual has made more than *de minimis* efforts on behalf of an operating business that he or she owns, regardless of whether the business is profitable or the individual remains available for other work. For example, in *Miller v. Herschmann, Inc.*, 2007 WL 4577373 (Del. Super.), the Court upheld the denial of benefits to a claimant who spent twenty to eighty hours per week working on his internet consulting business but who earned no wages from the business. The Court acknowledged that the claimant’s situation met the second statutory definition of unemployment because the claimant worked less than full-time hours but obviously earned less than the weekly benefit amount he would receive if he received unemployment compensation. However, the Court concluded that the claimant was self-employed and not entitled to benefits, noting that “unemployment is different from self-employment.” *Id.*, at *2. The Court determined that the claimant in the *Miller* case was self-employed because he had “acknowledged that he operated his own business and described his attempts to make the business successful.” *Id.* Similarly, this Court previously held in *Jones v. Unemployment Insurance Appeals Board*, 2001 WL 755379 (Del. Super.), that a claimant who spent thirty to fifty hours per week working on a small, as-yet unprofitable business owned by the claimant and his wife and who also spent thirty to fifty hours per week looking for alternate full-time employment was self-employed and therefore not eligible for

unemployment compensation benefits.⁴

The scenarios summarized above are indistinguishable from Mr. Miller's situation. He established and owns a business, Rendermill LLC. He put significant time into his efforts to build and better the business. He strived to obtain clients, performed work for them, and billed them. It is clear the Board's decision finding Mr. Miller a self-employed individual and therefore disqualified for receipt of unemployment benefits was free from legal error.

Conclusion

For the reasons stated herein, the Board's decision finding Mr. Miller was self-employed as September 1, 2010, is AFFIRMED.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

oc: Prothonotary
cc: Unemployment Insurance Appeal Board

⁴ *Workman v. Delaware Depart. of Labor*, 2011 WL 3903793, at *3 (Del. Super.).