IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jeremy M. Jones,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1414 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	Submitted: December 10, 2010
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: May 26, 2011**

Jeremy M. Jones (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of an Unemployment Compensation Referee (Referee) dismissing Claimant's appeal as untimely pursuant to Section 501(e) of the Unemployment Compensation Law (Law).[1] Claimant argues that the Board erred in dismissing her appeal as untimely because: Claimant mailed the appeal within the fifteen day time period;

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 821(e).

Pennsylvania law provides that appeals should not be denied on the basis of overly rigid technicalities; and the delay was caused by non-negligent conduct beyond Claimant's control.

Claimant worked for Keystone Hospice (Employer) from July 21, 2008, until November 1, 2009, when she resigned. Claimant applied for unemployment compensation (UC) benefits, and the Philadelphia UC Service Center (Local Service Center) issued a Notice of Determination (Notice) on December 21, 2009, finding Claimant ineligible for benefits. Thereafter, Claimant filed an appeal from the Notice, which was received by fax on January 8, 2010. A hearing was held before the Referee, at which the Referee considered whether Claimant's appeal from the Local Service Center should be dismissed as untimely. After concluding that Claimant's last day to appeal under Section 501(e) of the Law was January 5, 2010, and that Claimant faxed an appeal to the UC authorities on January 8, 2010, the Referee dismissed Claimant's appeal as untimely. Claimant appealed to the Board, which affirmed and made the following findings of fact.

> 1. A Notice of Determination (determination) was issued to the claimant on November 1, 2009, denying benefits.[2]
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> 2. A copy of this determination was mailed to claimant at her last known post office address on the same date.
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> 3. The claimant received a copy of the determination.
>
> 4. The notice informed the claimant that January 5, 2010 was the last day on which to file an appeal from this determination.

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[2] The Board's finding that the Notice was issued on November 1, 2009, is erroneous as the record establishes that the Notice was issued on December 21, 2009. However, this error has no bearing on the outcome of this matter.

> 5. A Department [of Labor and Industry (Department)] representative informed the claimant on January 5, 2010 that the Department had not posted her appeal.
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> 6. The claimant filed her appeal by fax on January 8, 2010.
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> 7. The claimant was not misinformed or misled by the unemployment compensation authorities concerning her right or the necessity to appeal.
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> 8. The filing of the late appeal was not caused by fraud or its equivalent by the administrative authorities, a breakdown in the appellate system, or by non-negligent conduct.

(Board's Decision, Findings of Fact (FOF) ¶¶ 1-8.) Based on these findings of fact, the Board concluded that, pursuant to Section 501(e) of the Law, Claimant had until January 5, 2010, to file an appeal from the Notice, but did not file her appeal until January 8, 2010. The Board noted that Claimant could have faxed her appeal on January 5, 2010, but chose to wait until January 8, 2010, to do so. Holding that the appeal provisions of Section 501(e) are mandatory and that the Board and its Referees do not have jurisdiction to allow an appeal filed after the expiration of the statutory appeal period except in circumstances that were not applicable here, the Board affirmed the dismissal of Claimant's appeal as untimely. Claimant now petitions this Court for review.[3]

On appeal, Claimant argues that her appeal was timely filed because she testified that she mailed her appeal on December 28, 2009, and, between that day

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[3] In reviewing the grant or denial of UC benefits, this Court's "review is limited to determining whether constitutional rights are violated, whether the adjudication is in accordance with the law and whether necessary findings of fact are supported by substantial evidence." Docherty v. Unemployment Compensation Board of Review, 898 A.2d 1205, 1208 n.5 (Pa. Cmwlth. 2006).

and January 5, 2010, she contacted the Department seven times to inquire about a hearing date. Claimant asserts that her repeated calls to the Department, which she alleges are reflected in her claim record, corroborate her testimony that she mailed her appeal before the appeal period expired. Claimant further contends that, pursuant to Moran v. Unemployment Compensation Board of Review, 973 A.2d 1024 (Pa. Cmwlth. 2009), and UGI Utilities, Inc. v. Unemployment Compensation Board of Review, 776 A.2d 344 (Pa. Cmwlth. 2001), the Board should incorporate flexibility into their timeliness regulations, that appeals should not be denied on the basis of overly rigid technicalities, and that common sense should have led the Board to the conclusion that her appeal had been mailed before January 5, 2010. Claimant equates her situation to the mailbox rule, in which a mailing is presumed to be received if it is mailed to the correct address and is not returned.

