

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

CALDWELL STAFFING SERVICES,)
)
Appellant,)
)
v.) CA No. 02A-07-002-JEB
)
NARINDRA V. RAMRATTAN,)
and UNEMPLOYMENT INSURANCE)
APPEAL BOARD,)
)
Appellees .)

Submitted: January 9, 2003

Decided: January 29, 2003

Upon Appeal From the Unemployment Insurance Appeal Board.

Reversed and Remanded.

OPINION

Appearances:

Robert F. Stewart, Esquire, Wilmington, Delaware.
Attorney for Appellant.

Narindra V. Ramrattan, 1316 Choptank Road, Middletown, Delaware, 19709
Pro Se Appellee

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

JOHN E. BABIARZ, JR., JUDGE.

This is the Court's opinion on an appeal filed by Caldwell Staffing Services (Employer) from a decision of the Unemployment Insurance Appeal Board (Board) granting unemployment benefits to Narindra Ramrattan (Claimant). Claimant has not participated in the appellate process, but the Board opposes the appeal and has filed papers accordingly.¹ For the reasons explained below, the decision of the Board is reversed, and the cause is remanded to the Board for a new hearing.

FACTS

Ramrattan worked as a converter cleaner for one of Caldwell's clients, Comcast Cable, sporadically from November 2001 through February 2002. On Friday, February 22, 2002, Nikki Waller, Ramrattan's supervisor at Comcast, indicated on Ramrattan's weekly time sheet that the assignment was over. Ramrattan did not report to Comcast on Monday, and the parties disagree as to whether or not Ramrattan called Caldwell to report that he was available for another assignment. He was terminated from his position shortly thereafter and applied to the Department of Labor for unemployment benefits. A claims deputy awarded him benefits, and Caldwell appealed. An appeals referee held a hearing where the parties were

¹Pursuant to Del. Code Ann. tit. 19 § 3322(a), the Department of Labor is a party to any appellate action and may participate in the proceedings.

permitted to question each other. The referee affirmed the claims deputy, and Employer appealed to the Board.

At the hearing, Jim Randall, president of Caldwell Staffing, introduced Nikki Waller, Ramrattan's supervisor at Comcast, but counsel for the Board stated, "You can't ask her questions. She's just got to testify."² Waller testified that she had marked Ramrattan's time sheet that his job was over, but that she had later told him to return to work on Monday. She never changed the time sheet. Ramrattan testified that he did not return to work because the time sheet indicated that there was no more work and that Waller had never told him otherwise.

The Board affirmed the referee's conclusion that Ramrattan was discharged without just cause and was therefore entitled to unemployment insurance benefits. The Board found Waller not to be a credible witness because she was unsure of what she said to Ramrattan and when she said it. Noting that Ramrattan's official time sheet for the week ending February 23, 2002, stated that the Comcast assignment was over, the Board concluded that Ramrattan did not commit misconduct in not reporting to Comcast on the following Monday. Finally, the Board affirmed the referee's

²Record at 41.

finding that Employer failed to prove that Ramrattan had failed to call Caldwell on Monday morning, as required.³ Employer filed a timely appeal, to which Ramrattan has not responded but which the Board opposes.

STANDARD OF REVIEW

The function of this Court on review of a Board decision is to determine whether the Board's decision is supported by substantial evidence.⁴ This Court does not weigh the evidence, determine questions of credibility or make factual findings.⁵ When the Board's factual findings are supported by the record, the jurisdiction of the Court is confined to questions of law.⁶

DISCUSSION

Employer argues first that the Board violated its due process rights by not allowing its president, James Randall, to question the witnesses. The Board argues in response that (1) Randall voiced no objection at the time and therefore Employer

³See Del. Code Ann. tit. 19 § 3327 (stating in part that an employee of a temporary help firm who does not contact the firm upon completion of an assignment will be deemed to have voluntarily quit).

⁴*General Motors v. Freeman*, 164 A.2d 686 (Del.1960).

⁵*Johnson v. Chrysler Corp.*, 213 A.2d 64 (Del.1965).

