

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

RONALD CLARK,)	
)	
Appellant,)	
)	
v.)	C.A. No. N12A-11-005 MJB
)	
UNEMPLOYMENT INSURANCE)	
APPEAL BOARD)	
)	
Appellee.)	

Submitted: July 24, 2013
Decided: October 28, 2013

*Upon Appellant’s Appeal from the Decision of the Appeals Referee, **REMANDED.***

ORDER

On this 28th day of October 2013, based on the record, evidence, and arguments presented, it appears to the Court that:

1. Ronald Clark (“Clark”) is, and has been at all relevant times, the president of Kral Music, Inc. (“Kral”).¹ One of Kral’s employees, Dale R. Burns (“Burns”), filed a claim with the Delaware Division of Unemployment Insurance (“Division”) for unemployment insurance on March 6, 2011, claiming Kral cut his hours.²
2. On March 8, 2011, the Division mailed Kral a Form UC-119 separation notice pursuant to 19 *Del. C.* 3317(b).³ Section 3317(b) provides:

¹ Record (hereinafter “R.”) at 8.

² Clark Br. at 1 (Apr. 26, 2013). Although not relevant to this appeal, the Court notes that Clark has contended throughout this case that Burns left Kral because he retired, rather than because his hours were cut. Regardless, because Clark, or some other employee or agent of Kral, did not submit the Form UC-119 discussed below, Kral is barred from ever challenging Burns’ eligibility for unemployment benefits.

³ R. at 13-14.

(b) Whenever an individual files a claim for benefits, the Department shall forward to the employer by whom the claimant was most recently employed, hereafter the “last employer”, or to the last employer's agent and to each base period employer or to each base period employer's agent relating to the individual's claim a separation notice. The last and base period employer(s) or agent(s) of the last and base period employer(s) shall return such notices completed, indicating the reason for the claimant's separation from work with them and the individual claimant's last date of work with them, within 7 days of the date contained on the separation notice. Any last or base period employer or any last or base period employer's agent who fails to timely return a separation notice or who fails to complete a separation notice or responds inadequately (which, for the purposes of this subsection, shall mean providing the Department insufficient information to make a determination of eligibility for the receipt of unemployment insurance benefits) within the period prescribed above shall be barred from claiming subsequently that the individual claimant to whom such separation notice applied shall be disqualified under any provisions of § 3314 of this title and shall be barred from seeking relief from benefit wage charges to its experience merit rating account under §§ 3349-3356 of this title⁴

3. Kral is both a base period and last employer of Burns.⁵ Therefore, pursuant to Section 3317(b), Kral had only seven days from March 8 to complete and return the Form UC-119 to the Division, stating the reasons for Burns' separation from employment, or be barred from ever challenging Burns' eligibility for benefits.⁶ It is undisputed that Kral never returned the Form UC-119.⁷ Clark has no recollection of ever receiving a Form UC-119.⁸

⁴ 19 *Del. C.* § 3317(b).

⁵“Under Delaware law, a worker is eligible for unemployment benefits if he/she ‘has, during the individual's base period, been paid wages for employment equal to not less than 36 times the individual's weekly benefit amount’ The base period is the first four of the last five completed calendar quarters.” *Smith v. Franklin*, 2004 WL 2830891, at *3 (Del. Super. Ct. Apr. 6, 2004) (citing 19 *Del. C.* § 3314(6)). “Based period employer” means any employer who, in the base period, paid wages to an individual who filed a claim or unemployment compensation within such benefit year. Unemployment Insurance Report, 2013 WL 1568106, ¶4007A, Sec. 21A-1A-6 (2013).

⁶ 19 *Del. C.* § 3317(b).

⁷ R. at 7.

⁸ *Id.*

4. As a consequence of Kral falling to respond to the Form UC-119, the Division determined that Burns was entitled to unemployment benefits, and Kral's unemployment insurance account was to be charged \$10,500.⁹ The Division mailed Kral an *undated* "Notice of 2012 Unemployment Insurance Assessment Rate" ("Assessment Notice") that stated a rate of 4.5%, and informed Kral that "[t]his rate determination becomes final unless, within 15 days after the mailing of this notice, a written request for review and redetermination is filed."¹⁰
5. Clark, on behalf of Kral, sent a letter by facsimile to the Division on August 2, 2012, complaining about a Division tax bill dated July 7, 2012.¹¹ The Division treated Clark's letter as a *timely* request for review and redetermination of the Assessment Notice, presumably because it was undated.¹² On August 6, 2012, the Division sent Kral a letter in which it denied the review and redetermination request for "failing to 'indicate a basis for such action,'"¹³ and went on to advise Kral of its right to appeal the denial within fifteen days to this Court, citing 19 *Del. C.* § 3354.¹⁴ Section 3354(b):

The employer shall be promptly notified of the Department's denial of the employer's application or of the Department's redetermination, both of which shall become final unless, within 15 days after the mailing of notice thereof to the employer's last known address or in the absence of mailing within 15 days after the delivery of such notice, a petition for judicial review is filed in the Superior Court of the county in which the employer's place of business is located.¹⁵

Thus, Kral had fifteen days to appeal the Division's August 6 denial to this Court.

