

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

RODNEY SQUARE BUILDING	)	
RESTORATIONS, INC.,	)	
	)	
Employer Below-Appellant,	)	
	)	C.A. No. 07A-07-007 PLA
v.	)	
	)	
DUANE K. NOEL,	)	
	)	
Claimant Below-Appellee,	)	
	)	
and	)	
	)	
UNEMPLOYMENT INSURANCE	)	
APPEAL BOARD,	)	
	)	
Appellee.	)	

**ON APPEAL FROM THE
UNEMPLOYMENT INSURANCE APPEAL BOARD
REVERSED AND REMANDED**

Submitted: June 5, 2008
Decided: July 22, 2008

Peter M. Sweeney, Esquire, GORDON, FOURNARIS, &
MAMMARELLA, P.A., Wilmington, Delaware, Attorney for Employer
Below-Appellant.

Duane K. Noel, *pro se*.

Mary Page Bailey, Esquire, and Thomas A. Ellis, Esquire, STATE OF
DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware,
Attorney for Unemployment Insurance Appeal Board.

ABLEMAN, JUDGE

I. Introduction

Employer Rodney Square Building Restorations, Inc. (“RSBR”) appeals a decision by the Unemployment Insurance Appeal Board (the “Board”) in favor of Claimant Duane K. Noel (“Noel”), holding, *inter alia*, that RSBR is barred from contesting Noel’s eligibility for benefits because it failed to timely return a separation notice pursuant to 19 *Del. C.* § 3317(b) (“Section 3317(b”). The Board determined that the Department of Labor (“DOL”) properly mailed RSBR the UC-119 separation notice (hereafter the “notice” or a “UC-119”), thereby affording RSBR the opportunity to timely respond, and it held that RSBR did not establish good cause for its untimely response. After reviewing the record, the Court determines that the Board mischaracterized the evidence upon which its good cause determination was based. Furthermore, the Court finds that RSBR had good cause for its delayed response and is therefore not barred from contesting Noel’s eligibility to receive unemployment benefits. For reasons set forth hereafter, the decision of the Board is **REVERSED AND REMANDED**.

II. Statement of Facts

Noel was employed as a full-time, salaried operations manager at RSBR for roughly five years, until October 2006,¹ when he was discharged

¹ Docket 4, at 28 (Decision of Appeals Referee (Jan. 31, 2007)).

by RSBR because of his declining job performance as well as an argument he had with RSBR's owner, Gabriel Fieni ("Fieni"), in front of a client.² Noel acknowledged his mistakes, and after asking Fieni to reinstate his job, was given the opportunity to resume work part-time and on an hourly basis.³ Noel testified that he accepted Fieni's new terms under the assumption that he would be allowed to "bank his hours."⁴ Noel returned to RSBR the following Monday for a few hours but failed to return to work for the remainder of the week.⁵ When he learned that he would not be permitted to bank his hours, Noel informed Fieni that this arrangement was unacceptable to him. He then resigned on or about October 31, 2006.⁶

Noel filed a claim for unemployment benefits with the DOL on November 12, 2006, claiming he was terminated without just cause.⁷ The

² *Id.*

³ *Id.*

⁴ *Id.* See also Docket 11, at A71:1-8 (App. to Employer-Below Appellant's Opening Br.). Noel used the term "banking these hours" to mean that he would work for RSBR but would not be paid until a court dispute with his ex-wife could be resolved. In an apparent effort to defraud the Court, Noel stated in his testimony before the Appeals Referee in January 2007, that "[i]t's for future pay so that once I resolve the issue with my wife's alimony I won't be paying her" Docket 11, at A71: 6-8.

⁵ Docket 4, at 28.

⁶ *Id.* See also Docket 11, at A72:16-21.

⁷ Docket 4, at 1.