⁶Del. Code. Ann. tit. 19 § 3323(a).

cannot raise the issue on appeal; (2) the Board has no discretion to allow the unauthorized practice of law; (3) there is no due process right for a non-attorney to question witnesses at the administrative level; and (4) the Board's rules require that an employer who wants representation must do so through an attorney. As to the Board's first argument, the Court will consider the issue of Randall's role at the hearing, even though he did not object to counsel's directive, because Delaware courts generally give *pro se* litigants a certain leeway not afforded to licensed attorneys.⁷

Pursuant to Del. Code Ann. tit. 19 sec. 3321(a), the Board may promulgate its own regulations for the conduct of hearings, and they need not conform to common law or statutory rules of evidence or other technical rules of procedure. However, the guarantee of due process trumps all else. While the Board may relax certain rules of procedure, the Delaware Supreme Court has stated that even at the administrative level "it is fundamental that the right to confront witnesses, to cross-examine them, to refute them, and to have a record of their testimony must be accorded unless

⁷*Vick v. Haller*, Del. Supr., No. 149, 1986, Christie, C.J. (March 2, 1987).

waived.”⁸ Thus, an employer appearing before the Board has due process rights that can not be abated. Several Department of Labor rules address this issue.

Employer relies on Code of Delaware Regulations 65 600 020(4)(a) (“Regulation 20”), which provides for appeals to the “Appeals Tribunals or to the Commission,” the predecessor of the current Unemployment Insurance Appeal Board.⁹ Regulation 20 provides in part that “[a]ny corporation or association may be represented by an officer or by a duly authorized representative.” In this case, Caldwell Staffing is clearly a business entity, but its precise nature is not apparent from the record. Employer argues that Regulation 20 explicitly permits an officer such as Jim Randall to represent its interests before the Board. The Board argues that Regulation 20 is part of a group of regulations promulgated by the Delaware Department of Labor, Division of Unemployment Insurance, which is different from the statutorily created Unemployment Insurance Appeal Board.¹⁰

The Board relies instead on its own Rule F, which provides as follows: “An

⁸*Torres v. Allen Family Foods*, 672 A.2d 26, 31 (Del. 1995) (quoting *General Div. Allied Chemical & Dye Corp. v. Fasano*, 94 A.2d 600, 601 (Del.1953)).

⁹Del. Code Ann. tit. 19 § 3101(a) (1995).

¹⁰*See* Del. Code Ann. tit. § 3101.

employer, if he desires representation, may be represented by an attorney-at-law duly admitted to practice in the State of Delaware.”¹¹ Despite the permissive “may be represented,” the Board argues that an employer seeking representation before the Board can do so only through an attorney.¹² Employer does not assert that it was unaware of this option; it merely chose not to take it.

The Court would construe the decision not to obtain counsel as a waiver of the right to confront witnesses were it not for Board Rule B. This Rule establishes a hybrid system where Board members and parties both take an active role in the hearing process:

The Board of Appeals shall have the power to call, examine and cross-examine a witness and to request documentary evidence be admitted into the record. **All parties to the hearing shall be given the opportunity to cross-examine witnesses, introduce documents and inspect documents.**¹³ (Emphasis added.)

While the Board is the primary questioner and sole fact finder, this rule envisions participation in the hearing by both Board members and parties. The

¹¹See Answering Brief, Exhibit B, Unemployment Insurance Appeal Board F.

¹²Answering Brief at 15.

¹³Board Rule B.

description of the parties' role is not limited to *pro se* claimants (as opposed to employers), nor is there any restriction imposed on artificial entities. In this case, the transcript shows that the Board failed to follow its own rules.¹⁴ Under these facts, where Employer believed it could represent itself and was, in fact, permitted to do so by Board Rule B, the Court concludes that the Board violated Employer's right to due process when it disallowed any questioning by the parties.

Despite the clear provisions of Board Rule B, the Board argues that allowing Randall to question or cross-examine witnesses would have constituted the unauthorized practice of law. The admission of attorneys to the practice of law and the exclusion of unauthorized persons from practice lie within the exclusive province of the Delaware Supreme Court.¹⁵ Although the Court has held that a corporation can be represented before a court only by a licensed attorney,¹⁶ the Court has not ruled on whether a non-attorney employee may represent an employer at the administrative level. The Board points to *dicta* from the *Delaware State Bar Ass'n v. Alexander* for

¹⁴The Board asserts that it is in the process of amending its rules to require artificial entities to be represented by counsel, but that effort is irrelevant to this case.

¹⁵*Delaware Optometric Corp. v. Sherwood*, 128 A.2d 812 (Del.1957).

