

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

MARLENE ZICARELLI,)	
)	
Appellant,)	
)	C.A. No. 07A-06-005 RRC
v.)	
)	
BOSCOV'S DEPARTMENT)	
STORE, LLC.,)	
and)	
UNEMPLOYMENT INSURANCE)	
APPEAL BOARD,)	
)	
Appellees.)	
)	
)	

Submitted: March 17, 2008
Decided: June 5, 2008

Upon Appeal from a Decision of
the Unemployment Insurance Appeals Board
AFFIRMED.

ORDER

Marlene Zicarelli, Newark Delaware, *pro se* Appellee.

Timothy M. Holly, Esquire, Connolly Bove Lodge & Hutz LLP,
Wilmington, Delaware, Attorney for Appellee, Boscov's Department Store,
LLC.

Mary Page Bailey, Esquire, Deputy Attorney General, Wilmington,
Delaware, Attorney for Appellee, Unemployment Insurance Appeal Board.

COOCH, J.

This 5th day of June, 2008, upon consideration of Appellant's Appeal from a decision of the Unemployment Insurance Appeals Board, it appears to the Court that:

1. This is an appeal from a decision of the Unemployment Insurance Appeal Board ("the UAIB"). The issues are 1) whether the record confirms the finding that Appellant's underlying appeal from a Claims Deputy decision was untimely filed; and 2) if so, whether the UAIB abused its discretion in declining to assume jurisdiction over the appeal, given the appeal's untimeliness. Because the Court finds that the record confirms that Appellant's appeal was untimely, and because the Court holds that the UAIB did not abuse its discretion in declining to assume jurisdiction, the Court affirms the decision of the UAIB.

2. On March 21, 2007, a Claims Deputy denied Appellant unemployment benefits after finding that Appellant had voluntarily terminated her employment with her employer, Boscov's Department Store, LLC., for personal reasons. The Claims Deputy sent a Notice of Determination to Appellant, dated March 21, 2007, which notice stated that the decision would become final after 10 days from the mailing of the

notice, pursuant to 19 *Del. C.* § 3318(b). Appellant filed her appeal on April 5, 2007. A Claims Deputy issued a decision on April 10, 2007, confirming that the March 21, 2007 decision was final and binding since Appellant had failed to timely file an appeal.

Appellant then appealed from that decision, and on May 1, 2007, the parties presented their arguments on the issue of timeliness at a hearing before an Appeals Referee. At that hearing, Appellant testified that she had received the Notice of Determination on either March 25 or 26, 2007,¹ and that she had intended to file an appeal by April 2, 2007, but that she could not because she was “sick with the flu” that day, and continued to be ill until April 5, 2007.² Appellant further testified that she filed her appeal on April 5, 2007.³ In a decision dated May 2, 2007, the Appeals Referee found that Appellant was late in filing her appeal, and affirmed the decision of the Claims Deputy.⁴

Appellant then appealed to the UAIB, claiming that “[e]ven with [her] illness [she] came within 10 days of mailing. The appeal date was on [Saturday, March 31, 2007].”⁵ On May 24, 2007, the UAIB affirmed the Appeals Referee’s decision, and held that the appeal of the Claims Deputy’s

¹ R. at 21.

² *Id.*

³ *Id.*

⁴ R. at 12.

⁵ R. at 23.

decision was jurisdictionally barred as untimely.⁶ Appellant now appeals from that UAIB decision.

3. Appellant contends that she received the Notice of Determination letter on March 26, 2007, and that this was the applicable starting date for the 10 day period within which she had to file her appeal. Appellant argues that her appeal, filed on April 5, 2007, was therefore timely.

Appellees contend that, pursuant to 10 *Del. C.* § 3318(b), the applicable starting date for the 10 day period was the date the Claims Deputy mailed the Notice of Determination, March 21, 2007, and that the decision of the UAIB should be affirmed since Appellant's appeal was untimely.

4. The review of the UAIB's factual finding is limited to determining whether there is substantial evidence on the record to support the UAIB's finding and whether the finding is free from legal error.⁷ The standard of review for an administrative discretionary ruling is "abuse of discretion."⁸

5. There was substantial evidence on the record to support the UAIB's finding that Appellant's appeal of the decision of the Claims Deputy was untimely. 10 *Del. C.* § 3318(b) provides, in pertinent part, that "[u]nless a claimant ... files an appeal within 10 calendar days after such Claims

⁶ R. at 25.

⁷ *Unemployment Insurance Appeal Board v. Martin*, 431 A.2d 1265 (Del. 1981).

⁸ *Gigiaco v. Bd. Of Pub. Educ.*, 507 A.2d 542, 546 (Del. 1986).

Deputy's determination was mailed to the last known address of the claimant and the last employer, the Claims Deputy's determination shall be final..."

The language of the statute is unambiguous: the 10 day period begins at the time the Claims Deputy mails the Notice of Determination.⁹ The starting date for the 10-day period was March 21, 2007, the date of the Notice of Determination,¹⁰ and because the final day of the 10-day period fell on a Saturday, the ending date was Monday, April 2, 2007. Since Appellant did not, by her own admission, file her appeal until April 5, 2007, her appeal was untimely. Appellant's argument as to the starting date is simply legally incorrect.

The UAIB did not abuse its discretion in declining to assume jurisdiction over the appeal. The UIAB has the authority to consider a late appeal, but this discretion should only be exercised "where there has been some administrative error on the part of the Department of Labor ... [or] where the interests of justice would not be served by inaction."¹¹ Here, the UAIB found no such administrative error (nor does Appellant allege that

⁹ *Funk v. UAIB*, 591 A.2d 222, 225 (Del. 1991) ("the ten-day period begins to run on the date of mailing").

¹⁰ The Court notes here that in her opening brief, Appellant, for the first time, raises the issue that the Notice of Determination was postmarked March 23, 2007. Even if the Court were permitted to consider evidence outside the record on appeal, which it is not, the Court notes that a March 23, 2007 starting date would still result in an April 2, 2007 deadline.

¹¹ *Funk*, 591 A.2d at 225.

there was any such error), and affirmed the Appeals Referee’s determination that Appellant’s alleged illness did not constitute “good cause for waiving the timeliness requirement.”¹² In fact, Appellant seems to have abandoned that argument, having failed to state anything about her alleged illness in both her opening brief and her reply brief. Thus, there is nothing to support an argument that there was an abuse of discretion in the UAIB’s decision.

5. For the foregoing reasons, the decision of the Unemployment Insurance Appeals Board is **AFFIRMED**.

IT IS SO ORDERED.

Richard R. Cooch

cc: Prothonotary

¹² R. at 24.