DOL followed its standard procedure, sending RSBK a UC-119 separation notice on November 16, 2006. At a hearing before the Appeals Referee in May 2007, the Claims Deputy stated twice in her sworn testimony that the DOL mailed the separation information to RSBK on November 16, 2006.⁸ The notice, dated November 16, 2006, indicates that a response was due by November 23, 2006, and bears the correct address of RSBK, as confirmed by Fieni during the hearing.⁹ Because of the Thanksgiving holiday, RSBK's response to the notice was due no later than Monday, November 27, 2006.¹⁰ Fieni testified at both the May 2007 hearing before the Appeals Referee and the June 2007 hearing before the Board that he did not receive the notice until around 5:30 PM on November 28, 2006.¹¹ Fieni also testified that the next day, November 29, he delivered the notice to his administrative assistant, who works out of her home in Maryland.¹² The assistant completed the notice and faxed it to the DOL at 11:35 AM on November 29,

⁸ Docket 11, at A85:13, A89:13-14.

⁹ Docket 4, at 6; *see also* Docket 11, at A92:15-19.

¹⁰ Docket 4, at 37. The notice was due back to the DOL on Thursday, November 23, 2006. Because all State offices were closed on Thursday, November 23 and Friday, November 24 in observance of the Thanksgiving holiday, the Board concluded that the effective due date of the notice was Monday, November 27, 2006.

¹¹ Docket 11, at A89:21-A90:1; Docket 11, at A115:1-6.

¹² *Id.* at A90:5-9; *id.* at A115:13-A118:5.

2006.¹³ Because the owner did not retain the original envelope, however, the only physical evidence introduced to support or refute the testimony regarding timely mailing was the copy of the faxed response from RSBR.

The Claims Deputy initially ruled in favor of Noel, finding that he was discharged without cause.¹⁴ RSBR timely appealed. After a hearing before the Appeals Referee on January 18, 2007,¹⁵ the Referee reversed the decision of the Claims Deputy and determined that Noel voluntarily quit his job without good cause and was therefore disqualified from receiving benefits.¹⁶ Noel then appealed that decision. The Board, noticing for the first time that RSBR returned the separation information late, concluded that a determination on the issue of whether RSBR had good cause for the late filing needed to be made before addressing Noel's eligibility for benefits.

¹³ Docket 4, at 6.

¹⁴ *Id.* at 7 (Decision of Claims Deputy (December 11, 2006)).

¹⁵ *Id.* at 27 (Decision of Appeals Referee (January 18, 2007)). As will be explained *infra*, RSBR appeared before the Appeals Referee on two separate occasions: January 18, 2007 and May 3, 2007. Although the captions of the two Appeals Referee decisions bear the appropriate dates, it appears that the decisions have been switched in the record. Therefore, this court will cite the first Referee decision, as it appears in the record, as the "May 2007" decision, and the second Referee decision as the "January 2007" decision.

¹⁶ *Id.* at 30.

The Board remanded the matter to the Claims Deputy to determine whether there was good cause for RSBR's untimely response.¹⁷

On remand, the Claims Deputy determined that RSBR did not have good cause for returning the notice late because it could not substantiate its claim of delay by the Postal Service.¹⁸ The Claims Deputy therefore concluded that Noel should receive benefits if otherwise eligible.¹⁹ RSBR timely appealed, and a hearing was held before the Appeals Referee on May 3, 2007.²⁰ The Referee reversed the decision of the Claims Deputy and concluded that RSBR "returned the form UC 119 within the required seven-day time period," and was therefore not barred from contesting Noel's claim.²¹ In reaching that conclusion, the Referee took official notice of the fact that all state offices were closed for the Thanksgiving holiday on November 23 and 24, 2006.²²

¹⁷ Docket 4, at 18 (Decision of Unemployment Insurance Appeal Board (Feb. 21, 2007)).

¹⁸ *Id.* at 20 (Determination of Claims Deputy (April 2, 2007)).

¹⁹ *Id.*

²⁰ *Id.* at 12 (Decision of Appeals Referee (May 3, 2007)).

²¹ *Id.* at 13.

²² Docket 4, at 13.

