SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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RE: *James Short v. Mountaire Farms and Unemployment Insurance Appeal Bd.*, C.A. No. S13A-04-001 RFS

Date Submitted: September 5, 2013
Date Decided: September 25, 2013

Dear Counsel:[1]

For the reasons discussed below, the Board's decision is **REVERSED** and **REMANDED** to make findings consistent with this opinion.

Facts

James Short began work as a mechanical operator for Mountaire Farms on November 25, 2011. Short's employment required him to complete a medical questionnaire. On this questionnaire appeared the questions "[h]ave you ever had any

[1] Mountaire did not participate in briefing this matter.

type of . . . [w]rist injury or sprains or surgery" and "[h]ave you ever had any type of hand problems[]?"[2] Short answered "NO" to both.[3] Also, on the questionnaire, an attestation of trust appeared above Short's signature:

> I understand that all questions must be answered and all questions must be answered and all positive responses must be explained in specific detail: failure to do so will be considered an omission. I understand that omissions as well as false or misleading information give on my Medical History Questionnaire may result in discharge whenever discovered.[4]

Mountaire's employment policy prohibited reporting false information.

On July 31, 2012, Short was involved in a work-related accident, requiring an X-ray on his left hand. On the X-ray report dated August 20, 2012, a notation appeared that the X-ray's images were "compared with the study of 11/11/2010."[5] Mountaire inquired about the notation and requested a copy of the 2010 report. The 2010 X-ray had been performed because Short had experienced joint pain. The report of that X-ray stated that everything appeared normal, except for a "navicular cyst."[6] On the medical questionnaire, Short made no indication of any prior issues relating

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[2] Record at 73.

[3] *Id.*

[4] *Id.* at 74.

[5] *Id.* at 21.

[6] *Id.* at 20.

to his hand. According to the Appeals Referee, Short's denial of having any hand-related issues was countered by his medical provider. Mountaire terminated Short on August 20, 2012.

When Short applied for unemployment benefits, the Claims Deputy found just cause for Short's termination, barring him from receiving any benefits. Short appealed this decision to the Appeals Referee. He testified that he did not remember the 2010 incident when he applied to Mountaire because "the questionnaire focused on injuries, like broken bones," and removal of a cyst two years prior did not warrant notation.[7] A Mountaire Human Resources representative testified before the Referee that Short "was discharged for reporting false information on his medical history questionnaire."[8] A medical care supervisor also testified for Mountaire, stating that Short's 2012 X-ray noted a 2010 X-ray, and that Mountaire, while considering a worker's compensation claim, verified that the 2010 X-ray had been taken and that Short never informed Mountaire about the X-ray. The Referee affirmed the Claims Deputy.

Short appealed the Referee's decision to the Unemployment Insurance Appeal Board. Short testified that his only hand-related issue in 2010 was a cyst that

[7] *Id.* at 68.

[8] Record at 68.

disappeared on its own without surgery. He "did not consider a cyst to be something he had to report."[9] When asked for documentation establishing lack of surgery, Short stated that the doctor for the 2010 incident was "no longer in practice."[10] The Mountaire Human Resources representative who had testified before the Referee testified before the Board that, allegedly, the hospital where Short received surgery in relation to the 2010 X-ray forwarded Mountaire the necessary documentation.

The Board affirmed the Referee's decision. Putting aside the surgery issue, the Board found that in 2010, Short "clearly had problems," which ultimately led him to receive an X-ray.[11] From its questionnaire, Mountaire clearly wanted to know about any hand-related "problems" Short experienced in the past. The Board validated Mountaire in considering Short's omission to be a violation of Mountaire's policies, thus giving Mountaire reasonable grounds to terminate Short's employment.

Standard of Review

When reviewing appeals from the Board, this Court only will examine the record upon which the Board relied in making its decision.[12] This Court only

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[9] *Id.*

[10] *Id.* at 100.
[11] *Id.* at 102.

[12] *Burgos v. Perdue Farms, Inc.*, 2011 WL 1487076, at *2 (Del. Super. Apr. 19, 2011).

determines whether substantial evidence supported the Board's decision, and whether the Board's decision lacked legal error.[13] The requisite degree of evidence is only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[14] Evaluating the evidence, deciding credibility issues, and determining factual questions are not within the Court's purview.[15] Ultimately, the Court only concludes whether a sufficient basis supports the Board's decision.[16]

Discussion

Under 19 *Del. C.* 3314, "[a]n individual shall be disqualified for benefits . . . [f]or the week in which the individual was discharged from the individual's work for just cause in connection with the individual's work . . . ."[17] "[T]he term 'just cause' refers to a wilful or wanton act in violation of either the employer's interest, or of the employee's duties, or of the employee's expected standard of conduct."[18] A "wanton" act encompasses recklessness, whereas a "wilful" act includes an intentional

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] 19 *Del. C.* § 3314(2).

