IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOSEPH BEY,	)	
	)	
Claimant-Below, Appellant,	)	
	)	
v.	)	
	)	
MURPHY MARINE SERVICES, INC.,	)	
	)	
Employer-Below, Appellee,	)	C.A. No. 01A-12-004 RRC
	)	
and	)	
	)	
UNEMPLOYMENT INSURANCE APPEAL BOARD,	)	
	)	
Appellee.	)	

Submitted: April 25, 2002
Decided: June 3, 2002

UPON APPEAL FROM A DECISION OF THE UNEMPLOYMENT INSURANCE APPEALS BOARD. AFFIRMED.

ORDER

This 3rd day of June, 2002 it appears to the Court that:

1. Claimant has filed a *pro se* appeal from a decision of the Unemployment Insurance Appeals Board (the "Board") dated November 20, 2001.[1] In its decision the Board determined that the Appeals Referee's

[1] The Board adopted the findings of fact as determined by an Appeals Referee. See R. at 0032, 0005-0008.

findings were supported by substantial evidence and free of any errors of law;[2] the Appeals Referee had found that under the totality of the circumstances, Claimant was disqualified from receiving unemployment insurance benefits because he was a "casual worker" and thus had no expectation of regular employment and income.[3] For the reasons below, the decision of the Board is **AFFIRMED**.

2. Claimant filed an application for unemployment insurance benefits on August 26, 2001, in which he claimed that he was unemployed due to "lack of work".[4] Murphy Marine Services, Inc. ("Murphy Marine"), a stevedoring company at the Port of Wilmington, responded that Claimant was "not able or available for work," and that "work was offered".[5] At an initial hearing on Claimant's application, the Appeals Referee framed the issues of Claimant's application as "whether the claimant became unemployed through no fault of his own or whether he's a member of that work force that is not considered to be eligible for benefits based upon the

[2] R. at 0032.

[3] R. at 0007.

[4] R. at 0001.

[5] R. at 0001.

nature of employment."[6] Neither Claimant nor Murphy Marine was represented by counsel at this initial hearing.

There are somewhat contradictory assertions regarding the exact nature of Claimant's relationship with Murphy Marine. Carol Ferguson ("Ferguson"), an administrative assistant at Murphy Marine, testified at the initial hearing that Claimant began working at Murphy on October 13, 1997,[7] that Claimant had filed an application to be placed in the "secondary" work force, [8] and that Claimant was considered a "clean hand", *i.e.*, a "casual" employee.[9] "Clean hand" employees are assigned duties after both unionized workers and "secondary" employees go to work.[10]

Claimant was informed before Ferguson testified that he would have the opportunity to question her.[11] Claimant disagreed with several statements that Ferguson had made. Claimant argued that he had been working for Murphy Marine since 1977 (even though Ferguson testified that Murphy Marine only started its business in 1994) because Murphy Marine's

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[6] R. at 0011.

[7] R. at 0012.

[8] R. at 0014.

[9] R. at 0014.

[10] R. at 0025-26.

[11] R. at 0011.

"name keeps changing but the company has remained the same."[12] Claimant also stated that he was a "union man",[13] and that he believed he "was entitled to unemployment [insurance benefits]…and that's why [he]…came up [to the initial hearing]."[14] Claimant admitted that he had "no guarantee" of continued work opportunities from Murphy Marine.[15]

The Appeals Referee found that Claimant had been employed as a "casual" worker by Murphy from October 13, 1997 through September 15, 2001.[16] The Appeals Referee also concluded that Claimant had filed an application to be a member of a "secondary work force" and that "secondary" workers are hired along with "casual" employees to supplement union workers on a daily basis as they are needed.[17] The Appeals Referee therefore found that Claimant was employed by Murphy Marine as a "casual" worker and thus had no expectation of regular employment and income such that unemployment insurance benefits would be available to

[12] R. at 0017.

[13] R. at 0023.

[14] R. at 0027.

[15] R. at 0022.

[16] R. at 0006.

[17] R. at 0006.

him.[18] Claimant then appealed the decision of the Appeals Referee to the Board.

The Board affirmed the Appeals Referee's decision because the Appeals Referee's findings were "supported by the undisputed testimony that [C]laimant was a casual worker at the Port of Wilmington who had no hiring preference and was hired on an 'as needed' basis to supplement the union work force."[19] The Board stated that a "worker must work 800 hours in one calendar year to be eligible as a union worker the following year," and that "Claimant ha[d] worked 604 hours from December 17, 2000 through [November 2001]."[20] The Board determined that Claimant's employment status could not therefore "provide an expectation of regular employment and/or income."[21] Claimant then took an appeal of the Board's decision to this Court.