Noel timely appealed and a second hearing was held before the Board on June 6, 2007.²³ The Board reversed the decision of the Appeals Referee, barring RSBR from contesting Noel's eligibility to receive benefits. The Board first noted that RSBR's failure to retain the envelope bearing a postmark left the Board with "no choice but to assume that the mailing was timely."²⁴ It then stated that RSBR's response was still not within the seven-day period required by statute, even if a four-day grace period is considered.²⁵ Finally, the Board concluded that "[t]he employer, by his own admission, received the form on November 24th and did nothing with it for four days. He has shown no good cause for his total lack of action."²⁶ The Board therefore held that RSBR did not have good cause for its late filing.

III. Arguments of the Parties

RSBR argues that the decision of the Board is not supported by substantial evidence and is erroneous as a matter of law. First, RSBR contends that the Board's conclusion that it did not demonstrate good cause was premised upon facts not in the record. In support of this argument,

²³ *Id.* at 36 (Decision of Unemployment Insurance Appeal Board (June 28, 2007)).

²⁴ Docket 4, at 37.

²⁵ *Id.* at 38.

²⁶ *Id.*

RSBR points to the discrepancy between the sworn testimony of Fieni, who stated on multiple occasions that he received the notice on November 28, 2006²⁷ and the Board's June 2007 decision, wherein it finds that Fieni admitted receiving the notice on November 24, 2006.²⁸

Second, RSBR argues that the Board misapplied the decision in *Lively v. Dover Wipes Co.*²⁹ because the *Lively* Court addressed only the presumption that a mailing was received, rather than the question of when it was received. Thus, RSBR argues that the Board inappropriately cited *Lively* to establish that RSBR timely received the notice.³⁰

Third, RSBR disputes the Board's conclusion that it failed to demonstrate good cause. RSBR argues that the notice was returned to the DOL within eighteen hours of receipt and that its prompt filing after receiving notice fulfills the spirit of the statutory requirement.³¹ Further, RSBR has offered evidence that the DOL has postmarked two litigation documents for this appeal after the dates contained on the documents.³²

²⁷ See Docket 11, at A89:17-A90:9; see also Docket 11, at A114:16-A115:12.

²⁸ Docket 10, at 11-12.

²⁹ 2003 Del. Super. LEXIS 193 (Del. Super. Ct. March 16, 2003).

³⁰ Docket 10, at 15.

³¹ *Id.* at 16-17.

³² *Id.* at 17. See also Docket 11, A120-A122.

RSBR argues that, under Delaware Rule of Evidence 201(b),³³ this Court should take judicial notice of these delayed mailings as proof of a pattern of late mailing by the DOL.³⁴

In response, Noel argues that Fieni's repeated testimony that he received the notice on November 28, 2006 is not sufficient to prove actual receipt on that date without any supporting physical evidence, such as the original envelope.³⁵ Noel further submits that the Board correctly applied *Lively* to support the premise that a correctly addressed and posted mailing was timely received.³⁶ Noel also suggests that under *Lively* good cause requires a showing of "verifiable 'UIAB error.'"³⁷ With respect to the construction of Section 3317(b), Noel contends that RSBR's interpretation is a misstatement of the law and that the statute specifically grants the DOL the authority to determine good cause.³⁸ Finally, Noel argues that the date RSBR actually received the notice could have been earlier than the date

³³ D.R.E. 201(b).

³⁴ Docket 10, at 17.

³⁵ Docket 12, at 8.

³⁶ *Id.* at 9.

³⁷ *Id.*

³⁸ *Id.* at 9-10.

Fieni became aware of the notice.³⁹ In support of this argument, Noel relies on his testimony about the slow and indirect process of mail sorting at RSBR.⁴⁰

In its reply brief, RSBR suggests that a strict interpretation of Section 3317(b) imposes too harsh a penalty on employers who receive the separation notice after the response date because it deprives them of any opportunity to contest a former employee's claim.⁴¹ RSBR argues that such an unjust result is magnified in this instance where the Appeals Referee initially determined that Noel should be ineligible for benefits because he voluntarily left his employment without good cause.⁴² Lastly, RSBR asserts that Noel's argument regarding the procedure for mail processing at RSBR does not support an inference that RSBR may have received the notice before November 28, 2006, because Fieni expressly testified that the notice was received on November 28, 2006.⁴³

³⁹ Docket 12, at 11.

⁴⁰ See Docket 11, at A100:21-A101:16.