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

element.[19] If an employer argues that an employee's violation of a workplace policy constitutes wilful or wanton misconduct, the Court analyzes the policy itself, and the nature of the employee's knowledge of the policy.[20] In the context of falsifying an employment application, an application that "fully explain[s] the consequences of not being truthful," of which the employee is aware satisfies the question of whether a policy existed and that the employee knew of it.[21] Lastly, if the Board decides whether an employer had reasonable grounds for terminating an employee, it is the employer's burden to establish just cause for termination.[22]

Short makes three principal arguments on appeal. First, he claims the Board erred by not appreciating the difference between the "hand" and the "wrist," chastising Short for not reporting any problems with his hand, when in actuality, any prior medical issue related to his wrist. Mountaire cannot argue that the difference between the two body parts is irrelevant because its own questionnaire asks one question specific to the hand, and another specific to the wrist. Additionally, any

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[19] *Bressi v. Eckerds Corp.*, 1994 WL 555471, at *2 ("'Wanton[]' . . . is heedless, malicious, or reckless but does not require actual intent to cause harm, while 'wilful' implies actual, specific, or evil intent" (citations omitted)).

[20] *Burgos*, 2011 WL 1487076, at *2 (citations omitted).

[21] *Id.*

[22] *Id.* (citations omitted).

"ambiguity must be construed against [Mountaire] as the drafter of the document."[23] Second, the Board did not possess "substantial evidence" in finding that he ever suffered any injury or experienced any problems with his hand or wrist. The only evidence the Board possessed was Short's testimony that he sought treatment in 2010 for a cyst on the wrist, an issue not listed on Mountaire's questionnaire, as well as a hearsay statement from the hospital that Short received surgery.[24] Third, none of Short's actions reached the level of seriousness required to be considered "wilful or wanton misconduct."[25]

Regarding Short's first argument, Mountaire's questionnaire asked first whether Short had ever experienced wrist injury, sprains, or surgery, and second whether Short had ever experienced any hand problems. Short responded *truthfully* to both of these questions because neither question asked for disclosure of the presence of a cyst on his left wrist. At first blush, Short's argument seems to be nothing more than an attempt to argue the significance of technicalities. On further

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[23] Opening Br. at 5 (citing *Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624, 630 (Del. 2003)).

[24] "The law does not permit the Board to rely solely on hearsay evidence without some other competent evidence to support its finding." *Id.* at 6 (citing *Geegan v. Unemployment Compensation Comm'n of DE*, 76 A.2d 116 (Del Super. 1950).

[25] *Id.* (citing and quoting, *inter alia*, *Evans v. Tansley & Unemployment Ins. Appeal Bd.*, 540 A.2d 1088 (Del. 1988)).

review, however, there does seem to be precedent that responses to a questionnaire on an employment application need only be limited to the actual words of the questions asked. For example, in *Bressi v. Eckerds Corp.*, an employee responded negatively when asked on her application if she had ever "been convicted of a felony, embezzlement or shoplifting?"[26] In fact, the employee had two out-of-state felony convictions on her record, and, as the Board found, a "knife charge" conviction.[27] These omissions caused the Board to deny her unemployment insurance benefits.[28] This Court reversed and remanded that decision because "*the record is unclear whether the knife charge referred to above was a misdemeanor or a felony*" and because the Board did not determine whether the employee wilfully omitted her out-of-state felony convictions.[29] Thus, irrespective of whether the employee's omission about the knife charge was wilful or wanton, the Court seemed to find relevant, at least in part, the technical distinction between a felony and a misdemeanor.

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[26] *Bressi v. Eckerds Corp.*, 1994 WL 555471, at *1 (Del. Super. Sept. 19, 1994).

[27] *Id.* (internal quotation marks omitted).

[28] *Id.*

[29] *Id.* at 2 (emphasis added).

Therefore, the technical distinction between the hand and the wrist should be recognized.[30] The Board incorrectly mixed the fact "that [Short] sought medical treatment for an issue with his hand and/or wrist in November 2010" with the conclusion that "[w]hether or not [Short] had surgery on his hand, he clearly had problems."[31] The questionnaire specifically asked Short if he ever experienced wrist injuries, sprains, or surgery, *or* whether he experienced any hand issues. Short cannot be punished for omitting something for which the questionnaire did not ask.

The question then becomes whether Short omitted something for which the questionnaire *did* ask. Specifically, since the only past medical issue involved in this case was a cyst on the wrist, it must be determined whether Short ever experienced a wrist injury, sprain, or surgery. The record does not sufficiently establish that the Board made such determinations. Therefore, this case will be remanded to the Board to make the appropriate findings.

