IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ALEXANDER MILNAMOW,	)	
	)	
Claimant Below/Appellant,	)	
	)	
v.	)	C.A. No. N10A-05-011 PLA
	)	
E.F. TECHNOLOGIES, INC.	)	
and UNEMPLOYMENT	)	
INSURANCE APPEAL BOARD,	)	
	)	
Appellees.	)	

ON APPEAL FROM THE
UNEMPLOYMENT INSURANCE APPEAL BOARD
REVERSED AND REMANDED

Submitted: March 18, 2011
Decided: March 24, 2011

Alexander Milnamow, *pro se*, Appellant.

Christopher M. Coggins, Esquire, GORDON, FOURNARIS & MAMMARELLA, P.A., Wilmington, Delaware, Attorney for Appellee E.F. Technologies.

Katisha D. Fortune, Esquire, Deputy Attorney General, Wilmington, Delaware, Attorney for Appellee the Unemployment Insurance Appeal Board.

ABLEMAN, JUDGE

I. Factual and Procedural History

E.F. Technologies, Inc. hired Appellant Alexander Milnamow as an electronics technician in May 2009. At the time, Milnamow had recently obtained his Associate's Degree in Electronics/Electrical Engineering. Milnamow's job at E.F. Technologies involved working on electrofusion equipment. A few months after his employment began, Milnamow injured his back, allegedly as a result of lifting machinery that weighed approximately sixty pounds during the course of his work. Following his injury, Milnamow returned to work in mid-August 2009 with instructions from his doctor that he should not lift loads in excess of twenty pounds and should temporarily limit his shifts to four hours per day.

By letter to Milnamow dated August 17, 2009, E.F. Technologies' Vice-President Dave Groft confirmed the company's awareness of these restrictions and expressed a willingness to accommodate Milnamow's medical limitations, at least in the short-term.[1] Nevertheless, E.F. Technologies is a small business and had only one other worker available to aid Milnamow with lifting. The company determined that it would be prohibitively expensive to obtain assistive devices to

[1] R. at 5. The letter from Groft stated in part as follows:

> It is my intention to fully comply with the instructions of your doctor as they exist now and as they may change over time. . . . AT NO POINT IN TIME WILL YOU RUN THE RISK OF DISCIPLINARY ACTION SHOULD YOU REFUSE TO PERFORM A TASK THAT YOU BELIEVE MAY INJURE/REINJURE YOUR BACK.

lift and move equipment. On September 18, 2009, E.F. Technologies terminated Milnamow on the basis that he was unable to work in the position for which he was hired due to his lifting restrictions.[2]

Milnamow filed for unemployment compensation benefits. A Department of Labor (DOL) claims deputy denied his unemployment claim pursuant to 19 *Del. C.* § 3314(8), finding that Milnamow's unemployment was due to an "inability to work."[3] Milnamow timely appealed the claims deputy's determination via a faxed notice of appeal.

On December 11, 2009, a DOL appeals referee held a hearing at which Milnamow and Groft testified. Groft explained that E.F. Technologies terminated Milnamow's employment because the company could not accommodate his ongoing physical restrictions. When Milnamow returned to work after his back injury, Groft anticipated that Milnamow would return to unrestricted duty by September 17, 2009. Instead, Milnamow's doctor cleared him for light-duty full-time work with the lifting restriction remaining in place. Although he had an unresolved workers' compensation claim outstanding at the time of the hearing, Milnamow testified that he was fully willing to work, provided heavy lifting was

[2] Although the record is somewhat obscure as to when Milnamow was cleared for regular shifts, it appears that he was no longer limited to four-hour shifts by the time of his termination or immediately thereafter, such that the lifting restriction was the primary or sole basis for his termination.

[3] R. at 8 (UC-409 Notice of Claims Deputy's Determination (Oct. 28, 2009)).

not required. Groft indicated that E.F. Technologies did not have a suitable position available.

