

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PETER A. KAMINSKI)	
)	CIVIL ACTION NUMBER
Appellant)	
v.)	04A-09-001-JOH
)	
UNEMPLOYMENT INSURANCE)	
APPEAL BOARD)	
)	
Appellee)	

Submitted: February 2, 2005

Decided: February 9, 2005

MEMORANDUM OPINION

*Upon Appeal from the Unemployment
Insurance Appeal Board - **AFFIRMED***

Peter A. Kaminski, 72 Salem Church Road, Newark, Delaware, 19713, Appellant

Mary Page Bailey, Deputy Attorney General, Department of Justice, for Unemployment
Insurance Appeal Board, Appellee

HERLIHY, Judge

Peter Kaminski appeals the decision of the Unemployment Insurance Appeal Board finding that he had not timely filed a notice of appeal. The appeal was to have been from a claims deputy's decision to an appeals referee. He had ten calendar days within which to file his notice but failed to do so. The Court concurs that his notice of appeal was untimely filed and that the Board did not abuse discretion in not allowing the appeal to proceed. The Board's decision is affirmed.

Factual Background

A claims deputy determined there had been an overpayment of benefits. The record is unclear but it appears Kaminski at first collected benefits but that it was later determined, for reasons not in this record, he was not entitled to them.¹ On May 25, the Department of Labor sent notice of a claims deputy's decision of an overpayment.²

The notice was mailed to Kaminski's address of record and where he resided. Kaminski was on a "personal" trip to Arizona, which had begun on the 23rd, when the claims deputy's decision arrived. His wife saw the envelope but did not open it. He testified that she mentioned it to him on June 4th, the deadline for filing his notice of appeal, but , he said it was after business hours that day. He also testified that she typed up on June 6th a notice of appeal but that he did not sign it until June 8th. He had arrived

¹ The documentation of all this was not, but should have been included in the record forwarded.

² This document was not in the record supplied for the appeal but should have been.

home on the 7th. The envelope with his notice was postmarked June 8, 2004 and the Department received it on June 10th.

A hearing was held before an appeals referee limited to the timeliness of Kaminski's notice of appeal. Kaminski offered the explanation and dates above. There is no evidence anyone in the Department prevented Kaminski from filing his notice or was in anyway responsible for the delayed filing.

The appeals referee determined Kaminski's notice had been filed untimely.

Kaminski timely filed a notice of appeal of that decision to the Board. The Board held a hearing but took no additional testimony. Relying upon the record before the referee and his findings, the Board sustained the appeals referee's decision. The affect, of course, is that the determination of overpayment stands. Kaminski timely filed a notice of appeal to this Court.

Standard of Review

On an appeal from the Board, this Court's role is to determine whether the Board's conclusions are supported by substantial evidence and are free from legal error.³ This Court does not weigh the evidence, determine questions of witness credibility or make its own factual findings and conclusions.⁴ When the Board relies upon the referee's decision

³ *Unemployment Ins. Appeal Bd. v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

⁴ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

and fact finding, the Court relies upon the referee's findings.⁵ Absent an abuse of discretion, this Court must uphold the Board's decision.⁶

Discussion

The ten calendar day time period in which to file an appeal of a decision of a claims deputy is set forth in 19 *Del. C.* § 3318(b).⁷ The notice of the claims deputy's decision was sent to Kaminski's address of record. The period begins to run on the date of mailing.⁸ In this case that was May 25, 2004, and his appeal notice was due no later than June 4th. This ten day period is jurisdictional. The Board, *sua sponte*, has the discretion, however, to consider a matter beyond the ten day limit when no appeal has been timely filed.⁹ The only other exception to this ten day rule is when the mailing fails to reach the recipient because of a mistake made by the Department.¹⁰ There was no evidence of that in this case.

⁵ *Boughton v. Div. of Unemployment Insurance*, 300 A.2d 25, 26 (Del. Super. 1972).

⁶ *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. Super. 1994).

⁷ Unless a claimant or a last employer who has submitted a timely and completed separation notice in accordance with § 3317 of this title files an appeal within 10 calendar days after such Claims Deputy's determination was mailed to the last known addresses of the claimant and the last employer, the Claims Deputy's determination shall be final and benefits shall be paid or denied in accordance therewith. 19 *Del. C.* § 3318(b).

⁸ *Funk v. Unemployment Ins. Appeal Bd.*, Del. Supr., 591 A.2d 222, 224 (1991).

⁹ *Funk* 591 A.2d at 225.

¹⁰ *Bowers v. UIAB*, 1998 WL 283401 (Del. Super. Ct. 1998), at *2.

The Court must next determine, therefore, whether the Board abused its discretion when it did not exercise, *sua sponte*, its authority under 19 *Del. C.* § 3320 to review the underlying issue of overpayment despite the untimely appeal. Kaminski does not claim that the notice was sent to an incorrect address, or that he did not receive the notice because of some error on the part of the Department. He states only that he did not receive the notice as he was out of state during the time period in question, but his wife, living at that residence, saw the envelope but chose not to open it. Kaminski's reason for not timely filing his appeal notice was a personal, two week trip to Arizona. These are not an adequate excuses for the late filing of an appeal.¹¹

As there is substantial and undisputed evidence to support the Board's and referee's findings that the appeal was filed late under 19 *Del. C.* § 3318(b), the Court finds that the Board was justified in denying the application for further review and did not abuse its discretion by declining to hear the substantive underlying matter.¹²

Conclusion

For the reasons stated herein, the decision of the Unemployment Insurance Appeal Board is **AFFIRMED**.

J.

¹¹ *Hartman v. Unemployment Ins. Appeal Bd.*, 2004 WL 772067 (Del.Super.2004), at *2.

¹² *Brown v. City of Wilmington*, 1995 WL 653460 (Del. Super. 1995), at *3.

