

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

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

December 1, 2010

Corey D. Wheatley
18629 Snowmess Run
Rehoboth Beach, Delaware 19971

Philip G. Johnson, Esquire
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

RE: *Corey D. Wheatley v. Division of Unemployment Insurance Appeals Board*
Civil Action No. S09A-12-002

Submitted: November 19, 2010
Decided: December 1, 2010

On Appeal from the Unemployment Insurance Appeal Board: **AFFIRMED**

Dear Mr. Wheatley and Mr. Johnson:

Corey D. Wheatley appeals the decision of the Unemployment Insurance Appeals Board (“the Board”) that held the Board lacked jurisdiction to consider Mr. Wheatley’s appeal on the merits from the Claims Deputy’s denial of unemployment benefits. For the reasons set forth herein, the Board’s decision is affirmed.

Procedural & Factual Background

Mr. Wheatley was employed as a sales associate for Home Depot (“Employer”) when an incident allegedly occurred with a customer on September 2, 2009. As a result of the customer’s allegations and Mr. Wheatley’s subsequent acknowledgment that he had said inappropriate things to the customer, Mr. Wheatley was terminated. Mr. Wheatley filed a claim for unemployment benefits on September 6, 2009. A Claims Deputy found just cause for Employer’s dismissal of Mr.

Wheatley. The Claims Deputy's decision was mailed October 1, 2009. Mr. Wheatley filed his appeal of the Claims Deputy's decision in person on October 14, 2009. The Claims Deputy denied Mr. Wheatley's request to file an appeal as untimely the same day. Mr. Wheatley immediately filed an appeal of this ruling to the Appeals Referee. On November 10, 2009, a hearing was held before the Appeals Referee on the issue of timeliness. After hearing testimony from Mr. Wheatley and Charlotte Harris, a representative for the Department of Labor, the Appeals Referee concluded Mr. Wheatley had failed to present evidence that there had been administrative error on the part of the Department of Labor and, therefore, Mr. Wheatley's request for an appeal on the merits was procedurally barred and the Claims Deputy's decision denying benefits was final and binding. The Appeals Referee's decision was mailed on November 12, 2009. Mr. Wheatley appealed this decision to the Board, which conducted a review on December 1, 2009. By way of written decision mailed December 3, 2009, the Board observed that Mr. Wheatley had failed to present any evidence to suggest his late filing was the result of any mistake or error on the part of the Department of Labor and, therefore, the Board affirmed the Appeals Referee's decision and denied the application for further review. Mr. Wheatley appealed the Board's decision to this Court on December 10, 2009.

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. *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265 (Del. 1981); *Pochvatilla v. United States 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.”). “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Gorrell v. Division of Vocational Rehab.*, 1996 WL 453356, at *2 (Del. Super.), *aff’d*, 693 A.2d 1082 (Del. 1997) (TABLE). The Court’s 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.” *McManus v. Christiana Serv. Co.*, 1997 WL 127953, at *1 (Del. Super.).

In this case, the Board made a determination based upon the procedural rules that govern the Department of Labor. That decision is supported by the record.

Section 3318(b) of Title 19 of the Delaware Code provides, in relevant part: “Unless a claimant ... files an appeal within 10 calendar days after such Claims Deputy’s determination was mailed to the last known address of the claimant..., the Claims Deputy’s determination shall be final and benefits shall be paid or denied in accordance therewith.” Pursuant to statute, then, Mr. Wheatley had until October 12, 2009, to file an appeal.¹ Mr. Wheatley filed an appeal in person on October 14, 2009. Judge Witham has succinctly summarized the law as it pertains to the Board’s jurisdiction of an appeal from a Claims Deputy’s determination of a claimant’s eligibility for benefits:

Appellate jurisdiction cannot be invoked or properly exercised unless an appeal is perfected within the time period fixed by law. The 10 day period for filing an appeal begins running on the date of the mailing unless the mailing fails to reach the recipient because of a mistake made by [the Claims] Deputy. Delaware law presumes that a mailing with the proper address and postage has been received by the intended claimant. Generally the [Board] is unable to accept jurisdiction over

¹ Technically, Mr. Wheatley had until October 11, 2009, to file an appeal but the 11th was a Sunday. Therefore, Mr. Wheatley had until Monday, October 12, 2009, to file his appeal.

appeals that are not timely filed. However, the [Board] may under certain circumstances accept appeals if it finds that the interest of justice would not be served by inaction. The Supreme Court ... provides that the [Board] can take jurisdiction over an untimely filed appeal if the lateness was traced back to [a Board] error, or if appellant proffers an excuse which could arrant the [Board's] *sua sponte* exercise of jurisdiction. It has long been the position of the [Board] and this Court that absent [a Board] error, the mere assertion that one did not receive the decision is not a sufficient reason for the [Board] to assert jurisdiction of an untimely appeal.

Lively v. Dover Wipes Co., 2003 WL 21213415, at *1 (Del. Super.) (internal quotation marks and citations omitted). Accordingly, the only factual finding the Board was required to make regarding the current proceeding was whether there was an error on the part of the Department of Labor. Before the Appeals Referee, Ms. Harris testified that the decision of the Claims Deputy was mailed to Mr. Wheatley on October 1, 2009, to the address on record for Mr. Wheatley. Mr. Wheatley testified that he had not received the Claims Deputy's decision but that the address on record was, in fact, his correct address. Mr. Wheatley further testified he had been in communication with the Department of Labor concerning the status of this claim and had been told via telephone "three or four days" before he filed his appeal in person on October 14, 2010, that his claim for unemployment benefits had been denied.

Mr. Wheatley now attempts to supplement the record with four envelopes addressed to Mr. Wheatley from the Division of Unemployment Insurance: one postmarked October 15, 2009, one postmarked October 16, 2009, one postmarked November 12, 2009, and the final envelope postmarked December 4, 2009. Mr. Wheatley correctly observes that none of the envelopes are postmarked prior to October 12, 2009, the deadline for the filing of an appeal. Nevertheless, the envelopes, by themselves, are not evidence of an error on the part of the Department of Labor. In any event, now is not the appropriate time to supplement the record. The Court is limited to

consideration of the record that was before the Board. *Hubbard v. Unemployment Ins. Appeal Bd.*, 352 A.2d 761, 763 (Del. 1976).

When Mr. Wheatley failed to appeal in a timely fashion the Claims Deputy's decision, the decision became binding and the Board lacked, and continues to lack, jurisdiction to consider the merits of that decision on appeal. Accordingly, the Board's decision concluding the Claims Deputy's decision denying unemployment insurance benefits to Mr. Wheatley is final and binding is free from legal error and is supported by the record.

Conclusion

For the reasons set forth herein, the Board's decision is affirmed.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

cc: Prothonotary
Unemployment Insurance Appeal Board