3. Claimant urges this Court to reverse the Board so that he may be awarded unemployment insurance benefits. Claimant argues that the Appeals Referee's decision was not supported by substantial evidence and

[18] R. at 0007.

[19] R. at 0032-33.

[20] R. at 0033.

[21] R. at 0033.

that the Appeals Referee made errors of law. Claimant maintains that he was not a "casual" employee of Murphy Marine and that he demonstrated the intent to remain permanently employed as a longshoreman and he therefore had an expectation of regular employment in the industry.

In support of his argument, Claimant states that he produced evidence to the Appeals Referee that he was a member of a union and not a "casual" employee of Murphy Marine. Claimant attached a copy of his "work history" to his opening brief that Claimant argues demonstrates his union member status; the form allegedly shows Claimant as having worked for at least three stevedoring companies other than Murphy Marine. Claimant argues that in determining whether he was a "permanent" employee for purposes of unemployment insurance benefits, his work with each of these stevedoring companies must be taken into account; Claimant cites a California case in support of this proposition, Matson Terminals, Inc. v. California Employment Comm'n, 151 P.2d 202 (Cal. 1944). Claimant also states that the trade organizations which oversee longshoremen and the local unions have fraudulently miscalculated the hours of work that Claimant has accumulated. None of this evidence was produced to either the Appeals Referee or the Board.

Claimant additionally argues that his ability to present his case before the Appeals Referee was "severely and adversely" affected because he was not represented by counsel and was "inexperienced in how to present his claim". Claimant maintains that the Appeals Referee had an "affirmative duty" to develop the record at the hearing, a "duty" which Claimant asserts the Appeals Referee "breached". Claimant cites two cases in support of this proposition, Jozefick v. Shalala, 854 F.Supp.342 (M.D. Pa. 1994), and Early v. Heckler, 743 F.2d 1002 (3d Cir. 1984).

In response, Murphy Marine argues that the Court's review of Claimant's appeal is "necessarily" confined to the evidence presented during the initial hearing before the Appeals Referee. Murphy Marine asserts that appeals from the Board to this Court are limited to the record that the Board had before it, and that the record here is limited to "certain preliminary administrative documents, the transcript of the Appeals Referee hearing, and the Referee's decision." Murphy Marine states that at no time below did Claimant raise the factual assertions or move to introduce the documents Claimant now seeks to have this Court evaluate.

Murphy Marine maintains that the copy of the "work history" which Claimant has attached to his opening brief is "unsubstantiated" and without support or foundation. Murphy Marine states that the record is "empty" of

any demonstration of the work history, union membership, or expectation of regular employment that Claimant proposes. Murphy Marine seeks to have the Board's decision affirmed.

4. The Supreme Court and this Court repeatedly have emphasized the limited appellate review of factual findings of an administrative agency; the function of the reviewing court is to determine whether substantial evidence supports the agency's decision.[22] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[23] On appeal, the court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[24] The reviewing court merely determines if the evidence is legally adequate to support the agency's factual findings.[25] When the Board adopts the factual findings of an Appeals Referee, this Court will also review the Appeals Referee's findings of fact and conclusions of law.[26] Upon appeal from a denial of

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[22] General Motors Corp. v. Freeman, 164 A.2d 686, 688 (Del. 1960); Johnson v. Chrysler Corp., 213 A.2d 64, 66-67 (Del. 1965).

[23] Olney v. Cooch, 425 A.2d 610, 614 (Del. 1981)

[24] Johnson, 213 A.2d at 66.

[25] See Del. Code Ann. tit. 19, § 3323 (a) (1995) (providing that, absent fraud, the factual findings of the Board shall be conclusive and the jurisdiction of a reviewing court shall be confined to questions of law).

[26] Boughton v. Dept. of Labor, 300 A.2d 25, 26 (Del. Super. Ct. 1972).

unemployment insurance benefits, this Court is limited to consideration of the record that was before the Board.[27] If substantial evidence exists and the Board made no error of law, its decision must be affirmed.[28]

5. Title 19, section 3315 of the Delaware Code provides that an employee is disqualified from receiving unemployment benefits:

> (1) For the week in which the individual left work voluntarily without good cause attributable to such work and for each week thereafter until the individual has been employed in each of 4 subsequent weeks (whether or not consecutive) and has earned wages in covered employment equal to not less than 4 times the weekly benefit amount.
>
> ….
>
> An individual who becomes unemployed solely as the result of completing a period of employment that was of a seasonal, durational, temporary or casual duration will not be considered as a matter of law to have left work voluntarily without good cause attributable to work solely on the basis of the duration of such employment.[29]

The determination of whether an employee is disqualified from receiving benefits under this section must be evaluated under the "totality of the circumstances of the employment."[30] This Court has previously enunciated several factors to assist in this analysis: "the regularity of the claimant's employment; the claimant's intention to remain permanently employed as

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[27] Hubbard v. Unemployment Ins. Appeals Bd., 352 A.2d 761, 763 (Del. 1976); see also Super. Ct. Civ. R. 72(g) (providing that unless otherwise expressly provided by statute, appeals to this Court shall be heard and determined on the record below).

