

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sunking J. Moss,	:	
	Petitioner	
	:	No. 1793 C.D. 2010
	v.	
	:	Submitted: March 25, 2011
Unemployment Compensation Board of Review,	:	
	Respondent	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

**OPINION NOT REPORTED**

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: May 25, 2011

Sunking J. Moss (Claimant) petitions for review of the July 13, 2010, order of the Unemployment Compensation Board of Review (Board), which affirmed a referee's decision dismissing Claimant's appeal under section 501(e) of the Unemployment Compensation Law (Law)<sup>1</sup>. We affirm.

Claimant was employed by YMCA of the Brandywine Valley (Employer) as a custodian from May 18, 2009, until December 22, 2009, when Claimant was terminated for alleged insubordination. (Reproduced Record (R.R.) at 18.) On January 28, 2010, the local service center issued a Notice of Determination concluding that Claimant was not ineligible for benefits under section 402(e) of the

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §821(e). Section 501(e) provides that an appeal from a service center's notice of eligibility determination must be filed by the claimant or employer within fifteen days.

Law, 43 P.S. §802(e),<sup>2</sup> based on Claimant's denial of insubordination and Employer's failure to provide information to show that Claimant was insubordinate. (R.R. at 3.) The local service center subsequently issued a Notice of Redetermination on February 1, 2010, denying benefits under section 402(e) of the Law. (Finding of Fact No. 1.) In denying benefits, the local service center relied upon information provided by Employer that Claimant refused to perform a task, thereby violating company policy to perform any duties deemed necessary by the supervisor. (R.R. at 5.) The notice informed Claimant that February 16, 2010, was the last day to file an appeal from the second determination. (Finding of Fact No. 4.) Claimant did not file an appeal until February 17, 2010. (Finding of Fact No. 5.)

The initial hearing for the appeal was scheduled for March 29, 2010; however, Claimant failed to appear because he was incarcerated. (Finding of Fact No. 8; R.R. at 11.) On March 31, 2010, a referee dismissed Claimant's appeal because it was untimely filed. (Original Record (O.R.) Item No. 10.) Through counsel, Claimant filed another appeal on April 14, 2010, and on May 27, 2010, the Board ordered a remand hearing to address Claimant's nonappearance at the initial evidentiary hearing and the timeliness of Claimant's appeal. (O.R. Item No. 14.)

During the remand hearing, Claimant testified that his nonappearance at the original hearing was due to his incarceration from March 26, 2010, to April 8, 2010. (Notes of Testimony (N.T.) at 3–4.) Claimant stated that while incarcerated, he was unable to make outside calls, and he was unable to contact the referee concerning his appearance at the hearing. (N.T. at 4.) Claimant testified that after he was

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<sup>2</sup> Section 402(e) provides that an employee shall be ineligible for compensation for any week in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work.

released, he received the referee's decision and then filed this appeal through counsel. (N.T. at 4.)

Regarding the filing of his initial appeal, Claimant testified that he did not receive the notice of determination until February 12, 2010. (N.T. at 6.) Claimant explained that upon receiving the letter, he repeatedly attempted to contact the service center by telephone because he did not understand how to file an appeal. (N.T. at 6–7.) Claimant testified that he was not successful in reaching the service center because the phones were always busy. Claimant stated that he went to the department website on February 16, 2010, to find further information on filing his appeal. (N.T. at 7.) Claimant testified that he e-mailed his appeal letter on February 17, 2010, and subsequently faxed it as well. (N.T. at 7.) Employer declined to participate in the hearing.

On July 13, 2010, the Board issued an order affirming the referee's decision to dismiss Claimant's petition for appeal as untimely. (O.R. Item No. 18.) The Board found the following:

1. A Notice of Determination (determination) was issued to the claimant on February 1, 2010, denying benefits.
2. A copy of this determination was mailed to the claimant at his last known post office address on the same date.
3. There is no evidence to indicate that the determination sent to the claimant was returned as undeliverable by the postal authorities.
4. The notice informed the claimant that February 16, 2010 was the last day on which to file an appeal from this determination.

5. The claimant did not file an appeal on or before February 16, 2010, but waited until February 17, 2010 before filing his appeal.

6. The claimant was not misinformed or misled by the unemployment compensation authorities concerning his or the necessity to appeal.

7. 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.

(Findings of Fact Nos. 1-7.)

On appeal to this Court,<sup>3</sup> Claimant argues that he should be permitted to appeal *nunc pro tunc*. We disagree.

The appeal provisions of section 501(e) of the Law are mandatory; failure to file an appeal within fifteen days, without an adequate excuse for the late filing, mandates dismissal of the appeal. U.S. Postal Service v. Unemployment Compensation Board of Review, 620 A.2d 572 (Pa. Cmwlth. 1993). The Board may permit an appeal *nunc pro tunc* only in limited circumstances, and the burden to establish the right to have an untimely appeal considered is a heavy one. Blast Intermediate Unit No. 17 v. Unemployment Compensation Board of Review, 645 A.2d 447 (Pa. Cmwlth. 1994). A claimant may satisfy this burden in two ways. First, he can show that the administrative authority engaged in fraudulent behavior or manifestly wrongful or negligent conduct. Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979). Second, he can show that non-negligent circumstances by the claimant, his counsel, or a third party caused the delay. Sofronski v. Civil Service

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<sup>3</sup> Our scope of review is limited to determining whether Claimant's constitutional rights were violated, whether an error of law was committed, or whether the necessary factual findings are supported by competent evidence. Sheets v. Unemployment Compensation Board of Review, 708 A.2d 884 (Pa. Cmwlth. 1998).