Section 501(e) of the Law provides, in relevant part:

> Unless the claimant . . . files an appeal with the board, from the determination contained in any notice required to be furnished by the department [of labor and industry] . . . within fifteen calendar days after such notice was delivered to him personally, or was mailed to his last known post office address, and applies for a hearing, such determination . . . shall be final and compensation shall be paid or denied in accordance therewith.

43 P.S. § 821(e). "The fifteen-day time period in which to file an appeal is mandatory." UGI Utilities, 776 A.2d at 347. The Board and its Referees are deprived of jurisdiction if an appeal is not filed during that time period. Id. The Board's regulation at 34 Pa. Code § 101.82 sets forth the manner in which an appeal's filing date is determined. That regulation provides, in pertinent part:

> (a) A party seeking to appeal a Department determination shall file an appeal in the form and manner specified in § 101.81 (relating to filing of appeal from determination of Department) and this section on or before the 15th day after the date on which notification of the decision of the Department was delivered personally to the appellant or mailed to him at his last known post office address.
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> (b) A party may file a written appeal by any of the following methods:
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> (1) United State mail. The filing date will be determined as follows:
>
> (i) The date of the official United States Postal Service [(USPS)] postmark on the envelope containing the appeal, a [USPS] Form 3817 (Certificate of Mailing) or a [USPS] certified mail receipt.
>
> (ii) If there is no official [USPS] postmark, [USPS] Form 3817 or [USPS] certified mail receipt, the date of a postage meter mark on the envelope containing the appeal.
>
> (iii) If the filing date cannot be determined by any of the methods in subparagraph (i) or (ii), the filing date will be the date recorded by the Department, the workforce investment office or the Board when it receives the appeal.

34 Pa. Code § 101.82.

Here, because the Department did not receive the appeal Claimant alleges she mailed on December 28, 2009, and Claimant did not obtain a certificate of mailing or certified mail receipt, the date Claimant filed her appeal cannot be determined by a USPS postmark, certificate of mailing, certified mail receipt, or a postage meter mark. Rather, because Claimant's appeal was faxed, the filing date of her appeal is governed by the Department's regulation at 34 Pa. Code § 101.82(b)(3), which provides, *inter alia*, that the date of filing will be the date of receipt imprinted by the Department's fax machine. Thus, under the Department's regulations, the filing date of Claimant's appeal must be determined by the date imprinted on the appeal by the Department's fax machine. That date, January 8,

2010, was three days after the fifteen day appeal period had expired. Although Claimant argues that the document the UC authorities received on January 8, 2010, was not her appeal, but a "copy" of her earlier mailed appeal, this was the only appeal the Department received. We are sympathetic to Claimant; however, we, like the Board and the Board's Referees, are bound by the Law and the Department's regulations, which provide a specific time period in which to file an appeal before a determination becomes final. The appeal period set forth in Section 501(e) is mandatory, and Claimant's appeal was not filed within that time period; consequently, Claimant's appeal was untimely.

Our decision is consistent with UGI Utilities and Moran, on which Claimant relies. In UGI Utilities, the Referee and the Board held that a fluorescent barcode, placed on an envelope by the USPS, was not a postmark for the purpose of determining whether an appeal was timely filed pursuant to the Board's regulation that governed when an appeal is deemed to be filed.[4] Therefore, the employer's appeal was untimely pursuant to Section 502 of the Law, 43 P.S. § 822 (providing fifteen days to appeal a Referee's determination to the Board). On appeal, this Court indicated that, although we would have considered the testimony of a witness from the post office that the barcode was as reliable as a postmark, we affirmed because case law required that the timeliness of a filing must be determined "from either the face of the document or from the internal records of the court." UGI Utilities, 776 A.2d at 348 (quoting Miller v. Unemployment

[4] The regulation formerly at 34 Pa. Code § 101.82(d) stated, in relevant part, that "the date of initiation of an appeal delivered by mail . . . shall be determined from the postmark appearing upon the envelope in which the appeal form or written communication was mailed." UGI Utilities, 776 A.2d at 347 n. 2 (quoting former 34 Pa. Code § 101.82(d)).

Compensation Board of Review, 505 Pa. 8, 13, 476 A.2d 364, 366 (1984)). Moreover, we held that we must defer to the Board's interpretation of its own regulations unless clearly erroneous and that the Board's interpretation of the term postmark to exclude the barcode at issue, which it adopted from the postal service's operations manual, was not clearly erroneous. Id. Recognizing the harshness of our holding, this Court suggested to the Board that it consider modifying its regulation as "it would seem desirable to incorporate some flexibility where common sense would lead the Board to the conclusion that an appeal was mailed before the deadline." Id. at 349. Thereafter, the Board responded and revised its regulations to their current form to consider factors other than the USPS postmark in determining the timeliness of an appeal.