Following the hearing, the appeals referee affirmed the claims deputy's decision that Milnamow was disqualified from receiving benefits. The appeals referee noted that "[t]he unemployment insurance fund does not serve as a substitute for disability insurance."[4] The referee concluded that Milnamow was "unemployed as a result of his physical inability to work without restriction in his identifiable labor market."[5]

The decision of the appeals referee was mailed on December 14, 2009, and stated that the last day for Milnamow to file an appeal was December 24, 2009. Milnamow faxed a notice of appeal to the DOL, seeking review of the appeals referee's decision by the Unemployment Insurance Appeal Board ("the Board"). The Board held a review on January 6, 2010, and issued a written decision several months later refusing Milnamow's appeal as untimely filed. In its decision of April 26, 2010, the Board explained as follows:

> For an appeal filed by facsimile transmission, the Department normally deems the date of the facsimile transmission to be the date of the appeal. However, in this case, the facsimile transmission line is indecipherable, and the receipt signed by the Agency Representative indicates receipt of the transmission to have been December 30, 2009. Lacking evidence to the contrary, the Board must assume that the

[4] R. at 11 (Referee's Decision (Dec. 14, 2009)).

[5] *Id.*

> attestation by the Agency Representative is a true and accurate indication of the date of receipt by the Department.[6]

Thus, the Board found that Milnamow's appeal from the referee's decision was filed on December 30, 2009, six days late.

II. Parties' Contentions

Milnamow timely filed a *pro se* appeal of the Board's ruling to this Court. Milnamow contends that the Board erred in deeming his faxed appeal untimely. In support of his position, Milnamow offers a transaction log from his printer/fax machine, which reflects a two-page fax transmission to the DOL's fax number made at 11:49 A.M. on December 24, 2009.[7] The transmission log indicates that the fax did not generate any error message. In addition to this documentation, Milnamow points out that the period between December 24 and December 30, when a DOL employee attested to receipt of his appeal, included Christmas Eve, the Christmas holiday, and a weekend (December 26 and 27). Milnamow suggests that the discrepancy between his alleged transmission date and the date of the DOL representative's signature may reflect a delay in the DOL's processing receipt of his appeal due to the holiday week. Milnamow also states that the DOL never contacted him regarding the "indecipherable" transmission line on the appeal notice printed by its fax machine.

[6] R. at 35 (Decision of the Unemployment Insurance Appeal Board (April 26, 2010)).

[7] R. at 48.

Furthermore, Milnamow argues that the merits of his claim should be addressed because E.F. Technologies hired him for his "knowledge and ability to understand complex electrical functions, not for his ability to continually lift without the necessary assistive technology devices," which he contends E.F. Technologies' own personnel manual required it to provide.[8] In essence, Milnamow denies that he should be considered unable to work in his field, because the ability to lift loads of more than twenty pounds without assistance is not generally a requirement for electronics technicians.

In response, E.F. Technologies and the Board argue that the Board properly refused to accept Milnamow's appeal from the referee's decision. Both appellees emphasize that the fax transmission log offered with Milnamow's appeal to this Court was not presented to the Board for consideration, and that Milnamow did not seek a rehearing of the Board's decision refusing jurisdiction over his appeal. E.F. Technologies also notes that a fax transmission log is not necessarily accurate, because the fax machine's owner controls the time and date information for his unit.

III. Standard and Scope of Review

This Court's appellate review of decisions of the Unemployment Insurance Appeal Board is limited. The Court's function is to determine whether the Board's

[8] Appellant's Opening Br. 2.

findings and conclusions are supported by substantial evidence and free from legal error.[9] The substantial evidence standard is satisfied if the Board's ruling is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[10] The Court does not weigh evidence, decide questions of credibility, or engage in fact-finding in reviewing a Board decision.[11] Where the Board has made a discretionary decision, the scope of the Court's inquiry includes examining the Board's action for abuse of discretion.[12] A discretionary decision will be upheld absent an abuse of discretion in which the Board "exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."[13]

IV. Analysis

Pursuant to 19 *Del. C.* § 3318(c), an appeals referee's determination becomes final ten days after the date of notification or filing of the decision unless an appeal is filed. Although the ten-day period for appeal is jurisdictional, the

[9] *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); *see also Lively v. Dover Wipes Co.*, 2003 WL 21213415, at *1 (Del. Super. May 16, 2003).

[10] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998) (citation omitted).

[11] *Hall v. Rollins Leasing*, 1996 WL 659476, at *2 (Del. Super. Oct. 4, 1996) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)); *see also Duncan v. Del. Dep't of Labor*, 2002 WL 31160324, at *2 (Del. Super. Sept. 10, 2002).

