

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C.

DISTRICT COURT  
SIXTH DIVISION

KEITH THOMPSON,  
Appellant/ Employee

:

:

VS.

: A. A. No. 12-0255

:

DEPARTMENT OF LABOR AND  
TRAINING, BOARD OF REVIEW,  
(Whitmarsh Corporation),  
Appellee/ Employer

:

:

JUDGMENT

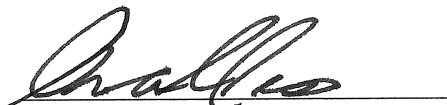
This matter came before Ovalles, J., on appeal from the Department of Labor and Training, Board of Review and, upon review of the record in its totality, a decision having been rendered, it is hereby,

ORDERED, ADJUDGED AND DECREED:

That the decision of the Board of Review is supported by the whole record and is a proper disposition of the facts and laws applicable thereto, and therefore, the decision is hereby affirmed.

Entered as an Order of this Court at Providence, Rhode Island on this 7<sup>th</sup> day of March 2013.

ENTERED:



Rafael A. Ovalles,  
Associate Judge

Dated: 7<sup>th</sup> March, A.D., 2013

PER ORDER:



**Stephen C. Waluk, Chief Clerk**  
Clerk

STATE OF RHODE ISLAND

PROVIDENCE, S.C.

DISTRICT COURT  
SIXTH DIVISION

KEITH THOMPSON  
Appellant/ Employee

VS.

:  
: A.A. No. 12-0255

DEPARTMENT OF LABOR AND :  
TRAINING, BOARD OF REVIEW, :  
(Whitmarsh Corporation) :  
Appellee/ Employer :

DECISION

OVALLES, J. This matter came before the Court on appeal, pursuant to R. I. General Laws § 42-35-15(a)<sup>1</sup>, by Appellant/ Employee who left his job as a result of a work-related injury. The Director of the Department of Labor and Training found the Appellant/ Employee ineligible for reinstatement pursuant to § 28-33-47, which is a prerequisite for back dating the base period of an employment security claim under § 28-42-3(3). The Appellant/ Employee was disqualified from meeting the requirements of the act, and therefore, the employee's request for modification was denied.

The Director mailed the decision on August 17, 2012. The Appellant/ Employee filed its appeal via facsimile on September 04, 2012, outside of the fifteen (15) day required period. The Referee ruled that *good cause* was shown for the late appeal, and therefore, the late appeal was accepted. Nonetheless, the Referee ruled that the Appellant/ Employee was ineligible to have his claim back dated according to § 28-42-3(3). In a unanimous decision, the Board of Review affirmed the Referee's decision.

---

<sup>1</sup> Administrative Procedures, § § 42-35-1, 42-35-18.

On appeal, Appellant/ Employee does not specifically state any error made by the Director, Referee or the Board of Review; rather, Appellant/ Employee states that “I was unable to meet the provisions of sec: 28-42-3(3) and was unable to finish my therapy sessions. Please grant me another appeal so that we may explore that fact deeper.” For the reasons that follow, the decision of the Board of Review is affirmed.

### FACTS AND PROCEDURAL HISTORY

Keith A. Thompson (hereinafter Appellant and/ or Employee) was employed by the Whitmarsh Corporation (hereinafter Appellee and/ or Employer), as a Child Care Counselor, from January 1, 2007 to February 16, 2011. The Employee last worked on February 16, 2011. The Employee left work as a result of a work-related injury, for which he received weekly workers’ compensation benefits and a lump sum settlement. The Employee was medically cleared to return to work on May 30, 2012. The Employee filed for employment security benefits on May 29, 2012.

The Director of the Department of Labor and Training ruled that the Employee was ineligible for reinstatement under the Workers’ Compensation Act. R. I. G. L. § 28-33-47(c)(1)(vi). And, the right of reinstatement ends one year from the date of the injury. Since the Employee was ineligible for reinstatement, the Director concluded that the Employee was not entitled to have his base period back dated to his last date of work.

A Referee presided at a *de novo* hearing. The Referee found that the Director’s decision was mailed to the Employee on August 17, 2012. The Employee filed an appeal via facsimile on September 4, 2012. Though the appeal was late, the Referee ruled that the Employee had shown *good cause* for filing the appeal late and, the Referee waived the statutory non-compliance. At the hearing, it was determined that the Employee was

medically cleared to return to work on May 30, 2012. (Referee's Transcript, P. 14, Lines 1-6). Moreover, all medical treatment ended in May 2012. The Employee reached maximum medical improvement in May 2012. (Referee's Transcript, P. 19, Lines 8-13). The Referee concluded that the Employee had not reached maximum medical improvement within the one year of the work-related injury, and since he was not in an approved program of rehabilitation, he was not entitled to reinstatement to his prior position. R. I. G. L. § 28-33-47(c)(1)(vi). The Employee was ineligible to have his base period back dated to his last date of work.

The Employee timely appealed the Referee's decision to the Board of Review. In a unanimous decision, the Board of Review affirmed the Referee's decision. Thereafter, the Employee filed a timely complaint for judicial review. Jurisdiction for review of the decisions of the Board of Review is vested in the District Court by R. I. G. L. § 28-44-52.

### APPLICABLE RHODE ISLAND LAW

#### A. Standard of Review

The District Court has jurisdiction to hear appeals from the Board of Review pursuant to R. I. General Laws § 42-35-15(a). The District Court's jurisdiction is limited, however, by R. I. General Laws § 42-35-15(g), which states in pertinent part:

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 the 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.

