

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ROBBIN BEENE,	:	
	:	C.A. No. K15A-09-001 WLW
Appellant,	:	In and For Kent County
	:	
v.	:	
	:	
UNEMPLOYMENT INSURANCE	:	
APPEALS BOARD,	:	
	:	
Appellee.	:	

Submitted: December 28, 2015  
Decided: February 3, 2016

**ORDER**

Upon an Appeal from the Decision of the  
Unemployment Insurance Appeals Board.  
*Remanded.*

Robbin Beene, *pro se.*

Paige J. Schmittinger, Esquire of the Department of Justice, Wilmington, Delaware;  
attorney for the UIAB.

WITHAM, R.J.

Before the Court is Appellant/Claimant Robbin Beene's ("Beene") appeal from a decision of the Unemployment Insurance Appeals Board ("UIAB" or "Board") denying unemployment insurance benefits based on a determination that Beene did not meet the definition of an unemployed person. For the reasons set forth below, the decision of the Board is **REVERSED** and the case is remanded back to the Board for further proceedings consistent with this decision.

### **FACTS AND PROCEDURAL BACKGROUND**

Beene and her husband are owners of J & R Beene Inc., a hotel and package store business. On February 24, 2015, the business suffered extensive damage in a fire and a resulting interruption in revenue. Beene is the Vice President and Secretary of the corporation. She was also a full time employee of the business and was compensated with a salary of \$800 per week. Beene filed for unemployment benefits effective April 12, 2015. Because Beene was the owner of the business, the claim was referred to an appeals referee. A Referee Hearing was held on May 19, 2015. The referee determined that Beene is performing some work in support of the fire related insurance claim but is receiving no wages while awaiting proceeds from the settlement. The referee also determined that Beene will immediately begin the clean-up and rebuilding process upon receipt of the insurance proceeds.

Based on this evidence, the referee determined that Beene was performing some services in an attempt to facilitate the insurance claim for the business. The referee further determined that Beene would return to full time employment with the corporation upon receipt of the insurance proceeds. Based on this determination, the

referee found that Beene was not actively seeking work and that her service to the corporation continues. The referee therefore held that Beene was not an unemployed individual.

On May 29, 2015, Beene appealed the decision of the referee to the Board. A hearing was held before the Board on July 15, 2015. At this hearing, Beene submitted three years of tax returns into evidence. She testified that she is arranging all of the contractors to come help with the rebuilding, and is currently seeking other employment. The Board noted that unemployment occurs “in any week during which the individual performs no services with respect to which no wages payable to the individual.”<sup>1</sup> The Board then affirmed the referee’s finding that Beene performed and continues to perform services for J & R Beene, Inc. and is therefore ineligible for unemployment benefits.

On September 1, 2015, Beene filed an appeal with this Court. On November 4, 2015, Beene filed her opening brief, and on November 30, 2015, the Board notified this Court that it did not intend to file an answering brief.

### **STANDARD OF REVIEW**

This Court reviews decisions by the Board to determine whether they are supported by substantial evidence and free from legal error.<sup>2</sup> “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support

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<sup>1</sup> 10 *Del. C.* § 3302(17).

<sup>2</sup> *Mathis v. Del. River and Bay Auth.*, 2012 WL 5288757, at \*2 (Del. Super. Aug. 22, 2012).

a conclusion.”<sup>3</sup> This Court “does not weigh the evidence, determine questions of credibility or make its own factual findings.”<sup>4</sup> It merely decides “if the evidence is legally adequate to support the agency’s factual findings.”<sup>5</sup> Absent an error of law, the Board’s decision will not be disturbed where there is substantial evidence to support its conclusions.<sup>6</sup>

### DISCUSSION

The General Assembly has determined that the public good requires “the compulsory setting aside of an unemployment reserve to be used for the benefit of persons unemployed through no fault of their own.”<sup>7</sup> In Delaware, as in other jurisdictions, self-employment may act as a bar to these unemployment benefits.<sup>8</sup> “Once an individual engages in a self-employed business or practice on a full-time basis . . . the individual is no longer unemployed nor available for work, nor clearly, is that individual ‘actively seeking work’ other than the self-employment.”<sup>9</sup> This bar

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<sup>3</sup> *Bradfield v. Unemployment Ins. Appeal Bd.*, 2012 WL 5462844, at \*1 (Del. Super. Mar. 13, 2012) (quoting *Gorrell v. Div. of Vocational Rehab.*, 1996 WL 453356, at \*2 (Del. Super. July 31, 1996)).

<sup>4</sup> *Annand v. Div. of Unemployment Ins. Appeal Bd.*, 2011 WL 2698620, at \*1 (Del. Super. July 1, 2011) (quoting *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

<sup>5</sup> *Bradfield*, 2012 WL 5462844, at \*1 (quoting *McManus v. Christiana Serv. Co.*, 1997 WL 127953, at \*1 (Del. Super. Jan. 31, 1997)).

<sup>6</sup> *Annand*, 2011 WL 2698620, at \*1.

<sup>7</sup> 19 *Del. C.* § 3301.

<sup>8</sup> *Weeraratne v. Unemployment Ins. Appeal Bd.*, 1995 WL 840722, at \*2 (Del. Super. Sept. 6, 1995).