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[30] It is true that this Court will not recognize arguments not presented to the Board. *See, e.g.*, *Weathersby v. Unemployment Ins. Appeal Bd.*, 1995 WL 465326, at *4 (Del. Super. June 29 1995) (citing, *inter alia*, *Nabb v. Haveg Indus., Inc.*, 266 A.2d 879, 880 (1970)) (explaining that, when hearing an appeal from an administrative agency's decision, this Court does not consider arguments that were not presented to that agency). The distinction between the hand and the wrist does not qualify as a procedurally barred argument, however, because it is an argument pointing out a flaw in the Board's ultimate reasoning, and therefore could not have been raised before the publication of the Board's decision.

[31] Record at 102.

Without attempting to decide anything for the Board, the Court makes a few remarks for guidance purposes only. First, "injury" can be defined as "hurt, damage, or loss sustained."[32] Thus, an "injury" can result from a naturally-occurring event. Second, as to whether Short ever received surgery on his wrist, Short correctly states in his second argument that the Board cannot rely solely on hearsay evidence in making that determination.[33] Putting aside hearsay evidence, however, the Board, as the trier of fact, is free to make a credibility determination based on Short's testimony that he did not have surgery.[34]

In response to Short's third argument that his conduct never reached the requisite level of wilful or wanton, while the Board is free to find Short's misconduct,

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[32] *Merriam-Webster's Collegiate Dictionary* 602 (10th ed. 1998).

[33] *See Baker v. Hosp. Billing & Collection Serv., LTD.*, 2003 WL 21538020, at *3 (Del. Super. Apr. 30, 2003) (citations omitted) ("Administrative boards are not constrained by the rigid evidentiary rules which govern jury trials, but should hear all evidence which could conceivably throw light on the controversy. Therefore, an informal tribunal, such as the UIAB, is not bound by the Delaware Rules of Evidence, but it may follow those rules in its discretion so long as a party is not unduly prejudiced. Hearsay evidence is generally admissible at administrative hearings for certain purposes. However, the admission of hearsay evidence does not determine the probative effect of the hearsay and the findings of an administrative body cannot rest alone on hearsay evidence."); *see also Taylor v. Unemployment Ins. Appeal Bd. of Dep't of Labor of State*, 1980 WL 317951, at *4 (Del. Super. Sept. 22, 1980) (citing *Geegan v. Unemployment Compensation Commission*, 76 A.2d 116 (Del. Super. 1950), to which Short cites, for the propositions that that "the Board [can] not rely *solely* on legally inadmissible evidence as a basis for its findings" and "that the decision must rest on substantial *competent* evidence." (emphasis in original)).

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

once it is labeled as such, wilful or wanton, the Board should keep in mind the difference between misconduct and inadvertent error. Clearly, deliberate untruthfulness constitutes wilful or wanton misconduct.[35] But, wilful or wanton misconduct differs from an inadvertent mistake.[36] Inadvertent error encompasses the ideas of good faith blunders or negligent acts.[37] The Board may conclude that Short's omission constituted inadvertent error, rather than wilful or wanton misconduct.

Based on the foregoing, this case is **REVERSED** and **REMANDED** to the Board to make findings consistent with this opinion.

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[35] *See, e.g.*, *Burgos v. Perdue Farms, Inc.*, 2011 WL 1487076, at *2 (Del. Super. Apr. 19, 2011) ("[I]t is well-settled Delaware law that when an employee wilfully makes false statements on an employment application, just cause for discharge is established."); *Smith v. Franklin*, 2004 WL 2830891, at *4 (Apr. 6, 2004) (citation omitted) ("An employer has a legitimate interest in having accurate information from prospective employees so as to make an informed hiring decision. It is a violation of that interest for a job application deliberately to furnish false information. Accordingly, it is held that a false statement on an employment application, wilfully made, can constitute just cause for discharge under 19 *Del. C.* § 3315(2).").

[36] *Cross v. Unemployment Ins. Appeal Bd.*, 1985 WL 188972, at *1 (Del. Super. Feb. 22, 1985) (The general rule seems to be that a false statement in an employment application is treated like any other kind of misconduct: if the false statement was made wilfully, it constitutes just cause for discharge, but if it was made inadvertently, it does not." (citing 23 WLR4th 1272 (1983)).

[37] *Abex*, 235 A.2d at 274 ("From th[e] evidence the [Board], at best, could have found that . . . [Employee] made a good faith but erroneous interpretation of the contract provision containing her instructions. It could also have found her error to be negligent, and caused concurrently by . . . [Employer's] negligent failure to correct . . . [Employee's] misapprehensions more affirmatively. Either view of the evidence would have supported a finding that . . . [Employee] was discharged for inadvertent error.").

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary
Mountaire Farms, and Unemployment Insurance Appeal Board