⁹ *Id.* at 21.

¹⁰ Division Br., Ex. 1 (May 29, 2013).

¹¹ Division Br., Ex. 2 (May 29, 2013).

¹² Division Br., at 2 (May 29, 2013).

¹³ *Id.*

¹⁴ *Id.* (citing 19 *Del. C.* § 3354).

¹⁵ 19 *Del. C.* § 3354(b).

6. Rather than appealing to this Court, on September 7, 2012, Clark sent a letter by facsimile to an Appeals Referee.¹⁶ In his letter, which was sent thirty-two days after the Division’s denial, Clark appealed, on behalf of Kral, the August 6 decision in which the Division denied the redetermination of the Assessment Notice.¹⁷ Rather than informing Clark that he should have appealed to this Court, the Appeals Referee scheduled a hearing¹⁸ and notified the parties that the issue to be decided at the hearing on appeal was “the timeliness of [Kral’s request for an appeal on benefit wages], [and] whether it was filed within the allowed timeframe.”¹⁹
7. The hearing before the Appeals Referee was held on October 24, 2012.²⁰ Instead of determining whether Kral’s appeal of the Division’s August 6 denial was timely under 19 *Del. C.* § 3354, the Referee decided whether Kral had timely returned the Form UC-119 as required by 19 *Del. C.* § 3317(b).²¹ On November 1, 2012, the Referee affirmed the Division’s denial, finding Karl failed to return the Form UC-119 within seven days of the date contained on the notice.²² The Appeals Referee then advised the parties that its decision was appealable to this Court pursuant to 19 *Del. C.* § 3355(d).²³

¹⁶ R. at 8.

¹⁷ *Id.*

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 12.

²⁰ *Id.* at 10.

²¹ *Id.* at 22.

²² *Id.*

²³ *Id.* 20. Section 3355(d) provides, in relevant part:

(d) Unless the request for redetermination is withdrawn, an appeals tribunal . . . shall affirm, modify or reverse those portions of the benefit wage charge notice challenged by the employer. The base period employer, the Department, and a claimant, if involved, shall be duly notified of the appeal tribunal's decision on each benefit wage charge for which redetermination is requested, together with its reasons therefor, which shall be deemed to be final unless within 15 days after the delivery of such decision, a petition for judicial review is filed in the Superior Court. . . .

19 *Del. C.* § 3355(d).

8. The Appeals Referee erred in two respects. First, the Appeals Referee, rather than this Court, heard Kral's appeal from the Division's August 6 denial.²⁴ Second, the Referee evaluated the incorrect issue—*i.e.*, whether Kral returned the Form UC-119 on time—because the relevant issues on appeal were (1) as a threshold, whether Kral's appeal of the Division's decision in which it denied Kral's review and redetermination request was timely, and (2) if timely, whether the Division erred when it denied Kral's application for review and redetermination.²⁵ Additionally, although the Referee informed the parties that they could appeal its decision to this Court pursuant to 19 *Del. C.* § 3355(d),²⁶ there is no evidence in the record that the predicate "quarterly notification" was sent to Kral of benefit wages charged to its experience rating, which is required by 19 *Del. C.* § 3355(a).²⁷
9. On May 29, 2013, counsel for the Division sent a letter to the Court, reciting the above facts and claiming the Division is "the real party in interest" in the present case.²⁸ According to the Division, the record in this case "at this point is a hopeless muddle," due to the errors of the Appeals Referee.
10. The Division's May 29 letter requests this Court remand the case to the Appeals Referee "in the interest of justice and to create a coherent record while at the same time preserving Kral's right of judicial review."²⁹ The Division requests this Court instruct the Appeals Referee, on remand, to direct the Division to issue or reissue the

²⁴ R. at 9-22.

²⁵ 19 *Del. C.* § 3355(d) (providing a fifteen-day period for an appeal to be taken from the Division's decision for review and redetermination of Kral's 2012 Unemployment Insurance Assessment Rate).

²⁶ R. at 20 (citing 19 *Del. C.* § 3355(d)).

²⁷ "The Department shall provide quarterly notification to base period employers of benefit wages charged to their experience merit rating accounts hereafter referred to as 'benefit wage charge notices.'" 19 *Del. C.* § 3355(a).

²⁸ Division Br., at 1-2.

²⁹ *Id.*

quarterly notification of benefit wage charges to Kral's account contemplated by § 3355(a), thus giving Kral a new fifteen-day period to seek review and redetermination by the Division of the 2012 Assessment Notice.³⁰

11. Therefore, to ensure that the record is adequately developed and proper appellate procedures are followed, this matter is **REMANDED** to the Appeals Referee who is instructed to direct the Division to issue or reissue the quarterly notification of benefit wage charges to Kral's account as required by § 3355(a). This would provide Clark, on behalf of Kral, a fifteen-day period within which to seek review and redetermination by the Division. Clark can then, if necessary, appeal the Division's decision to this Court pursuant to 19 *Del. C.* 3354.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

³⁰ *Id.*