⁴¹ Docket 13, at 3.

⁴² *Id.*

⁴³ *Id.* at 4 (citing Docket 12, at A111:14-17.).

IV. Standard of Review

In reviewing the decision of the Board, this Court is limited to a consideration of the record.⁴⁴ The Court must determine only whether the ruling is supported by substantial evidence and free from error of law.⁴⁵ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁴⁶ Substantial evidence is “more than a scintilla but less than preponderance”⁴⁷ This Court will not make its own determination of credibility, nor will it make factual findings.⁴⁸

Determinations of good cause are questions of law within the discretion of the DOL and are therefore subject to review.⁴⁹ A discretionary decision of the Board will be upheld absent an abuse of that discretion.⁵⁰ Only where the record clearly indicates that the agency’s decision was based

⁴⁴ *Lively*, 2003 Del. Super. LEXIS 193 at *3 (citing *Hubbard v. Unemployment Ins. Appeal Bd.*, 352 A.2d 761 (Del. Super. Ct. 1976)).

⁴⁵ *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).

⁴⁶ *Lively*, 2003 Del. Super. LEXIS 193 at *2-3 (citation omitted).

⁴⁷ *Id.* at *2 (citation omitted).

⁴⁸ *Id.* at *3 (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

⁴⁹ *Neill v. Unemployment Ins. Appeals Bd.*, 1987 Del. Super. LEXIS 1347, at *5-6 (Del. Super. Ct. Nov. 9, 1987).

⁵⁰ *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991).

on improper or inadequate grounds has the agency abused its discretion.⁵¹ Where the agency's determination is supported by substantial evidence, however, the Court will affirm the ruling.⁵² The Court reviews questions of law *de novo* to determine "whether the Board erred in formulating or applying legal precepts."⁵³ Where the issue presented is a question of law or the application of law to undisputed facts, the Court's review is plenary.⁵⁴

V. Analysis

Section 3317(b) requires the DOL to send a UC-119 separation notice to a former employer when a former employee files a claim for unemployment benefits.⁵⁵ Section 3317(b) gives the employer seven days from the "date contained on the separation notice" in which to respond to the notice, indicating the reasons for the employee's separation and his last date of employment.⁵⁶ Failure to respond within seven days bars the employer

⁵¹ *Kreshtool v. Delmarva Power & Light Co.*, 310 A.2d 649, 652 (Del. Super. Ct. 1973) (citation omitted).

⁵² *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (citing 29 Del. C. § 6442(d)).

⁵³ *Funk*, 591 A.2d at 225.

⁵⁴ *Stoltz*, 616 A.2d at 1208 (citing *E.I. du Pont de Nemours Co., Inc., v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985)).

⁵⁵ See 65 Del. Admin. C. § 600-010; 19 Del. C. § 3317(b).

⁵⁶ § 3317(b).

from challenging the claimant's eligibility for benefits, unless the Board finds good cause for the default.⁵⁷

1. The Notice was Properly Mailed to RSBR

Generally, for any notice to be effective, it must be received.⁵⁸ In Delaware, notice that is correctly addressed, stamped and mailed is presumed to have been received by the party to whom it was addressed.⁵⁹ This presumption may be rebutted, however, by evidence that notice was never received.⁶⁰ If notice is properly addressed by the agency and not received because of some fault of the party to whom it was addressed, the notice may still be deemed sufficient even if the party did not receive it.⁶¹ In *Reagan National Advertising, Inc. v. Unemployment Insurance Appeal Board*,⁶² this Court held that direct testimony from a Claims Deputy that

⁵⁷ *Id.*

⁵⁸ *Integrity Staffing Solutions, Inc. v. Div. of Unemployment Ins.*, 2001 Del. Super. LEXIS 527, at *7 (Del. Super. Ct. Dec. 20, 2001) (citing *Jewell v. Unemployment Comp. Comm'n*, 183 A.2d 585, 587 (Del. 1962)).

⁵⁹ *Integrity*, 2001 Del. Super. LEXIS at *7 (citing *Hall v. Camper*, 347 A.2d 137, 139 (Del. Super. Ct. 1975)).

