IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

Richard L. Rieger, Appellant, v. KJM Transport, L.L.C., Appellee, 5. Unemployment Insurance Appeal Board, Appellee.	)	C. A. No. 01A-05-001

Submitted: September 17, 2001
Decided: December 10, 2001

ORDER

Upon Appeal from a Decision
of the Unemployment Insurance Appeal Board

AFFIRMED

Richard L. Rieger, Sr., Appellant, *pro se*.

KJM Transport, L.L.C., Appellee, *pro se*.

Stephanie Ballard, Esquire, Deputy Attorney General, Wilmington, Delaware for Appellee, Unemployment Insurance Appeal Board.

WITHAM, J.

1. This is an appeal from the Decision of the Unemployment Insurance Appeal Board ("Board") declining to hear the late-filed appeal of Richard L. Rieger, Sr. ("Claimant"), from a determination of the Appeals Referee which disqualified Claimant from benefits. Because there is substantial evidence on the record to support the conclusion that Claimant missed the proper appeal deadline, the Decision of the Board is affirmed.

I. FACTS

2. It appears that on December 15, 2000, Claimant was employed as a truck driver with KJM Transport, L.L.C. ("Employer"), when he had a single-vehicle collision while driving a company milk tank truck. Claimant drove off the roadway, overturned and struck a utility pole. After the accident, Claimant was out on workers' compensation from December 15, 2000, until he was released to return to full duty on January 12, 2001.

3. Upon Claimant's return, he was informed that he would no longer be driving milk tank trucks, but would be provided maintenance work in the shop for $8.00 an hour with the possibility of driving flatbed trucks in April when the work picked up. The Claimant voluntarily refused the job and quit.

4. On February 18, 2001, Claimant applied for unemployment and was awarded benefits on March 7, 2001. The Claims Deputy applied 19 *Del. C.* § 3315(1)[1] which

[1] 19 *Del. C.* § 3315(1) provides in pertinent part:

> An individual shall be disqualified for benefits: (1) For the week in which the individual left work voluntarily without good cause attributable to such work . . . .

disqualifies individuals for benefits when they leave work voluntarily without good cause attributable to the work. The Claims Deputy found that Claimant quit for good cause, finding that Claimant's condition of hire had changed. Claimant stated that he had been making between $700 and $800 per week at the time of the accident, and for that reason, the offer of work in the shop at $8.00 an hour was a material change in his condition of hire, and provided good cause to justify his voluntary quit.

5. The Employer appealed the decision of the Claims Deputy, and on April 3, 2001, a hearing was held before an Appeals Referee. Although duly notified, the Claimant did not appear.

6. The Employer attended and presented evidence that Claimant was originally hired in July 2001, to drive flatbed trucks hauling concrete pipe. When a new milk tank route was acquired, the Claimant was given the option of switching over to drive a milk tanker. Claimant had two accidents in the milk tanker, including the one that occurred on December 15th. Due to the accidents, Employer no longer allowed Claimant to drive milk tankers, but allowed him to drive flatbeds in conjunction with work in the shop for $8.00 an hour. (Apparently, Claimant has not had an accident while driving flatbeds.)

7. The busy period for both types of drivers occurs from June 1st until December 31st each year. Flatbed drivers average $400-$500 per week during this period. Milk tank drivers average between $700-800 during this same time. This latter amount is what Claimant was making at the time of the accident. In contrast, during the first part of the

year, from January through May, there is a lull when both flatbed and tanker drivers make the same pay of $80 per day (and usually work only two or three days a week because there are less runs in bad weather).

8. The Employer explained that due to these seasonal variations, and for the reason that Claimant was originally hired to drive a flatbed truck, there was no material change in the conditions of his employment when Claimant returned to work on January 12, 2001.

9. The Appeals Referee found that if Claimant had returned to driving flatbeds in January when he returned to full-duty, he would have been making $250 per week at that time. For this reason, the Employer's offer of work in the shop at $8.00 per hour was not a material change in the pay rate when compared to all the other truck drivers at that time. Claimant would be making $320 per week in the shop. Moreover, Claimant would be permitted to supplement that income with flatbed runs which started to pick up again in April. He would be permitted to do the job for which he was hired (driving flatbeds) and his income would be equivalent to the other flatbed drivers at that season.

10. Under the applicable legal standard, 19 *Del. C.* § 3315(1), an employee who voluntarily terminates his employment has the burden of proof to show that he had good cause for leaving.[2] Good cause can be found where there has been a substantial reduction

[2] *Longobardi v. Unemployment Ins. Appeal Bd.,* Del. Super., 287 A.2d 690 (1971), *aff'd,* Del. Supr., *293 A.2d 295 (1972).*

in hours, wages, or a substantial deviation in the working conditions from the original agreement of hire to the detriment of the employee.[3]

11. In this case, upon hearing the evidence of the Employer, the Appeals Referee reversed the Claims Deputy and decided that the Claimant was disqualified from receiving benefits because he did not voluntarily quit for good cause. Her decision stated:

> Since the [C]laimant would have been earning less driving a milk tanker, the only steady work available at the time of his return from worker's compensation, the offer by the [E]mployer did not constitute any reduction of wages whatsoever. Additionally, while the [C]laimant might have preferred driving trucks to working in the shop, this tribunal does not see how the change was to the [C]laimant's detriment. Indeed the change was only temporary. In April, the [C]laimant would have been driving flatbeds regularly again. For these reasons, the [C]laimant, who did not appear at the hearing, has not carried his burden of proving good cause attributable to the

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[3] *Hopkins Const., Inc. v. Unemployment Ins. Appeal Bd.*, Del. Super., C.A. No. 98A-05-002, 1998 WL 960713, Graves, J. (Dec. 17, 1998) (Mem. Op.).

work for his resignation. He is disqualified from benefits.[4]

12. The decision of the Appeals Referee was dated and mailed to Claimant on April 9, 2001, and clearly indicated that April 19, 2001 was the last day upon which Claimant could file an appeal to the Board. The decision was sent to the Claimant's last address of record and contained instructions on how to appeal.