In Moran, we affirmed the Board's determination that an employer's appeal was timely filed under Section 501(e) and 34 Pa. Code § 101.82, where the employer's appeal bore a private postage meter mark that indicated that it was mailed within the fifteen day appeal period. The claimant in Moran argued that, notwithstanding 34 Pa. Code § 101.82(b)(1)(ii), which permits the use of "postage meter marks" to determine the date of filing, the employer's appeal was not timely because it was received by the Department after the appeal period had expired. The claimant argued that the Board's regulation allowing the use of private postage meter marks was contrary to a Pennsylvania Supreme Court decision, Lin v. Unemployment Compensation Board of Review, 558 Pa. 94, 735 A.2d 697 (1999), in which the Supreme Court considered the regulation that determined the filing date *at that time*, which spoke only to "the postmark appearing upon the envelope." Id. at 97, 735 A.2d at 698-99 (quoting former 34 Pa. Code § 101.82(d).) The

Supreme Court in Lin held that, because a private postage meter did not bear the same reliability as a USPS postmark, an appeal bearing the mark of a private postage meter was to be considered filed on the date received by the Department. Id. at 99-100, 735 A.2d at 700. Moreover, in Moran, we held that the Board properly relied upon the private postage meter mark, and we rejected the claimant's assertion that these marks cannot be relied upon, noting that the regulation had been amended since Lin and stating "[w]e believe that Section 101.82(b)(1)(ii) reasonably introduces flexibility into the unemployment compensation system and ensures that appeals by both employer and claimants alike are not denied on the basis of overly rigid technicalities." Moran, 973 A.2d at 1029.

The flexibility and common sense discussed in UGI Utilities were addressed by changes to the Department's regulations that now allow more flexibility as to how appeals could be filed, including by e-mail and, as here, fax, and allowing the use of postage meter marks, a fact that we recognized in Moran as preventing the application of overly rigid technicalities. However, we do not believe that our statements in UGI Utilities and Moran meant that all of the formal requirements for determining the filing date of an appeal should be abandoned, as Claimant appears to suggest. Rather, in both UGI Utilities and Moran, we applied the Department's existing regulations to determine an appeal's filing date, as we do here.

Finally, we address Claimant's argument that because she testified that she mailed her appeal on December 28, 2009, to the UC authorities, her appeal must be considered timely filed under the mailbox rule. Claimant asserts that her claim

record reveals that she called the UC authorities seven times between December 28, 2009, and January 5, 2010, to inquire about her appeal and that this corroborates her testimony that she mailed her appeal on December 28th.

Initially, we note that the claim record does not support Claimant's contention that she called seven times regarding her appeal. There are seven entries in the claim record during the fifteen day appeal period, but the entries occur either on December 28, 2009, or on January 5, 2010. Only one of these entries refers to Claimant contacting the UC authorities regarding her appeal, which occurred on January 5, 2010, Claimant's last day to appeal. (R. Item 1, Claim Record at 1.) Moreover, even if the mailbox rule would be applicable in unemployment compensation appeals in general, a question that remains unresolved, the mailbox rule would not apply here. "The common law 'mailbox rule' . . . provides that the depositing in the post office of *a properly addressed letter* with prepaid postage raises a natural presumption that the letter *reached its destination by due course of mail*." In re Rural Route Neighbors, 960 A.2d 856, 861 (Pa. Cmwlth. 2008) (emphasis added). Claimant is not relying on the mailbox rule to establish that the UC authorities *received* the appeal alleged to have been mailed on December 28, 2009, but to establish that she *mailed* the appeal on December 28, 2009, and, therefore, that her appeal is timely. This is not a proper use of the mailbox rule. Additionally, although Claimant testified that she mailed an appeal on December 28, 2009, (R. Item 8, Hr'g Tr. at 7-8), there was no evidence that the appeal was properly addressed to the UC authorities, as no envelope or other indicia of where she mailed the appeal was introduced as evidence. See Weston v. Zoning Hearing Board, 994 A.2d 1185, 1187 (Pa.