⁶⁰ *Camper*, 347 A.2d at 139 (citation omitted).

⁶¹ See *Funk*, 591 A.2d at 226 (finding no due process violation “where the claimant had notice through prior experience of the possible misdelivery of his mail and where the misdelivery was made through no fault of the Department of Labor”).

⁶² 1990 Del. Super. LEXIS 274 (Del. Super. Ct. July 19, 1990).

notice was mailed is sufficient, despite any documentary evidence of mailing, to establish that notice was properly sent to a party.⁶³ Furthermore, record copy of the notice, absent any evidence of mistake on the part of the DOL, is legally adequate proof of mailing.⁶⁴

Here, the Board's decision that notice was mailed to RSBR on November 16, 2006 is supported by substantial evidence. In her direct testimony, the Claims Deputy indicated twice that the notice was mailed on November 16, 2006.⁶⁵ RSBR's faxed copy of the UC-119 form, bearing the November 16, 2006 date and the correct address, was introduced as evidence that the DOL followed the standard procedure of printing and mailing the notice. The testimony of the Claims Deputy and the record copy of the notice bearing the date are sufficient evidence to establish that the notice was properly mailed to RSBR on November 16, 2006.

Contrary to RSBR's argument, the Board's reliance on *Lively* was simply to show that the DOL does not bear the burden of establishing precisely when and how it mailed the notice. Rather, the employer must

⁶³ *Id.* at *8.

⁶⁴ *Malatesta v. Thiokol Corp.*, 1994 Del. Super. LEXIS 92, at *6 (Del. Super. Ct. Mar. 31, 1994).

⁶⁵ Docket 11, at A85:13; Docket 11, at A89:13-14. Specifically, the Deputy stated, "It was mailed out to the employer on the 16th of November 2006." Docket 11, at A85:13.

carry the burden of proving that a mistake was made.⁶⁶ The Court also agrees that the Board correctly applied *Lively* to support the conclusion that the notice was properly mailed. In *Integrity Staffing Solutions, Inc. v. Div. of Unemployment Ins.*,⁶⁷ this Court stated, “[o]nce the Division established that it probably sent the UC-119 form correctly, the burden shifted to [the employer].”⁶⁸ Because the Board had substantial evidence to find that the notice was timely and correctly mailed to RSBR, the notice had to be returned at the latest, by November 27, 2006.⁶⁹ Since it is undisputed that RSBR did not return the notice until November 29, 2006, two days later than this deadline, the Court must now focus on whether the Board’s conclusion that there was no good cause for RSBR’s untimely response is supported by substantial evidence and free from error.

2. The Board’s Good Cause Determination was Not Supported by Substantial Evidence and was an Abuse of Discretion

Without citing either law or evidence on the record, the Board summarily concluded that there was no good cause for RSBR’s untimely response to the UC-119 notice. The Board’s decision states, “[t]he

⁶⁶ Docket 11, at 37.

⁶⁷ 2001 Del. Super. LEXIS 527 (Del. Super. Ct. Dec. 20, 2001).

⁶⁸ *Id.* at *9.

⁶⁹ § 3317(b); Docket 4, at 6.

employer, by his own admission, received the form on November 24th and did nothing with it for four days. He has shown no good cause for his total lack of action.”⁷⁰ The Court has not been able to locate any evidence in the record where Fieni indicates that he received the notice on any day other than November 28, 2006. It appears that the Board’s good cause determination was based solely on this factual inaccuracy. Because the Board’s conclusion that RSBR received the notice on November 24, 2006 is not supported by any evidence, the Board abused its discretion when it summarily concluded that RSBR did not have good cause for its untimely response.

3. RSBR Had Good Cause for its Untimely Response, and is Not Barred from Contesting Noel’s Eligibility for Benefits

Delaware’s system of unemployment compensation was enacted in an effort to protect the health, morals, and general welfare of its citizens from the effects of involuntary unemployment.⁷¹ If this purpose is to be realized, the provisions of Delaware’s unemployment compensation scheme must be liberally construed.⁷² The Legislature did not intend its language to be

⁷⁰ Docket 4, at 38.

⁷¹ 19 Del. C. § 3301.