13. On April 20, 2001, one day after the deadline, Claimant filed his appeal with the Board. The Claimant alleges that his request for an appeal was delivered to the Unemployment Office in Dover, Delaware on April 19th, and it was promised that it would be faxed over to the Wilmington office that same day.

[4] April 9, 2001, Ref. Dec at 3.

14. The Board denied Claimant's appeal as untimely, finding that "[a]lthough [C]laimant wrote the date '4/19/01' on the top of his appeal request, the record indicates that his appeal was delivered in person to the Dover office at the Department of Labor on April 20, 2001, one day past the deadline."[5] The Board upheld the Appeals Referee's decision as final and binding, and Claimant appeals.

II. STANDARD OF REVIEW

[5] May 28, 2001, Dec. of Unemployment Ins. App. Bd.

15. "The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency."[6] Upon review of a Decision of the Unemployment Insurance Appeal Board, the Court must establish that the Board's Decision is supported by substantial evidence[7] and is free from legal error.[8] The Court does not weigh the evidence, determine questions of credibility, or make factual findings.[9] Substantial evidence is relevant evidence that a reasonable person might accept

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[6] *Knight v. Domino's Pizza and Unemployment Ins. Appeal Bd.*, Del. Super., C.A. No. 95A-08-009, 1996 WL 944845 at *1, Quillen, J. (Apr. 8, 1996).

[7] *General Motors Corp. v. Freeman*, Del. Supr., 164 A.2d 686, 688 (1960).

[8] *Boughton v. Div. of Unemployment Ins.*, Del. Super., 300 A.2d 25, 26-27 (1972); *Ridings v. Unemployment Ins. Appeal Bd.*, Del. Super., 407 A.2d 238, 239 (1979).

[9] *Johnson v. Chrysler Corp.*, Del. Supr., 213 A.2d 64, 66 (1965).

as adequate to support a conclusion.[10]

III. DISCUSSION

[10] *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994).

16. "The Unemployment Insurance Appeal Board is a creature of statute. Its power extends only to cases properly before it in compliance with the statutory law."[11] Claimant's right to appeal is limited by 19 *Del. C.* § 3318(c), which provides that all Board appeals are subject to a ten-day limitations period.[12] Only in severe cases may the Board, *sua sponte*, chose to hear a matter wherein no valid appeal has been filed by a party.[13] The Delaware Supreme Court has stated "that a statutory ten-day time limit for filing an

[11] *Chrysler Corp. v. Dillon*, Del. Supr., 327 A.2d 604, 605 (1974) (citations omitted).

[12] *Id.*; 19 *Del. C.* § 3318(c) requires the filing of an appeal "within 10 days after the date of . . . mailing." Here, the Referee's decision was mailed on April 9, 2000, thus establishing the due date of April 19, 2001, for a timely appeal.

[13] *Funk v. Unemployment Ins. Appeal Bd.*, Del. Supr., 591 A.2d 222, 225 (1991).

administrative appeal is reasonable."[14]

17. The determinative question here is factual—did the Claimant file his appeal within the statutory ten-day window?[15] Claimant alleges that the appeal request was filed in a timely manner in Dover, Delaware, on the last available day, April 19, 2001. He stated that he was denied an appeal by the Board, however, because his appeal did not reach the Wilmington office of the Department of Labor until April 20, 2001, one day beyond the ten-day statutory deadline.

18. Claimant alleges that he spoke with the Secretary ("Helen") at the Department of Labor on the morning of April 19, 2001, regarding his request for an appeal.

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[14] *Id.* at 226.

[15] The parties have submitted *pro se* briefs which present the merits of the disqualification issue to the Court; however, on this appeal, the Court may only consider whether the Decision of the Board (to deny the appeal from the Appeals Referee) is supported by substantial evidence and free of legal error.

Helen instructed him to deliver the appeal to the Dover office that day, which he then did. Claimant alleges his appeal request was delivered to the Dover office by his wife on April 19, 2001, "and it was promised to be faxed over to the Wilmington office that same day." Claimant states that, "Agencies do make errors regardless of any time sensitive stamps being used. These procedures are carried out by humans and humans make errors."

19. The record shows that Claimant's appeal request was clocked in at the Department of Labor, in Dover, Delaware, at 3:17 p.m., on April 20, 2001. Claimant provides no receipt or clocked-in copy, showing a date of April 19, 2001, in order to prove his version of the facts. The machine-generated date on the fax, by which the appeal was faxed from Dover to the Wilmington office, also displays a date of April 20, 2001.

20. "It is the Board's function, not the Court's, to determine which version of conflicting testimony to believe."[16] The Board considered the Claimant's version of the facts, as well as the written record which conflicted with Claimant's statements. The Board chose to resolve the conflict in favor of the written documentation. The clocked-in request for appeal, and the dated fax papers, constitute substantial evidence from which the Board could conclude that the Claimant missed his statutory deadline to appeal the Referee's decision. Consequently, under 19 *Del. C.* § 3318(c), the Board could decline to

[16] *Cagle v. Shu-ChingKuo*, Del. Super., C.A. 00A-03-007, 2000 WL 33113939 at *3, Goldstein, J. (Oct. 26, 2000) (ORDER).

hear Claimant's appeal.

For the foregoing reasons the Decision of the Unemployment Insurance Appeal Board is *AFFIRMED.*

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Richard L. Rieger, Sr.
KJM Transport, L.L.C.
Stephanie Ballard, Esquire