¹⁶*Transpolymer Industries, Inc. v. Chapel Main Corp.*, No. 284, 1990, Horsey, J. (Sept. 18, 1990) (ORDER).

the proposition that only a licensed attorney may practice before an administrative body.¹⁷ In *Alexander*, the Court quoted case law from numerous jurisdictions, including a 1946 New Jersey case which states that “[t]he exercise of such professional skill certainly includes the pursuit, **as an advocate for another**, of a legal remedy within the jurisdiction of a quasi-judicial tribunal.”¹⁸ This clause refers to an individual representing the interests of “another,” not to the representation of an employer by one of its own officers or employees.

The Superior Court has addressed this issue on several occasions. In *Brainard v. Chrysler Corp.*, this Court held that a non-attorney employee of an employer may represent the employer before the Board based on the previously cited Regulation 20.¹⁹ Four years later, in *Marshall-Steele v. Nanticoke Memorial Hospital*, this Court held that a non-employee, non-attorney hired by the employer solely for purposes of representation could not represent that employer before the Industrial Accident Board

¹⁷*Delaware State Bar Ass’n v. Alexander*, 386 A.2d 652 (Del.1978).

¹⁸*Id.* at 661 (emphasis added).

¹⁹C.A. No. 94A-08-020, Del Pesco, J. (Feb. 14, 1995).

because such conduct would constitute unauthorized practice of law.²⁰ The *Marshall-Steele* Court explicitly distinguished between the representation of a non-attorney employee and that of a non-attorney non-employee, as in *Brainard*. This Court has also stated that “[t]hough corporations must be represented by an attorney in court proceedings, a non-attorney employee may represent the employer at an administrative hearing.”²¹ The Court finds these cases to be persuasive.

The Court further finds that unless and until the Board changes its rules, parties who appear before the Board may cross-examine witnesses and produce and examine documents, as provided for in Board Rule B. In the case at bar, Employer’s belief that its officer could question witnesses was supported by the Board’s rules, which the Board failed to follow. In disallowing cross-examination of witnesses despite the provisions of Rule B, the Board violated Employer’s right to due process, which extends to quasi-judicial proceedings. For all these reasons, the Board’s decision is reversed and the cause is remanded with instructions to the Board to conduct a new

²⁰1999 WL 458724, *5 (Del.Super.). See also *Hall v. State*, 2000 WL 1211307 (Del. Super.) (noting that under *Nanticoke* a non-attorney may not represent a **claimant** before the Industrial Accident Board but not addressing employers’ representation by an employee).

²¹*Hooks v. Legum & Norman*, Del. Super., C. A. No. 00A-05-001, Graves, J. (Oct. 27, 2000).

hearing.

In so ordering, the Court is not authorizing business officers or employees to practice law before the Board, but is ordering the Board to inform parties that they may either hire an attorney for full representation or elect to “cross-examine witnesses, introduce documents and inspect documents” themselves, as set forth in Board Rule B. Nor is the Court suggesting in any way that parties may usurp the Board’s role as the primary interrogator. As Board Rule B provides, “[t]he Board shall inquire fully into the facts of the particular case and shall consider the issues expressly ruled upon in the decision from which the appeal was filed. . . . The Board of Appeals shall have the power to call, examine and cross-examine a witness and to request documentary evidence be admitted into the record.”

The Court notes with interest that at the hearing before the appeals referee, the parties were given ample opportunity to question each other. If there are rules for the referee to follow, they are not part of the record in this case, and the pertinent statute requires only that the referee conduct a “fair hearing.”²² Common sense suggests that hearings before the appeals referee and the Board should follow similar procedures.

²²Del. Code Ann. tit. 19 § 3318(c). *See also* § 3319 (creating the intermediate appeal level but not specifying procedures for hearings).

Until this odd discrepancy creates a due process problem for a litigant who appeals to this Court, this is a matter for the Division of Unemployment to address.

Having found as a matter of law that the Board violated Employer's right to due process, the Court need not reach the other issues raised on appeal.

CONCLUSION

For all the reasons discussed above, the Board's decision granting unemployment insurance benefits to Claimant Narindra Ramrattan is ***Reversed***, and the cause is ***Remanded*** to the Board for a new hearing consistent with this Opinion.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

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JEB,jr/rmp/bjw
Original to Prothonotary