

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

| | | |
|------------------------|---|---------------------------|
| TISHUNDA FENNELL |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | C.A. No.: N13A-06-002 FSS |
| |) | |
| UNEMPLOYMENT INSURANCE |) | APPEAL |
| APPEALS BOARD |) | |
| |) | |
| Appellee. |) | |

Submitted: July 10, 2014
Decided: August 27, 2014

ORDER

Upon Appeal from the Unemployment Insurance Appeals Board – AFFIRMED

1. On January 5, 2012, a claims deputy determined Appellant had received an overpayment of benefits. Claimant had ten days to file an appeal, but did not do so until April 1, 2013, claiming she had just received notice of the determination. The appeals referee found the appeal untimely, and the Board affirmed. Appellant now argues she was entitled to all benefits received and her appeal should have been accepted because the original determination was mailed to a former address and never received.

2. Appellant received unemployment benefits before returning to work on March 28, 2011. On January 5, 2012, a claims deputy found Appellant had been overpaid \$1,683.00 after failing to “actively engage in a systematic and sustained effort to obtain work” for nine weeks. The determination became final January 15, 2012.

3. The Department of Labor mailed the determination to Appellant’s last address of record: 131 Scarborough Park Drive, Apartment 5, Wilmington, Delaware 19805. On July 29, 2011, however, Appellant had moved to Newark, Delaware. Appellant testified to the Board that after she returned to work and notified the state, she believed her obligation to the Department of Labor was finished, but admits she never updated her address. Appellant asserts she filed a change of address with the local post office, but never received the determination.

4. Appellant testified she first found out about the overpayment determination in March 2013, when her state taxes were intercepted. After contacting the Department of Labor about the taxes and learning of the determination, she immediately filed her appeal on April 1, 2013. It appears, however, the original decision, allegedly sent to the wrong address, was not returned by the post office, and the record before the Board does not show why it would not have been delivered or forwarded.

5. On June 18, 2014, the court asked the state to supplement the record regarding how Claimant was put on notice that an overpayment determination was under consideration. The Department of Labor replied July 10, 2014, essentially stating “there was no record of any advance notice being given to Ms. Fennell.” The reply also notes, however, that the 1099 for Claimant’s 2011 unemployment benefits was sent to the same address of record as the determination. The decision here does not turn on the supplementation.

6. Appellant argues the appeal should have been accepted as she would have timely protested had she received the determination, or were she aware of the obligation to update her records with the Department of Labor. Appellant also argues substantively against the overpayment determination because she had applied for three different positions, with different responsibilities and qualifications, albeit within one organization.

7. Review of the Board’s decision is limited to whether the Board’s findings were supported by substantial evidence and whether the decision is free from legal error.¹ The court will not weigh evidence, determine questions of credibility, or make its own factual findings and conclusions.²

¹ *Thompson v. Christina Care Health Sys.*, 25 A.3d 778, 781–82 (Del.2011).

² *Id.* at 782.

8. As an initial matter, this appeal, as explained below, is limited to the timeliness issue. Appellant’s substantive claims regarding overpayment are not in the record and cannot be addressed.³ The court is only considering whether the Board abused its discretion in refusing to hear Appellant’s untimely appeal. While the Board can *sua sponte* hear an untimely appeal, it has broad discretion.⁴

9. The law regarding the jurisdictional appeal time period is well settled, and it can be hard on litigants. The deputy’s decision is final ten calendar days after mailing,⁵ unless the mailing fails to reach a party “because of some mistake made by employees of the Department of Labor.”⁶ Mail properly addressed with proper postage is presumed to have been received.⁷ The court has repeatedly affirmed the Board’s decisions to deny untimely appeals where the claimant failed to update her address,⁸ and even where the mail was returned to the Department of Labor.⁹

10. The Supreme Court recently reaffirmed the law. In *Han v. Unemployment Insurance Appeals Board*,¹⁰ the Board’s decision not to hear an

³ *Cassidy v. Liberty Staffing*, 2011 WL 7452778 (Del. Super. 2011).

⁴ *Funk*, 591 A.2d at 225.

⁵ 19 Del.C. § 3318(b).

⁶ *Funk v. Unemployment Insurance Appeal Board*, 591 A.2d 222, 224 (1991).

⁷ *Crawford v. Park Plaza Condo. Assoc.*, 1994 WL 380305 (Del. Super. 1994).

⁸ *E.g.*, *Crawford*, *supra* note 6, 1994 WL 380305.

⁹ *Venturini v. UIAB*, 2011 WL 3585605 (Del. Super. 2011).

¹⁰ *Han v. Unemployment Ins. Appeal Bd.*, 93 A.3d 653 (Del. 2014) (TABLE).

untimely appeal was affirmed where, on February 25, 2013, a Department of Labor employee told the claimant to expect a determination in two to three weeks, and when the claimant returned on March 20, 2013, he was told the determination had been mailed March 8, 2013 and the appeal window had closed two days earlier. Even in that circumstance, the Board's decision not to review the determination was not an abuse of discretion.¹¹ The Board has broad discretion, which "is exercised rarely and only in cases where there has been administrative error by the Department of Labor that has deprived the claimant of the ability to file a timely appeal or where the interests of justice would be served."¹²

11. The record here provides substantial evidence supporting the Board's finding that Appellant's failure to timely file her appeal was not attributable to the Department of Labor. Rather, it was Appellant's failure to update her address that caused any delay in receiving the determination.

12. While the record, as it stands, suggests Appellant was not involved in the claims deputy proceeding and she may not have been aware of the "determination," Appellant does not deny she was aware of the hearing or the subsequent, inevitable determination. Further, even if she had denied actual

¹¹ *Id.*

¹² *Id.*

knowledge, the law is clear.¹³ With the Board’s finding in mind and no strong counterpoints, the court cannot find that the Board abused its discretion when it decided not to relax its filing deadline. The court suggests, however, the Board consider adding a sentence to the award of benefits letter, alerting benefit recipients of their duty to update their address in the event future notices are necessary.

For the above reasons, the Unemployment Insurance Appeals Board’s decision is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

CC: Prothonotary
Michael P. Freebury, Esquire
R. Stokes Nolte, Esquire

¹³ *Slater v. J.C. Penny Inc.*, 2012 WL 2905303 (Del. Super. 2012) (finding no abuse of discretion even where appellant claimed no “knowledge that a decision was rendered”).