[12] *See, e.g.*, *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991); *Meacham v. Del. Dep't of Labor*, 2002 WL 442168, at * 1 (Del. Super. Mar. 21, 2002).

[13] *Nardi v. Lewis*, 2000 WL 303147, at *2 (Del. Super. Jan. 26, 2000) (citation omitted); *see also Funk*, 591 A.2d at 225.

Board may exercise authority under 19 *Del. C.* § 3320 to review the record *sua sponte* if the failure to timely appeal was caused by administrative error or if "the interests of justice would not be served by inaction."[14] The Board's assumption of § 3220 jurisdiction is a rare event, triggered by extreme circumstances.[15]

The Court finds that the Board erred in deeming Milnamow's appeal untimely without holding a hearing on that issue. The Court must therefore reverse the Board's decision and remand for a hearing. To the extent the Board determines after hearing that Milnamow's appeal was untimely, the circumstances of this case are such that the Board's authority to assume jurisdiction under § 3320 in the interests of justice is potentially implicated, and should be considered upon remand.

Both E.F. Technologies and the Board suggest that Milnamow is foreclosed from raising arguments based upon his fax transmission log because he did not submit the log to the Board. This argument incorrectly presumes that Milnamow had a fair and reasonable opportunity to present evidence before the Board rendered its decision deeming his appeal untimely. Nothing in the record supports that the Board's January 6, 2010 review of Milnamow's case encompassed a

[14] *See* 19 *Del. C.* § 3320(a) ("The Unemployment Insurance Appeal Board may on its own motion, affirm, modify, or reverse any decision of an appeal tribunal on the basis of the evidence previously submitted to the appeal tribunal or it may permit any of the parties to such decision to initiate further appeal before it."); *Funk*, 591 A.2d at 225.

[15] *Funk*, 591 A.2d at 225.

hearing. The Board's written decision does not list Milnamow or E.F. Technologies as among those present for the review. No transcript of the proceeding exists in the record, nor can the Court discern if Milnamow was given any notice of the review.

In short, assuming *arguendo* that Milnamow faxed his appeal on December 24, 2009, nothing in the record before the Court suggests he would have known that the receipt information generated by the DOL's fax machine was indecipherable before the Board rendered its decision. Thus, Milnamow may have been justifiably ignorant of any need to present evidence regarding the timeliness of his transmission, and it appears that no hearing occurred at which he could do so. Indeed, if Milnamow's appeal was first processed by the DOL on December 30, regardless of the date of transmission, the Court is hard-pressed to perceive how the DOL could have provided Milnamow adequate notice of a proceeding on January 6 and an opportunity to gather and present evidence by that date, especially given the postal holiday on New Year's Day.

As E.F. Technologies points out, a sender's fax transmission log may not necessarily be accurate. Ordinarily a sender's log is irrelevant to establishing the time of appeal because the received fax bears its own transmission information. In this case, however, the DOL's fax machine produced indecipherable transmission information. As a consequence, for reasons beyond his control, Milnamow's own

transmission log constitutes the best, and perhaps only, means by which he can contest the timeliness of his filing. In its decision, the Board accepted the December 30 date placed on the appeal by the agency representative in the "absence of evidence to the contrary." Milnamow possesses contrary evidence, and is entitled to a fair opportunity to present it for the Board's consideration. This was not a situation in which the timeliness of the appeal could be determined without a hearing.[16]

In its decision, the Board also failed to consider whether it should exercise its authority to assume jurisdiction over Milnamow's appeal pursuant to § 3320.[17] In many cases, the inapplicability of § 3320 jurisdiction is patently obvious. Here, however, the facts raise a possibility that, even if Milnamow's appeal to the Board was untimely, "the interests of justice would not be served by inaction." Specifically, the Court has significant concerns about the evidence supporting the appeals referee's determination that Milnamow was "unable to work at his regular occupation" and physically unable to "work without restriction in his identifiable labor market." Accordingly, the Board should explicitly consider and decide the

[16] *See Greene v. Blevins*, 2000 WL 303325 (Del. Super. Mar. 9, 2000) (holding that the Board abused its discretion in deeming an appeal untimely filed without first holding a hearing to consider claimant's allegation that he had mailed an earlier appeal that the DOL failed to place in his file).

[17] The Board noted the existence of its authority to accept untimely appeals *sua sponte*, but did not articulate any reason for its implicit refusal to exercise that authority in Milnamow's case.

propriety of assuming jurisdiction *sua sponte* if it deems Milnamow's appeal untimely on remand.

