STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Robert A. Martin	:	
	:	
v.	:	**A.A. No. 12 - 132**
	:	
Department of Labor & Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is REVERSED.

Entered as an Order of this Court at Providence on this 23rd day of August, 2012.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Robert A. Martin	:	
	:	
v.	:	**A.A. No. 2012 – 132**
	:	
Department of Labor and Training,	:	
Board of Review	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this case Mr. Robert A. Martin urges that the Board of Review of the Department of Labor and Training erred when it decided he was ineligible to receive unemployment benefits. Jurisdiction for appeals from the Department of Labor and Training Board of Review is vested in the District Court pursuant to Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-8.1. After a review of the entire record, I find that a fair and proper application of the Employment Security Act to Mr. Martin's circumstances does not require that he be found ineligible to receive unemployment benefits. I

therefore recommend that the decision of the Board finding claimant ineligible be reversed.

FACTS & TRAVEL OF THE CASE

While the factual circumstances of Mr. Martin's claim are fairly straightforward, the legal issues are, at least facially, somewhat convoluted. I will endeavor to unravel this knot before undertaking my analysis of the legal questions posed.

Mr. Martin was working as a truck driver for Bonollo Provisions until June 25, 2010 — when he was involved in an accident on Route 195 in Massachusetts caused by material falling from an overpass. As a result of his injuries he received worker's compensation benefits. He was released to work in December of 2011. All parties agree that his job was unavailable when he was released to return to work. Without a job to return to, he filed a claim for unemployment benefits on January 27, 2012. The Director determined him financially ineligible for benefits because he had no earnings at all during his "base year."[1]

Mr. Martin then requested that the Director "backdate" his base period

[1] This result occurred whether that period was calculated in the regular fashion or in the alternative fashion permitted by statute. See Director's Benefit Rate Decision, February 1, 2012, Claimant's Exhibit No. 3; and see Gen. Laws 1956 § 28-44-11 (Earnings Requirement) and § 28-42-3(3)(Definition of "Base Period").

to the date of his injury, as is permitted in cases where a claimant had been receiving workers' compensation. See Gen. Laws 1956 § 28-42-3(3). But the Director's designee declined to do so, finding that he was not eligible for reinstatement under section 28-33-47 of the Worker's Compensation law, which is cross-referenced in subsection 28-42-3(3). See Director's Decision, February 23, 2012, Department's Exhibit No. 3. Because his base year was not backdated and because he had no income in the base period that was used, he was again declared monetarily ineligible.

Mr. Martin appealed and a hearing was held before Referee Nancy Howarth on March 22, 2012. Mr. Martin was the sole witness at the hearing — neither the Department nor his employer was represented. But on March 29, 2012, the Referee ruled that claimant was ineligible to have his base year backdated because, under subsection 28-33-47, he was not entitled to reinstatement because his right to reinstatement terminated one year from the date of injury. Since Mr. Martin was injured in June of 2010 but not released to work until December of 2011, Referee Howarth decided he had no right to reinstatement and was, as a result, not entitled to have his base year backdated.

An appeal was taken and the Board of Review affirmed the Referee's ruling in a decision dated May 24, 2012. Mr. Martin filed a Petition within the Sixth Division District Court on June 22, 2012.

STANDARD OF REVIEW

The standard of review which this Court must employ is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases.**
> * * *
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[2] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of

[2] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

fact.[3] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[4]

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing the Employment Security Act:

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

APPLICABLE LAW

Three provisions of the Rhode Island General Laws are especially pertinent to the proper resolution of this case. The first two are found in the

---

3 Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

4 Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review,

Employment Security Act; the third is a section of Rhode Island's Worker's Compensation law.

1. The Earnings Requirement.

The first provision of the Employment Security Act which is pertinent to our inquiry is section 28-44-11. It was relied upon by the Board of Review in its final decision. Section 11 provides that applicants for employment security benefits must satisfy an earnings requirement.

> **28-44-11. Earnings requirement for benefits. —** (a)(rule for pre-1989 claims omitted) * * *
> (b)(1) In order to be deemed eligible for benefits an individual whose benefit year begins on or after October 1, 1989:
> (i) Must have been paid wages in any one calendar quarter of the base period which are at least two hundred (200) times the minimum hourly wage as defined in chapter 12 of this title, and must have been paid wages in the base period amounting to at least one and one-half (1½) times the wages paid to the individual in that calendar quarter of the base period in which the individual's wages were highest; provided, that the minimum amount of total base period wages paid to the individual must be at least four hundred (400) times the minimum hourly wage as defined in chapter 12 of this title. The base period wages must have been paid to the individual for performing services in employment for one or more employers subject to chapters 42 -- 44 of this title; or
> (ii) Must have been paid wages in the base period for performing services in employment for one or more employers subject to chapters 42 -- 44 of this title amounting to at least three (3) times the total minimum amount required in paragraph (i) of this subdivision.
> * * *

Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

It must be remembered that the employment security system is regarded as an insurance program, not a welfare program. By including an earnings requirement, the legislature has ensured that a recipient of unemployment benefits has had a recent employment history of such strength that it was worth insuring and that, since the contributions are paid on the basis of a weekly payroll, that a certain amount of premiums have been paid on behalf of a claimant. The earnings are measured in a time frame known as the "base period" — which is itself defined in a separate statutory provision.

2. Definition of "Base Period."

The second statute we must consider is subsection 28-42-3(3). The provision defines the term "base period" which, as we noted, is referenced in section 11:

> **28-42-3. Definitions. —** The following words and phrases, as used in chapters 42 -- 44 of this title, have the following meanings unless the context clearly requires otherwise:
>
> * * *
>
> (3) "Base period", with respect to an individual's benefit year means the first four (4) of the most recently completed five (5) calendar quarters immediately preceding the first day of an individual's benefit year. For any individual's benefit year and for any individual deemed monetarily ineligible for benefits for the "base period" as defined in this subdivision, the department shall make a re-determination of entitlement based upon the alternate base period which consists of the last four (4) completed calendar quarters immediately preceding the first day of the claimant's benefit year. Notwithstanding anything contained to the contrary in this subdivision, the base period shall not include any calendar

> quarter previously used to establish a valid claim for benefits; provided, that notwithstanding any provision of chapters 42 -- 44 of this title to the contrary, for the benefit years beginning on or after October 4, 1992, whenever an individual who has received workers' compensation benefits is entitled to reinstatement under § 28-33-47, but the position to which reinstatement is sought does not exist or is not available, the individual's base period shall be determined as if the individual filed for benefits on the date of the injury; * * *. (Emphasis added)

Thus, the basic definition of base period furnished in subsection 28-42-3(3) is — the first four of the five most recent calendar quarters preceding the start of receiving benefits; alternatively, it may be the most recent four calendar quarters prior to the receipt of benefits. But, a specific provision of the definition encompasses the scenario in which a worker files a claim for unemployment benefits after having previously collected workers' compensation. The definition's final sentence [emphasized above], provides that when a person who has been receiving worker's compensation benefits attempts to return to work — but his or her position is unavailable — the base period may be set back to the date of the injury. Of course, if this is done, a claimant will often become monetarily eligible to receive benefits. We shall now examine this provision in greater detail.

3. Limitations on the Right to Reinstatement.

The final provision of the Employment Security Act which illuminates this controversy is section 28-33-47, which provides, in pertinent part:

28-33-47. Reinstatement of injured worker. — (a) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon written demand for reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of the position with reasonable accommodation made by the employer in the manner in which the work is to be performed. A workers' former position is "available" even if that position has been filled by a replacement while the injured worker was absent as a result of the worker's compensable injury. If the former position is not available, the worker shall be reinstated in any other existing position that is vacant and suitable. A certificate by a treating physician that the physician approved the worker's return to the worker's regular employment or other suitable employment shall be prima facie evidence that the worker is able to perform the duties.

(b) * * *.

(c) Notwithstanding subsection (a) of this section:

(1) The right to reinstatement to the worker's former position under this section terminates upon any of the following:

(i) * * *;

(ii) * * *;

(iii) * * *;

(iv) * * *;

(v) * * *;

(vi) The expiration of thirty (30) days after the employee reaches maximum medical improvement or concludes or ceases to participate in an approved program of rehabilitation, or one year from the date of injury, whichever is sooner, provided, in the event a petition to establish liability for an injury is filed, but not decided within one year of the date of the injury, within twenty-one (21) days from the first finding of liability. Notwithstanding the foregoing, where the employee is participating in an approved program of rehabilitation specifically designed to provide the employee with the ability to perform a job for which he or she would be eligible under subsection (a) of this section, the right of

> reinstatement shall terminate when the employee concludes or ceases to participate in the program or eighteen (18) months from the date of injury, whichever is sooner. (Emphasis added).

Thus, under subdivision (c)(1), the right of reinstatement terminates at various times based on various eventualities — most of which are not quoted above since they are immaterial to the case at bar. Even under the single paragraph quoted above — paragraph (c)(1)(vi) — the right of reinstatement may be determined to cease in five different ways.

ISSUE

The issue before the Court is whether the decision of the Board of Review was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law. More precisely, was claimant properly ruled monetarily ineligible to receive unemployment benefits based on a determination that his base period should not be backdated to his date of injury?