[28] Breeding v. Contractors-One-Inc., 549 A.2d 1102, 1104 (Del. 1988).

[29] Del. Code Ann. tit. 19, § 3315(1) (1995)

[30] City of Wilmington v. Unemployment Ins. Appeals Bd., 516 A.2d 166, 169 (Del. Super. Ct. 1986).

the job will allow; and the claimant's expectation of regular employment and/or income."[31]

Here, the evidence Claimant urges the Court to consider was not produced at the initial hearing below, and therefore cannot now be considered in the Court's review of the Board's decision.[32] The Board found (and the Court agrees) that the "undisputed" testimony demonstrated that Claimant was a "casual" worker at the Port of Wilmington who had no hiring preference and was hired on an "as needed" basis to supplement the union work force; as such, Claimant's employment status can not provide an expectation of regular employment and income. The fact that Claimant would seek those employment opportunities that remained after unionized and "secondary" workers were given work is not dispositive of his intention to remain permanently employed; Claimant was hired "as needed", and he testified that he had no guarantee from Murphy Marine of continued work opportunities.

The Matson case on which Claimant relies is inapposite. In that case the California Supreme Court determined that one of the objects of a contract between longshoreman and the local union hall at issue "was the

[31] Hill v. Diamond State Port Corp., 1999 WL 1611426, at *4 (Del. Super.).

[32] Hubbard, 352 A.2d at 763.

abolition of the system that normally prevailed when some longshoremen worked regularly for one employer while others had only occasional work."[33] On the present record, it is clear that Claimant's working relationship with potential employers such as Murphy Marine was not at all like that relationship at issue in the Matson case. Instead, Claimant would have had occasional work "as needed" when unionized and "secondary" workers were not enough. Any discrepancy in this testimony should have been raised below, for it is now deemed waived.

Claimant's second argument (that because he was not represented by counsel and was inexperienced in how to present his claim, the Appeals Referee had an "affirmative duty" to develop the record at the hearing) is not persuasive. While those cases Claimant cites to do speak of a heightened duty required of an Administrative Law Judge in certain settings, the primary case from which such a duty is drawn (and to which Claimant's cited cases point) shows that this duty is inapplicable here. In Dobrowolsky v. Califano, 606 F.2d 403 (3d. Cir. 1979), the Court stated that it had "repeatedly emphasized that the special nature of proceeding for [Social Security] disability benefits dictates extra care on the part of the agency in developing an administrative record and in explicitly weighing all

[33] Matson, 151 P.2d at 208.

evidence."[34] The particular facts of that case involved a 52-year-old applicant who had worked as a meat cutter continuously for over 30 years and who failed to challenge the testimony of a vocational expert introduced at the hearing on his application for Social Security disability benefits.[35] Those are not the facts here, and the Court is not otherwise persuaded that the reasoning behind the Dobrowolsky Court's decision applies.

Chancellor Quillen, sitting by designation as an Associate Justice of the Supreme Court in the Hubbard case, made an observation that is particularly noteworthy here. He wrote:

> …this case demonstrates the importance of presenting all of the evidence in the administrative proceeding within the Department of Labor. Frequently both claimants and employers appear without counsel before the Board and do not develop the factual record that is necessary to support their contentions. In cases such as this…it is important for unions and others who assist claimants to impress upon them the importance of making their best case at the administrative level.[36]

6. The Court finds that substantial evidence supports the Board's decision. The Board otherwise committed no error of law. The decision of the Board is **AFFIRMED**.

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[34] Dobrowolsky, 606 F.2d at 406-07.

[35] Id. at 408.

[36] Hubbard v. Unemployment Ins. Appeal Bd., 352 A.2d 761, 763 (1976) (Quillen, C., concurring).

IT IS SO ORDERED.

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Richard R. Cooch

oc: Prothonotary
cc: Joseph Bey, *pro se*
G. Kevin Fasic, Esquire, Attorney for Murphy Marine Services, Inc.
Stephani Ballard, Esquire, Attorney for the Unemployment Insurance Appeals Board