The Court's concerns stem from the appeals referee's approach to the concept of "ability to work" on the facts of Milnamow's case. In order to qualify for unemployment benefits, a claimant must be both able to work and available for work.[18] An individual will be disqualified for benefits under § 3314(8) if the DOL determines "that total or partial unemployment is due to the individual's inability to work," but the disqualification will "terminate when the individual becomes able to work and available for work as determined by a doctor's certificate," and can satisfy all other statutory requirements for eligibility. A claimant's availability for work reflects that he is "genuinely attached to the labor market" in the sense of being "willing, able and ready to accept employment" which he has no good cause to refuse.[19] The concept of availability encompasses the ability to work and "qualification through skill, training or experience for a particular occupation, commonly expressed in terms of an identifiable labor market."[20] A claimant's

[18] *See* 19 *Del. C.* § 3314(8); 19 *Del. C.* § 3315(3).

[19] *Petty v. Univ. of Delaware*, 450 A.2d 392, 395 (Del. 1982).

[20] *Clemmons v. Lifecare at Lofland Park*, 2003 WL 21090169, at *2 (Del. Super. Apr. 25, 2003) (quoting *Petty*, 450 A.2d at 395).

availability need not be for his usual type of work; availability for a different type of work will suffice.[21]

At the hearing appeals referee's hearing, Milnamow presented certificates from his doctor dated September 19, 2009, and October 19, 2009, stating that he could perform full-time work but was restricted from lifting more than twenty pounds. Milnamow testified that he was willing to work, subject to his doctor's recommended lifting limitation. The appeals referee apparently concluded that Milnamow should be disqualified from benefits based upon his inability to work *for E.F. Technologies*, which could not accommodate him. Yet heavy lifting is not a requirement readily associated with the occupation of electronics technician, and the decision does not state the basis upon which the referee concluded that Milnamow's lifting restrictions rendered him unable to work for other employers in either his usual type of work or another type of job for which he possessed the requisite skills, training, and experience. Milnamow's written appeal to the referee asserted that lifting was "a minor part of the job I was hired to perform" at E.F. Technologies, reiterated his willingness to work, and stated that most electronics-technician jobs do not require any lifting. In fact, Groft's August 2009 letter to Milnamow indicated that E.F. Technologies expected that it could accommodate the lifting restriction in Milnamow's then-existing job.

[21] *Id.* (citing *Briddell v. DART First State*, 2002 WL 499437 (Del. Super. Mar. 28, 2002)).

The appeals referee correctly stated that unemployment benefits are not to be utilized as disability insurance, but the record raises questions about whether Milnamow could be considered disabled from work for unemployment compensation purposes as of his doctor's certificates in August and September 2009. Section 3314(8) contemplates that a claimant's disqualification due to inability to work will "terminate when the individual becomes able to work and available for work as determined by a doctor's certificate." The appeals referee's decision rejecting both the doctor's certificates and Milnamow's evidence that lifting ability is not a crucial job requirement for electronics technicians leaves the Court uncertain as to how a claimant in Milnamow's position would be expected to demonstrate his ability and availability to work without expending funds to hire a labor market expert.

The Court reaches no final conclusion regarding the merits of the appeals referee's determination, which is not before it in this appeal. Rather, the Court raises these questions about the referee's decision to ensure that the Board considers them if it must decide whether to assume § 3320 jurisdiction. Concededly, the Court is not reviewing the record presented to the appeals referee or the applicable law with the same level of scrutiny it would bring to bear if the merits of the referee's decision were before it. At this stage, the Court simply holds that if the Board deems Milnamow's appeal untimely after its hearing on

remand, it should expressly consider the propriety of exercising its discretionary jurisdiction under § 3320 in light of the concerns the Court has outlined.

For the foregoing reasons, the decision of the Board is **REVERSED** and the matter is **REMANDED** to the Board for a hearing to determine whether Milnamow's appeal from the decision of the appeals referee was timely filed. In the event that the Board concludes that Milnamow's appeal was untimely, its decision should directly address whether the assumption of jurisdiction pursuant to § 3320 would be appropriate under the particular circumstances of this case.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Alexander Milnamow
Christopher M. Coggins, Esq.
Katisha D. Fortune, Esq.