Commission, City of Philadelphia, 695 A.2d 921 (Pa. Cmwlth. 1997). Moreover, in Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996), our Supreme Court held that in order for an appeal *nunc pro tunc* to be granted, the appellant must show that the appeal was filed within a short time after learning of the untimeliness, the period which elapsed was of a very short duration, and the appellee was not prejudiced by the delay. Id. 543 Pa. at 384-385, 671 A.2d at 1131.

Claimant first contends that he should be permitted to file an appeal *nunc pro tunc* because the failure to timely appeal was caused by the fraudulent submission of altered documents by Employer. However, Claimant's argument in this regard relates to the merits of Claimant's appeal and does not address whether he should be granted an appeal *nunc pro tunc*. Therefore, this argument is without merit.

Claimant next argues that he should be permitted to file an appeal *nunc pro tunc* because the failure to timely appeal was caused by fraud and an administrative breakdown on the part of the service center. Relying on Winkler v. Unemployment Compensation Board of Review, 338 A.2d 770 (Pa. Cmwlth. 1975), Claimant argues that he was denied benefits because the service center relied on "unsupported evidence" in issuing the redetermination. The circumstances in Winkler, however, are distinguishable from the instant case.<sup>4</sup> More important, this

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<sup>4</sup> The claimant in Winkler contended that the Board erred in denying him benefits because the only evidence on which the Board based its findings was hearsay. The Board's findings were based on handwritten summaries of telephone conversations between the Bureau of Employment Security and the employer that were written on the back of the claimant's "Summary of Interview" sheet and completed after the claimant's interview. The claimant did not object to the introduction of the statements at the referee's hearing because he did not know of their existence until the time of the appeal. This Court held that the summaries were hearsay and could not be the basis of the (**Footnote continued on next page...**)

argument also relates to the merits, rather than the timeliness of Claimant's appeal, and thus is not relevant to our disposition.

Claimant further suggests that the service center erred in issuing the redetermination because he was not given a hearing. Claimant argues that the proper procedure by the service center was to wait for an appeal by Employer, rather than issue a redetermination, and that Claimant was prejudiced by the service center's failure to follow that procedure. However, we rejected this argument in Garza v. Unemployment Compensation Board of Review, 669 A.2d 445 (Pa. Cmwlth. 1995). In Garza, the claimant received a notice of determination on March 3, 1995, granting benefits, but then on March 10, 1995, received a notice of redetermination denying benefits before any party filed an appeal. The claimant argued that the initial determination was controlling and that the department did not have the authority to issue a redetermination. This Court held that sections 501(d) and (e) of the Law, 43 P.S. §§821(d) and (e), provided for the ability to revise determinations within the fifteen-day appeal period if no appeal has been filed.

Here, the service center initially found that Claimant was eligible for benefits on January 28, 2010, and issued a redetermination that Claimant was ineligible for benefits on February 1, 2010, before any appeal was filed. Therefore, under Garza, this argument also is without merit.

Claimant also asserts that the delay in filing was caused by the fact that he did not receive the denial letter until February 12, 2010, which did not provide him

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**(continued...)**

Board's findings when the claimant had no opportunity to object to their admission into the record. We conclude that Claimant's reliance on Winkler is misplaced.

enough time to meet the February 16, 2010, deadline. Unfortunately, although four or five days may not have been sufficient for his purposes, the law does not permit *nunc pro tunc* relief on this basis.

Claimant also contends he was confused as to what to file. Claimant asserts that he was not provided a copy of the evidence the service center relied upon in revising its initial notice of determination, and therefore he was unsure how to respond or what to file. However, the notice of redetermination includes appeal instructions that are complete and clear. (O.R. Item No. 3.) Thus, the record supports the Board's findings that the late filing of Claimant's appeal was not caused by fraud or its equivalent by the administrative authorities, a breakdown in the appellate system, or by non-negligent conduct. (Findings of Fact Nos. 6-7.)

A statutory appeal period is mandatory and may not be extended as a matter of grace or mere indulgence. Union Electric Corporation v. Board of Property Assessment, Appeals & Review of Allegheny County, 560 Pa. 481, 746 A.2d 581 (2000). Permitting an appeal *nunc pro tunc* is a recognized exception to the general rule prohibiting the extension of an appeal period, and is granted only where there were extraordinary circumstances involving fraud, a breakdown in the court's operations, or non-negligent conduct. Cook. Because Claimant did not establish such circumstances here, the Board properly denied his request for *nunc pro tunc* relief.

Accordingly, we affirm.

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PATRICIA A. McCULLOUGH, Judge

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**ORDER**

AND NOW, this 25<sup>th</sup> day of May, 2011, the order of the Unemployment Compensation Board of Review, dated July 13, 2010, is affirmed.

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PATRICIA A. McCULLOUGH, Judge