

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ERNEST L. SUTTON)	
)	CIVIL ACTION NUMBER
Appellant)	
v.)	09A-04-010-JOH
)	
UNEMPLOYMENT INSURANCE)	
APPEAL BOARD)	
)	
Appellees)	

Submitted: November 2, 2009

Decided: January 15, 2010

MEMORANDUM OPINION

*Appeal from a Decision of the Unemployment
Insurance Appeal Board - **REMANDED***

Appearances:

Ernest L. Sutton, 1222 Tatnall Street, Wilmington, Delaware, appellant

Phillip G. Johnson, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, attorney for employer-below, appellee

This is Ernest Sutton's appeal from a decision of the Unemployment Insurance Appeal Board ("Board"). The Board summarily denied Sutton's appeal because it found the appeal was not timely filed. This Court finds that the Board failed to address a claim that Sutton had in fact filed his appeal within the required ten day period. The decision is **REMANDED** to determine if Sutton's appeal was timely filed.

Factual Background

Ernest Sutton was employed by the City of Wilmington Department of Works as a sanitation worker from June 2007 until July 2008. He was disqualified from unemployment benefits on July 27, 2008, because he was terminated for cause. He reopened his claim on December 14, 2008, after he was laid off from Delaware Temps, where he worked as a flagger. His December claim was also denied.

On January 2, 2009, Michelle Haile, Claims Deputy for the Department of Labor, denied Sutton's December claim. It was denied because he failed to meet the "four by four" requirement. Title 19 of Delaware Code § 3314(2) states that an individual shall be disqualified for benefits:

For the week in which the individual was discharged from the individual's work for just cause in connection the individual's 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.¹

¹ 19 Del. C. § 3314(2).

Notification of the Claims Deputy's denial was sent to Sutton on January 2, 2009. The notification form indicated that he had until January 12, 2009 to file an appeal. On January 13, 2009, one day late for the ten day requirement,² the Department of Labor accepted Sutton's appeal and a hearing with a referee was scheduled for February 10, 2009.

The hearing commenced as scheduled. The referee wrote his decision on February 12, 2009. He determined that Sutton failed to meet the "four by four" required under § 3314(2) to break his previous disqualification. The decision documented that Sutton's weekly benefits were \$330.00. According to the four by four determination, he would have needed to supply documentation that stated he made at least \$1320.00 and was employed four weeks to reinstate his eligibility. Sutton's pay stubs showed that he earned \$648. Despite the fact that he testified he received more income, he did not have documentation to support his claim.³ As a result, he could not break the previous disqualification and his claim was denied.

The disqualification notice sent to Sutton contains the following in a box in the center of the page:

Section 3318, Title 19, Delaware Code, provides that any interested party involved, the claimant, the employer, or the Claims Deputy has a right to

² January 12, 2009 was a Monday and not a legal holiday.

³ Sutton claimed that his W-2's were yet to be issued and would have shown he made more than \$648.

appeal from the decision of the Referee to the Unemployment Insurance Appeal Board, and further provides the opinion of the Referee “shall be deemed to be the final decision of the Department of Labor unless within 10 days after the date of notification or mailing of such decision further appeal is initiated ...” You are, therefore, hereby notified that if an appeal is not made within the ten-day period specified by law, all further right to appeal is lost and the case cannot be reopened. The appeal may be made at the local officer or directed to Department of Labor, Division of Unemployment Insurance, 4425 N. Market St, PO Box 9950, Wilmington, DE 19809. ⁴

The next interaction in the record between Sutton and the Department of Labor is an Appeal Request Notification. It was received by the Department of Labor on March 20, 2009 and states:

I appeal the decision of the Referee because: I have pay statements to show my income from the time period required. I submitted an appeal on 2/20/09 in drop Bx c/o Mrs. Hale Hearing Appeals /s/ Ernest L. Sutton /s/.

The Board determined that Sutton’s appeal was not timely filed. It stated that the window for filing the appeal expired on February 22, 2009 and the appeal was not initiated until almost a month later. The Board declined to accept the appeal. Sutton appeals the Board’s denial to this Court.

Parties’ Contention

Sutton, filing his appeal *pro se*, argues that he filed the appeal in a timely matter with the Board. He alleges he gave notice on February 20, 2009, at the Department of

⁴ Record at 7.

Labor and sent by inter-office mail to the Board. Sutton claims that he now has confirmation that he received more income. The Board did not file a brief in response.

Standard of Review

On appeal from a denial of unemployment benefits, the Superior Court is limited to consideration on the record.⁵ Its role is to ascertain whether the Board's conclusions are supported by substantial evidence and free from legal error.⁶ It is not the Court's role to weigh evidence, determine credibility or make its own factual findings.⁷

Discussion

A claimant must file an appeal from the referee's decision within ten days.⁸ The clock begins to run when the notice is sent from the Department of Labor to the claimant.⁹ Sutton alleges that his claim was timely filed. In his March notice of appeal he stated the he filed an earlier, timely, appeal on February 20, 2009, in a matter consistent with the notice given to him when the referee denied his first appeal.¹⁰ The Board did not consider this argument when it denied Sutton's appeal.

⁵ Petty v. Univ. of Del., 450 A.2d 392, 396 (Del. 1982).

⁶ Unemployment Ins. Appeal Bd. v. Duncan, 493 A.2d 978, 980 (Del. 1975).

⁷ McManus v. Christina Serv. Co., 1997 WL 127954 (Del. Super. Feb. 26, 1997).

⁸ 19 Del. C. § 3318(c).

⁹ Funk v. Unemployment Insur. Appeals Bd., 591 A.2d 222, 224 (Del. 1991).

¹⁰ See, supra note 4.

It is outside this Court's authority to make the factual determination necessary to determine whether the appeal has been filed or not and the record is incomplete without such a determination. However, the absence of adequate determinations on the record constitutes an error of law¹¹ and the case must be remanded. It is in the interest of justice to provide Sutton with the opportunity to submit evidence to the Board that helps establish the existence or non-existence of a February 20, 2009 notice of appeal.

Conclusion

The Court holds that the record is incomplete to consider this appeal and the decision in **REMANDED** with the following instructions. Upon the mailing of this order, Sutton will have 30 days to reopen his appeal and present evidence attempting to establish the appeal was timely filed. The Department of Labor, if it chooses, shall have the opportunity to respond in kind. The Board will then make a determination, on the record, indicating its finding and proceed accordingly. Should the Board determine an appeal was timely filed, Sutton would then have the opportunity to present his pay evidence. The Board can then render a decision on that issue.

IT IS SO ORDERED.

J.

¹¹ *United Propane v. Sowers-Vescovi*, 2000 WL 305504, at *5 (Del. Super. Jan. 14, 2000).