SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

1 The Circle, Suite 2
GEORGETOWN, DE 19947

November 17, 2015

Jerome B. Brown
116 W 9th St
Laurel, DE 19956

First State Fabrication, LLC
P.O. Box 763
Laurel, DE 19956
Attention: Scott Calloway

RE: Jerome B. Brown v. First State Fabrication, LLC
C.A. No: 15 A-02-001 ESB

Date Submitted: August 25, 2015

Dear Messrs. Brown and Calloway:

This is my decision on Jerome B. Brown's appeal of the Unemployment Insurance Appeal Board's denial of his claim for unemployment benefits. Brown worked as a welder earning $12.00 per hour for First State Fabrication, LLC. First State Fabrication has a shop in Seaford, Delaware. First State Fabrication does fabrication work at job sites throughout the surrounding area. First State Fabrication's employees are not compensated for their commuting expenses. First State Fabrication's employees are told this when they are hired. Brown was told this when he was hired. Brown signed a form titled "Terms and Conditions of Employment" when he was hired. One section is titled "Travel Time and Expenses."

This section states, in part, the following:

> I will not be compensated for travel time from home-to-work. First State offers transportation to jobs as a benefit and convenience. It is not mandatory. Employees may drive their own vehicle (at their own expense) to jobsites.

First State Fabrication's employees typically start work at a job site at 7:00 a.m. First State Fabrication called Brown at home on Sunday, September 7, 2014. First State Fabrication told Brown to go to the shop at 4:30 a.m. the next day to drive a truck loaded with steel to a job site. Brown told First State Fabrication that he was not going to drive the truck to the job site unless he was going to get paid for doing so. First State Fabrication told Brown he would not get paid. Brown arrived at the shop the next day at 7:00 a.m. instead of 4:30 a.m. First State Fabrication fired Brown. The Claims Deputy, Appeals Referee, and Board all concluded that Brown was not entitled to unemployment benefits because he had been fired for just cause, reasoning that his refusal to drive First State Fabrication's truck loaded with steel from the shop to the job site for two and one-half hours without pay was an act of insubordination.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. On appeal from

a decision of the Board, this Court is limited to a determination of whether there is substantial evidence in the record sufficient to support the Board's findings, and that such findings are free from legal error.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The Board's findings are conclusive and will be affirmed if supported by "competent evidence having probative value."[3] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[4] It merely determines if the evidence is legally adequate to support the agency's factual findings.[5] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[6]

DISCUSSION

This Court's job in reviewing an appeal is to determine if the Board's decision

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[1] *Unemployment Ins. Appeals Board of the Dept. of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

[2] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. dism.*, 515 A.2d 397 (Del. 1986).

[3] *Geegan v. Unemployment Compensation Commission*, 76 A.2d 116, 117 (Del. Super. 1950).

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

[5] 29 *Del.C.* § 10142(d).

[6] *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

is based upon substantial evidence and free from legal error. According to 19 *Del.C.* § 3314(2), a claimant is not eligible for benefits when he or she is terminated from employment for "just cause." "Just cause" has been defined by this Court as a "wilful or wanton act in violation of either the employer's interest, or of the employee's duties, or of the employee's standard of conduct."[7] A wilful or wanton act requires the employee to be "conscious of his conduct or recklessly indifferent to its consequences."[8] An action of an employee showing dishonesty and untrustworthiness justifies a dismissal for just cause.[9] Insubordination may constitute just cause for termination. The Delaware Superior Court has defined insubordination as a willful or intentional disregard of the lawful and reasonable instructions of the employer.[10] Further, "the credibility of witnesses, the weight to be given their testimony, and the inferences to be drawn therefrom are for the Board's determination."[11] Hearsay is admissible in administrative hearings.[12]

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[7] *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. Super. 1967).

[8] *Coleman v. Department of Labor*, 288 A.2d 285, 288 (Del. Super. 1972).

[9] See *Barisa v. Charitable Research Foundation, Inc*., 287 A.2d 679 (Del. Super. 1972).

[10] *Scott v. Unemployment Insurance Appeal Board*, 1993 WL 390365, n. 2 (Del. Super. Sept. 22, 1993).

[11] *Behr v. Unemployment Insurance Appeal Board*, 1995 WL 109026, at *2 (Del. Super. Feb. 7, 1995).

[12] *Jordan v. Town of Milton*, 2012 WL 5494667 (Del. Super. Oct. 31, 2012).

I have concluded that the Board's decision is not supported by the applicable law or substantial evidence in the record. The Board did not understand First State Fabrication's policy on commuting. Brown, when he was hired, agreed that he would not be compensated "for travel time from home-to-work." First State Fabrication's policy goes on to state that while it offers transportation to jobs as a benefit and convenience, it is not mandatory. First State Fabrication's policy on this matter ends by stating that employees may drive their own vehicle to job sites at their own expense. The Board took this policy and concluded that since Brown agreed that he would not be compensated for commuting expenses from his home to a job site, that he should also not be compensated for going from his home to the shop and driving a truck loaded with steel for two and one-half hours to a job site. That is not what First State Fabrication's policy sets forth. Driving a truck loaded with steel from the shop for two and one-half hours to a job site is work, not commuting. First State Fabrication wanted Brown to work for two and one-half hours without pay. Brown was an hourly worker. Brown was supposed to get paid for the work that he did by the hour. There is a big difference between going from your home to a job site and going from your home to the shop and then driving your employer's truck loaded with steel for two and one-half hours to a job site. The former is commuting. The latter is working. Brown did not have to work without pay and it was not an act of

insubordination for him to refuse to work without pay. The Board's finding that First State Fabrication had "just cause" to terminate Brown for insubordination is not supported by First State Fabrication's commuting policy and the applicable law on "just cause" terminations.

CONCLUSION

The Unemployment Insurance Appeal Board's decision is **REVERSED.**

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

ESB/sal
oc: Prothonotary
cc: Unemployment Insurance Appeal Board