Cmwlth. 2010) (applying mailbox rule where party presented a list of the addresses to which a notice was sent); Rural Route Neighbors, 960 A.2d at 859 (indicating that evidence was introduced as to the address of the party to whom an ordinance was sent). Thus, even if she was properly relying on the mailbox rule, that rule would not apply because she did not meet her evidentiary burden of proving that the appeal was properly addressed. Rural Route Neighbors, 960 A.2d 861 (holding that the party seeking to benefit from the mailbox rule bears the burden of producing supporting evidentiary proof).

Alternatively, Claimant asserts that, even if the Board properly determined that her appeal was untimely, the merits of her appeal should be considered *nunc pro tunc* pursuant to Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979), and United States Postal Service v. Unemployment Compensation Board of Review, 620 A.2d 572 (Pa. Cmwlth. 1993). According to Claimant, her conduct in this matter was not negligent where she mailed her appeal eight days before the deadline and repeatedly contacted the Department to determine the status of her appeal. Claimant asserts that, in contrast to her non-negligent conduct, the Department's representatives were negligent in not advising Claimant to simply fax in a copy of her appeal before January 5, 2010, but waited until January 8, 2010, to give such advice. Having established that her conduct was non-negligent and/or that the Department engaged in fraudulent, manifestly wrong, or negligent conduct, Claimant maintains that she has established an entitlement to *nunc pro tunc* relief.

"[T]he time for taking an appeal cannot be extended as a matter of grace or mere indulgence." Bass, 485 Pa. at 259, 401 A.2d at 1135. Only where an untimely appeal is caused by fraud or some breakdown in the administrative agency's operation or non-negligent conduct by the claimant or claimant's counsel will the courts grant *nunc pro tunc* relief. Id. at 259, 401 A.2d at 1135; United States Postal Service, 620 A.2d at 573-74. In Bass, our Supreme Court held that *nunc pro tunc* relief was proper where the appeal was prepared and ready for timely filing but, due to an unexpected illness of counsel's secretary, who was to file the appeal and was the secretary who routinely checked on the work of other ill secretaries, was not filed until her return to work, four days after the appeal period had expired. Bass, 485 Pa. at 258-59, 401 A.2d at 1134-35 The Supreme Court held that this situation was not the result of negligence of the appellant or appellant's counsel and that, "in those circumstances involving the non-negligent failure to file an appeal, members of the public should not lose their date in court." Id. at 260, 401 A.2d at 1135. In United States Postal Service, we held that the failure of the UC authorities to mail a notice of determination finding a claimant eligible for benefits to the employer's last known post office address such that the employer's appeal was untimely justified the grant of *nunc pro tunc* relief. United States Postal Service, 620 A.2d at 573-74.

However, the situation here is not like Bass or United States Postal Service. As is apparent from the Board's findings of fact and the record, Claimant was aware that January 5, 2010, was the last day to file her appeal, and a Department representative informed Claimant on January 5, 2010, that the Department had not received her appeal. (FOF ¶ 4; R. Item 1, Claim Record at 1; R. Item 8, Hr'g Tr. at

10.) Even if Claimant had mailed her appeal on December 28, 2009, she knew that it had not been posted as received by the UC authorities on January 5, 2010. Knowing this, Claimant could have faxed her appeal on that date, resulting in a timely filed appeal, but she did not. Although Claimant appears to argue that she did not know that she could fax her appeal, the appeal directions on the Notice included directions on how to file an appeal by fax, as well as the fax number where Claimant's appeal could have been sent. (Notice at 2, R. Item 4.) With regard to Claimant's averments that she contacted the Department seven times before faxing her appeal on January 8, 2010, the claim record does not support these averments as discussed above. Moreover, Claimant did not testify that the UC authorities told her that she could file her appeal *after* January 5, 2010. Accordingly, the Board's findings that Claimant "was not misinformed or misled by the unemployment compensation authorities concerning her right or the necessity to appeal" and that Claimant's late appeal was not the result of "fraud or its equivalent by the administrative authorities, a breakdown in the appellate system, or by non-negligent conduct," is supported by substantial evidence. (FOF ¶¶ 7-8.) As such, Claimant has failed to meet her burden of proving an entitlement to *nunc pro tunc* relief.

Because the Board did not err in concluding that Claimant's appeal was untimely and Claimant is not entitled to an appeal *nunc pro tunc*, we are constrained to affirm the Board's order dismissing Claimant's appeal as untimely.

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RENÉE COHN JUBELIRER, Judge

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	:	
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

O R D E R

NOW, May 26, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

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RENÉE COHN JUBELIRER, Judge