<sup>9</sup> *O’Brien v. Unemployment Ins. Appeals Bd.*, 1993 WL 603363, at \*3 (Del. Super. Oct. 20, 1993).

exists because the “General Assembly has not authorized unemployment benefits for the purpose of supporting the early stages of a new business.”<sup>10</sup> Thus, an application of the self-employment bar should focus on whether the claimant is working full-time for his own company.<sup>11</sup>

Whether a self-employed person is eligible for unemployment insurance benefits depends on the facts surrounding the unemployment. In *Jones v. Unemployment Insurance Appeals Board*, the claimant filed an unemployment claim because the business he and his wife had recently opened was operating at a loss.<sup>12</sup> The claimant testified that he devoted 30-50 hours per week to the new business and an equal amount of time conducting a job search via the internet.<sup>13</sup> The court noted that “even though public policy favors construing unemployment laws in favor of the unemployed claimant, . . . the General Assembly has not authorized unemployment benefits for the purpose of supporting the early stages of a new business.”<sup>14</sup> Because the claimant was working full time and thus not available to work, the court found he was not entitled to receive unemployment insurance benefits.<sup>15</sup>

In *Annand v. Division of Unemployment Insurance Appeals Board*, different

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<sup>10</sup> *Weeraratne*, 1995 WL 840722, at \*2.

<sup>11</sup> *See Annand*, 2011 WL 2698620, at \*2.

<sup>12</sup> *Jones v. Unemployment Ins. Appeals Bd.*, 2001 WL 755379, at \*1 (Del. Super. June 11, 2001).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (quoting *Weeraratne*, 1995 WL 840722, at \*2).

<sup>15</sup> *Id.*

circumstances led the court to remand the case after the claimant was denied benefits because of his self-employed status.<sup>16</sup> While working for a surveying company, the claimant started his own surveying company in order to supplement his income. An economic downturn reduced the claimant's hours with his employer as well as with his own company. The claimant was denied unemployment insurance benefits after the board determined he was still providing *some* services for his employer and his own company and thus was not unemployed under the definition found in 19 *Del. C.* § 3302(17).<sup>17</sup> On appeal, the court determined the appeals board relied only on the first part of the statute stating “[u]nemployment’ exists and an individual is ‘unemployed’ in any week during which the individual performs no services and with respect to which no wages are payable to the individual. . . .”<sup>18</sup> A complete reading of the section shows that unemployment benefits are also payable “in any week of less than full-time work if the wages payable to the individual with respect to such

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<sup>16</sup> *Annand*, 2011 WL 2698620, at \*1.

<sup>17</sup> 19 *Del. C.* § 3302(17) states:

“Unemployment” exists and an individual is “unemployed” in any week during which the individual performs no services and with respect to which no wages are payable to the individual, or in any week of less than full-time work if the wages payable to the individual with respect to such week are less than the individual's weekly benefit amount plus whichever is the greater of \$10 or 50% of the individual's weekly benefit amount. The Department shall prescribe regulations applicable to unemployed individuals making such distinctions in the procedures as to total unemployment, part-total unemployment, partial unemployment of individuals attached to their regular jobs and other forms of short-time work as the Department deems necessary.

<sup>18</sup> *Id.*

week are less than the individual's weekly benefit amount plus whichever is the greater of \$10 or 50% of the individual's weekly benefit amount."<sup>19</sup> Because the statute allows an individual to collect unemployment benefits when he is working fewer hours than he normally works, the appeals board decision was reversed and the case remanded.<sup>20</sup>

Beene's business was established. Unlike the claimant in *Jones*, she is not attempting to use unemployment insurance benefits to support a new business, and nothing in the record indicates she is working 30-50 hours per week. Beene's situation is more analogous to that of the claimant in *Annand*. External forces due to no fault of the Claimant have caused a reduction in hours. At the moment, she is attempting to process an insurance claim related to the fire, and once the claim is settled, she will be spending time organizing contractors to complete a rebuilding of the business. No inquiry was made into how many hours per week Beene is currently working or will need to work in the coming months for the business. She comes to the Board seeking the use of funds that are set aside "to be used for the benefit of persons unemployed through no fault of their own."

The Board erred in finding that Beene was not eligible for unemployment benefits because she continues to perform services for J & R Beene, Inc. The Board found that Beene is currently seeking other employment, and made no finding that Beene was devoting full time effort to the corporation. Although the referee

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<sup>19</sup> *Id.*

<sup>20</sup> *Annand*, 2011 WL 2698620, at \*2.

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determined that Beene would return to full time employment once she received insurance proceeds, that determination was not supported by substantial evidence. At no point does Beene state the amount of time she will need to spend coordinating the contractors who will rebuild the business. The proper inquiry requires the Board to determine whether Beene qualifies under the latter language of section 3302(17) which states a person is unemployed “in any week of less than full-time work if the wages payable to the individual with respect to such week are less than the individual’s weekly benefit amount plus whichever is the greater of \$10 or 50% of the individual’s weekly benefit amount.”

### **CONCLUSION**

The decision of the Unemployment Insurance Appeal Board is **REVERSED** and the case is remanded to the Board for further proceedings on Beene’s claim for unemployment benefits consistent with this decision.

IT IS SO ORDERED.

/s/ William L. Witham, Jr. \_\_\_\_\_  
Resident Judge

WLW/dmh