⁷² *Harper v. Unemployment Ins. Appeal Bd.*, 293 A.2d 813, 816 (Del. Super. Ct. 1972); see also *Nat’l Vulcanized Fibre Co. v. Unemployment Comp. Comm’n*, 82 A.2d 725, 729 (Del. Super. Ct. 1951).

applied strictly to all cases “without reference to the facts of a particular situation and without consideration of the basic aims and objectives of the [statute].”⁷³ In *Johnston v. Chrysler Corp.*,⁷⁴ the Delaware Supreme Court stated that the Court should not apply the unemployment compensation laws “by adhering slavishly to a technical . . . construction of the Law’s provisions.”⁷⁵ The unemployment compensation laws were drafted for “the benefit of persons unemployed through no fault of their own, who also are sincerely co-operating to end their unemployment,” and should be interpreted and applied to that end.⁷⁶

The good cause exception written into Section 3317(b) indicates that the Legislature recognized there will be circumstances when preventing an employer from contesting an employee’s claim due only to a delay in response will produce injustice. The intent of the section was obviously not to bar untimely responses in all cases. Furthermore, the lack of clarity as to how the DOL computes the seven-day response period, and the DOL’s willingness to extend RSBR a four-day grace period, are indicative of the

⁷³ *Emrick v. Unemployment Comp. Comm’n*, 173 A.2d 743, 744 (Del. Super. Ct. 1961), overruled on other grounds by *Lowe Bros., Inc. v. Unemployment Ins. Appeal Bd.*, 332 A.2d 150 (Del. 1975).

⁷⁴ 178 A.2d 459 (Del. 1962).

⁷⁵ *Id.* at 464.

⁷⁶ *Id.*

flexibility with which the rule is, and should be, applied. The denial of RSBR's right to challenge Noel's eligibility for benefits because of a mere two-day delay in response does not serve the ends contemplated by the statute.

Determinations of good cause are questions of law within the jurisdiction of this Court on appeal.⁷⁷ Furthermore, the essential facts in this matter are not in dispute: (1) Noel resigned from his part-time employment because RSBR would not permit him to bank his hours illegally, in an effort to defraud the Court in his alimony dispute with his ex-wife; (2) notice was sent on November 16, 2006 and was due November 27, 2006 at the latest; (3) the Thanksgiving holiday fell during this window of time in 2006; (4) the Court accepts, and the record reflects, that RSBR received the notice on November 28, 2006;⁷⁸ and (5) RSBR returned the notice less than one day after receipt and a mere two days after the effective due date.⁷⁹ RSBR has also offered two postmarked documents from the DOL showing a gap in

⁷⁷ *Neill*, 1987 Del. Super. LEXIS 1347 at *5-6.

⁷⁸ See Docket 11, at A89:21-A90:1, A115:1-6.

⁷⁹ Docket 4, at 6.

time between the date on the documents and the date of the postmark.⁸⁰

While Noel testified at the June 2007 hearing about RSBR's inefficient and disorganized mail practices,⁸¹ this testimony alone is insufficient to rebut the undisputed evidence on the record that RSBR received the notice on November 28, 2006.

Based on the facts outlined *supra*, the pattern of late mailing indicated by the DOL mailings in the record, and the intent of the statute, this Court is satisfied that RSBR has shown good cause for its untimely response to the UC-119 notice. RSBR is therefore not prevented from contesting Noel's eligibility to receive unemployment benefits.

VI. Conclusion

For the foregoing reasons, the decision of the Unemployment Insurance Appeal Board finding that RSBR did not have good cause for its untimely response, thereby precluding it from contesting Noel's eligibility to receive unemployment benefits, is **REVERSED**, and the cause is **REMANDED** to the Board for consideration of Noel's eligibility to receive unemployment benefits.

⁸⁰ See Docket 11, at A120-122. RSBR submitted these documents in support of its contention that the notice, dated November 16, 2006, was not, in fact, mailed on that date.

⁸¹ See Docket 11, at A100:21-A101:15.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Peter M. Sweeney, Esq.
Mary Page Bailey, Esq.
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Duane K. Noel