ANALYSIS

In order to properly decide this case, we need to consider the impact of the three statutes enumerated above. Let us commence by summarizing the particulars of the legal issue before us.

We begin by noting that Mr. Martin must show that he had sufficient earnings to meet the section 11's earnings requirement during his base period. As a base period is customarily defined, this would be impossible, because Mr. Martin had been out of work, collecting worker's compensation. However, subsection 28-42-3(3) provides that an applicant for employment security benefits who previously collected worker's compensation benefits may have his or her base period backdated to the date of injury if the applicant's prior position is unavailable.

Pausing momentarily in our analysis, we may note that it is undisputed that Mr. Martin meets all the foregoing conditions. However, there is one more condition that must be satisfied before we can backdate his base year and declare him eligible for benefits — he must show he sought to return to his prior job while he was protected by the statutory right to reinstatement established in section 28-33-47. We shall now consider the application of this last condition to Mr. Martin's circumstance — beginning with the Referee's analysis.

In her Decision, the Referee addressed the question of backdating a base period rather summarily:

> Section 28-33-47 provides that the right to reinstatement terminates one year from the date of the injury. The claimant did not reach maximum medical improvement within one year of the

> date of his injury. Therefore, he was not eligible for reinstatement to his former position under the provisions of Section 28-33-47 of the Rhode Island Workers Compensation law, which is a prerequisite for backdating the base period of an unemployment claim under Section 28-42-3(3).Therefore, the claimant's request to have his base period backdated to be made effective January 29, 2012, must be denied under the provisions of the above Section of the Act.

Decision of Referee, March 29, 2012, at 1-2. We see that, without expressly quoting the text, the Referee held that an injured worker must reach maximum medical improvement within one year in order to fall under the salutary ambit of paragraph (c)(1)(vi). She therefore found that paragraph (c)(1)(vi) gave Mr. Martin — who was injured in June of 2010 but did not reach maximum medical improvement until December of 2011 — no relief.

The Referee's understanding of the law may be accurate — insofar as it describes its first sentence of paragraph (c)(1)(vi) — but it entirely ignores and overlooks the second sentence.[5] Although quoted above, for convenience' sake we shall re-quote it here:

> * * * Notwithstanding the foregoing, where the employee is participating in an approved program of rehabilitation specifically designed to provide the employee with the ability to perform a job for which he or she would be eligible under subsection (a) of this section, the right of reinstatement shall terminate when the employee concludes or ceases to participate in the program or

[5] While brevity may be the soul of wit it is not always the most opportune manner in which to analyze a statute. William Shakespeare, Hamlet, Act II, scene ii, line 90.

> eighteen (18) months from the date of injury, whichever is sooner.

Thus, under the second sentence of paragraph (c)(1)(vi), a claimant who is participating in a rehabilitation program enjoys the right of reinstatement for eighteen months, not a year.

The Referee did not consider whether Mr. Martin satisfied the terms of this provision, even though she had a duty to address all material issues. See Gen. Laws § 28-44-44. This omission would normally require the instant matter to be remanded to the Board for consideration to be given to the issue. However, I do not believe that additional effort will be necessary in this case.

The record certified to this Court by the Board of Review contains a document which demonstrates convincingly that Mr. Martin was subject to reinstatement under section 28-33-47. Dated December 14, 2011, it is denominated the "Final Physical Therapy Assessment" and carries the letterhead of the Dr. John E. Donley Rehabilitation Center;[6] it indicates that Mr. Martin could now physically return to work. See Claimant's Exhibit No. 1. It is signed by "Catherine Silva, DPT." Id. It also indicates Mr. Martin's prior position was already unavailable to him. Id. As the work-product of an agency

[6] The Donley Center is a component of the Department of Labor and Training. See Gen. Laws 1956 § 28-38-19.

within the Department of Labor and Training, I believe the report is unassaillable for all purposes pertinent to the instant case.

Granting the report the full weight and evidentiary value I believe it deserves, it becomes clear that Mr. Martin was in a rehabilitation program until December 14, 2011, and so he was protected by the right of reinstatement until that date. See Gen. Laws 1956 § 28-33-47(c)(1)(vi). Accordingly, he was entitled to have his base period backdated to his date of injury.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was affected by error of law in that claimant should be deemed eligible to have his base period backdated. GEN. LAWS 1956 § 42-35-15(g)(4).

Accordingly, I recommend that the decision of the Board be REVERSED and the instant matter REMANDED for the calculation of benefits.

/s/
Joseph P. Ippolito
MAGISTRATE

AUGUST 23, 2012