

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. HENLEY GRAVES  
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE  
ONE THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947

May 21, 2009

Susan Bianco  
8895 Riverside Drive  
Seaford, DE 19973

Division of Unemployment Insurance  
Appeal Board  
P.O. Box 9950  
Wilmington, DE 19809

**Re: *Susan Bianco v. Unemployment Insurance Appeal Board***  
**C.A. No. 08A-03-003 THG**

DATE SUBMITTED: April 21, 2009

Dear Ms. Bianco and Members of the Unemployment Insurance Appeal Board:

Susan Bianco (“Claimant”) appeals the decision of the Unemployment Insurance Appeal Board’s (“the Board”) dismissal of her appeal of the Appeals Referee’s denial of her claim for unemployment benefits. The Board declined to review Claimant’s appeal because she did not, according to the Board, timely file the appeal. For the reasons set forth herein, the Board’s decision is **AFFIRMED**.

**PROCEDURAL AND FACTUAL BACKGROUND**

Based on an appeal to the Board, Claimant was found disqualified from receipt of unemployment benefits for one year by decision of the Board dated August 10, 2007. The Board found that the Claimant knowingly and repeatedly failed to disclose material information regarding her employment earnings in order to receive benefits to which she was not entitled, resulting in an overpayment of benefits in the amount of \$4,217.00. The Board’s decision became final on August 20, 2007. A timely appeal to this Court should have been filed by September 4, 2007. On November

30, 2007, the Department of Labor issued an overpayment determination in the amount of \$4,217.00 as there was no timely appeal of the Board's decision. On or about December 21, 2007, long after the Board's decision had become final and after the Department had issued the overpayment, Claimant filed an appeal to this Court. Claimant also appealed the determination of overpayment to the Appeals Referee.

A hearing was held before an Appeals Referee on the overpayment issue, at which Claimant testified that she does not think the overpayment amount equals \$4,217.00, and that she has paid some of that amount back. Claimant wants to only pay back those months in which she was not entitled to receive benefits. The referee held that, because Claimant had received the benefits and it was later determined that she was not entitled to them - a finding claimant did not timely appeal - the Claimant was liable to repay the amount of overpayment. The Board reviewed the Referee's decision on February 13, 2008, and affirmed the appeal referee's decision.

### **STANDARD OF REVIEW**

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.<sup>1</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>2</sup> The Court's review is limited: "It is not the appellate court's role to weigh the evidence, determine creditably questions or make its own factual findings, but merely to decide if the evidence is legally adequate to support the agency's factual findings."<sup>3</sup> Absent

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<sup>1</sup>*Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265 (Del. 1981); *Pochvatilla v. U.S. Postal Serv.*, 1997 WL 524062 (Del. Super. Jun. 9, 1997); 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.").

<sup>2</sup>*Gorrell v. Div. of Vocational Rehab.*, 1996 WL 453356, at \*2 (Del. Super. July 31, 1996).

<sup>3</sup>*McManus v. Christiana Serv. Co.*, 1197 WL 127953, at \*1 (Del. Super. Jan. 31, 1997).

an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusion.<sup>4</sup>

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**DISCUSSION**

The Appeals Referee's decision clearly quotes 19 *Del. C.* § 3318(c), which states that a referee's decision "shall be deemed to be final unless within 10 days after the date of notification or mailing of such decision further appeal is initiated pursuant to 19 *Del. C.* § 3320 of this title." This time limit is jurisdictional.<sup>5</sup> The Board's decision became final on August 20, 2007, and a timely appeal to this Court should have been filed by September 4, 2007, including weekends and holidays. However, Claimant did not file an appeal until December 21, 2007. Claimant has not offered this Court any reason for her untimely appeal. All determinations and decisions in this case were mailed to Claimant's address of record. There is no evidence of error on the part of the Department of Labor which might have delayed her appeal of the initial determination. Claimant's failure to file her appeal within the mandatory time frame not only acted as a waiver by Claimant of her right to appeal the Appeals Referee's decision, but it also divested the Board of its jurisdiction to hear Claimant's appeal.

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**CONCLUSION**

The Court finds that the Board's decision was supported by legally substantial evidence. Accordingly, the decision of the Unemployment Insurance Appeal Board is hereby **AFFIRMED**.

**IT IS SO ORDERED.**

Very truly yours,

T. Henley Graves

oc: Prothonotary

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<sup>4</sup>*Dellachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

<sup>5</sup>*Funk v. Unemployment Ins. App. Bd.*, 591 A.2d 222, 225 (Del. 1991).