The District Court, therefore, lacks the authority to assess witnesses' credibility or to substitute its judgment for that of the Board of Review concerning the weight of the evidence on questions of fact. Link v. State, 633 A. 2d 1345 (R. I. 1993). The District Court is limited to a determination of whether the Board of Review's decision is supported by competent evidence. Nickerson v. Reitsma, 853 A. 2d 1202 (R. I. 2004); Marran v. State, 672 A. 2d 875 (R. I. 1996).

The District Court may reverse the decision of the Board of Review only where the decision "is clearly erroneous in light of the reliable, probative, and substantial evidence, or where it is arbitrary or capricious or that it is characterized as an abuse of discretion." Champlin's Realty Association v. Tikoian, 989 A. 2d 431 (R. I. 2010); Costa v. The Registry of Motor Vehicles, 543 A. 2d 1307, 1309 (R. I. 1988). Substantial evidence is that which a reasonable mind might accept to support a conclusion. Newport Shipyard v. R. I. Commission for Human Rights, 484 A. 2d 893, 897 (R. I. 1984). However, questions of law are not binding upon a reviewing court and may be freely reviewed to determine what the law is and its applicability to the facts. Champlin's Realty Associates, 989 A. 2d @ 432; Rossi v. Employees' Retirement System of Rhode Island, 895 A. 2d 110 (R. I. 2006).

Ultimately, the District Court is not entitled to substitute its judgment for that of the Board of Review on questions of fact "even in a case in which the court might be inclined to view the evidence differently and draw inferences different from the Board." Johnston Ambulance Surgical Associates, Inc. v. Nolan, 755 A. 2d 799, 805 (R. I. 2000).

Simultaneously, the District Court has liberally construed and applied the Employment Security Act.<sup>2</sup>

B. Rhode Island Employment Security Act/ Appeal/ Base Period

Rhode Island General Laws § 28-44-40(b) provides the process to appeal a Director's decision and states in pertinent part:

**... Reconsideration of other determination – Appeal ...**

Unless the claimant or any other interested party who is entitled to notice requests a hearing within fifteen (15) days after the notice of determination has been mailed by the director to the last known address of the claimant and any other interested party, the determination shall be final. For good cause shown the fifteen (15) day period may be extended.

The Employee attempted to appeal the Director's decision in a timely manner. The Employee admitted to the accuracy of his last known address.<sup>3</sup> The Employee procured the service of a local 7 Eleven store and had the appeal faxed on September 1, 2012; the appeal was marked received September 4, 2012, the next business day.

Section 28-42-3(3) states in pertinent part that "whenever an individual who has received workers' compensation benefits is entitled to reinstatement under § 28-33-47[(c)(1)(vi)], 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."

---

<sup>2</sup> Eligibility for employment security benefits is to be determined in the light of the expressed legislative policy that "Chapters 42-44 of this title shall be construed liberally in aid of their declared purpose, which declared purpose is to lighten the burden that now falls on the unemployed worker and his or her family." R.I.G.L § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing that 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. Harraka v. Board of Review of Department of Employment Security, 200 A. 2d 595, 597 (R. I. 1964).

<sup>3</sup> The Claimant testified that 2 Olmstead Way, # 201, Providence, R. I., 02904, was his current address.

Moreover, § 28-33-47(c)(1)(vi) specifically states that the right of reinstatement is generally limited to one year from the date of injury.<sup>4</sup> The main issue in this case is whether or not the Appellant/ Employee was entitled to reinstatement to his prior position, after his doctors concluded that he had reached maximum medical improvement.

### DISCUSSION

The Employee testified that he filed the appeal of the Director's decision on September 1, 2012. The appeal notice was stamped received on September 4, 2012, the next business day at the Department of Labor.<sup>5</sup> The Referee found the Employee's testimony credible. The Referee concluded that the Employee had shown *good cause* to have the appeal period extended beyond fifteen (15) days. Naturally, this court will not substitute its judgment for that of the Referee on a question of fact.

The right of reinstatement ends one year from the date of injury, unless the injured Employee is participating in an approved program of rehabilitation. In the instant claim, the Employee sustained a work-related injury on February 16, 2011. Moreover, the Employee last worked on February 16, 2011. The Employee's last medical appointment was January 9, 2012, prior to one year from the date of injury. However, during the next succeeding four (4) weeks, the Employee did not seek reinstatement. The Employee reached maximum medical improvement within one year of the date of injury. Moreover, the Employee was not participating in an approved program of rehabilitation, which

---

<sup>4</sup> R.I.G.L. § 28-33-47(c)(1)(vi) provides that "the right to reinstatement to the worker's former position under this section terminates upon any of the following: 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 injury, within twenty-one (21) days from the first finding of liability."

<sup>5</sup> September 1, 2012, was Saturday; September 3, 2012, was Monday, Labor Day.

would have enabled him to invoke the right of reinstatement beyond the one year period and possibly return to his former position. R. I. G. L. § 28-33-47(a).

CONCLUSION

The Referee's Decision was supported by reliable, probative, and substantial evidence of the whole record. Accordingly, the Board of Review's Decision to affirm the Referee's Decision is hereby affirmed.

Judgment filed simultaneously with this Decision.