

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Kevin M. Joe,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1811 C.D. 2010
	:	
	:	Submitted: January 14, 2011
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

***OPINION NOT REPORTED***

**MEMORANDUM OPINION  
BY JUDGE BROBSON**

**FILED: March 21, 2011**

Petitioner Kevin M. Joe (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), dated August 12, 2010, which affirmed a Referee’s decision dismissing Claimant’s appeal as untimely pursuant to Section 501(e) of the Unemployment Compensation Law (Law).<sup>1</sup> We now affirm the Board’s order.

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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) of the Law states:

(e) Unless the claimant . . . files an appeal with the board, from the determination contained in any notice required to be furnished by the department . . . within fifteen calendar days after such notice . . . was mailed to his last known post office address, and applies for a hearing, such determination of the department, with respect to the particular facts set forth in such notice, shall be final and compensation shall be paid or denied in accordance therewith.

Claimant filed for unemployment compensation benefits following termination of his employment with Art of Life, Inc. (Employer). On April 19, 2010, the Philadelphia UC Service Center (Service Center) issued a Notice of Determination in which it determined that Claimant was ineligible for unemployment compensation benefits under Section 402(b) of the Law,<sup>2</sup> relating to voluntarily leaving work without cause of a necessitous and compelling nature. (Reproduced Record (R.R.) at 1a.) The notice stated that the last day that Claimant could appeal the determination was May 4, 2010. (*Id.*) Claimant did not file his appeal until May 7, 2010, after the statutory appeal had expired. (R.R. at 4a.)

A Referee conducted a hearing on June 3, 2010, for the purpose of determining whether Claimant's appeal from the Notice of Determination was timely. (R.R. at 9a-17a.) During the hearing, Claimant testified that he received the determination on or around May 7, 2010, upon his return from a trip to Virginia, and he immediately responded by filing his appeal via mail. (R.R. at 13a.) He explained that his mother, who is 72 years old and lives alone, broke her hip, and he had to go out of town to Virginia to care for her for approximately three and one-half (3½) weeks. (R.R. at 13a, 15a-16a.) He did not take any steps to deal with his mail or contact the post office because he lives alone and could not reach anyone at that time. (R.R. at 16a.)

By decision dated June 3, 2010, the Referee dismissed Claimant's appeal as untimely. (R.R. at 18a-19a.) In doing so, the Referee issued the following findings of fact:

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<sup>2</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b).

1. The claimant filed an application for unemployment compensation benefits effective March 7, 2010.
2. On April 19, 2010, the Philadelphia UC Service Center mailed a Notice of Determination to the claimant's last know mailing address which denied benefits to the claimant under Section 402(b) of the Law.
3. Said determination contained appeal instructions which indicated the last day to file a timely appeal to the determination was May 4, 2010.
4. At the time the Notice of Determination was issued, the claimant was in Virginia taking care of his mother.
5. The claimant did not notify the UC authorities or the post office he would be out of town for several weeks taking care of his mother.
6. The claimant returned to Pennsylvania from Virginia on May 7, 2010.
7. The claimant filed his appeal to the Notice of Determination via the US postal authorities on May 7, 2010.
8. The claimant was not misinformed or misled with respect to his appeal rights.

(*Id.*) The Referee reasoned that because Section 501(e) of the Law provides that a Notice of Determination shall become final unless an appeal is filed within fifteen (15) days of its issuance, the Referee has no jurisdiction to consider an appeal that was filed after the expiration of the statutory appeal period. (*Id.*) The Referee wrote:

[T]he competent evidence . . . establishes that the . . . UC Service Center mailed a Notice of Determination to the claimant's last known address . . . . The record is devoid

of any evidence that the Notice of Determination . . . was returned by the postal authorities as being undeliverable. In addition, the claimant acknowledged at the hearing he received the notice, however [he] did not receive it prior to the expiration of his appeal period because he was in Virginia taking care of his mother. However, the record in this matter is void of any evidence to establish the claimant took any steps regarding his mail . . . , and the record is void of any evidence to establish the claimant informed the UC authorities he would be out of town for approximately three weeks. The Referee wishes to note that the provisions of Section 501(e) of the Law are mandatory, and in the absence of any evidence to establish the claimant was misinformed or misled with respect to his appeal rights, or otherwise was prevented from filing a timely appeal due to fraud or the equivalent of an administrative breakdown, the Referee is constrained to dismiss the claimant's appeal as untimely.

(*Id.*) As a result, the Referee dismissed Claimant's appeal.

Claimant appealed to the Board, and the Board affirmed the Referee's decision. (R.R. at 20a-23a.) The Board adopted and incorporated the Referee's findings of fact and conclusions of law. (R.R. at 23a.)

On appeal,<sup>3</sup> Claimant argues that the Board erred in dismissing his appeal as untimely because he established that he is entitled to an appeal *nunc pro tunc* based on non-negligent circumstances. As noted above, Section 501(e) of the Law provides that unless a claimant files an appeal with respect to a Notice of Determination within fifteen calendar days after it was mailed to his last known post office address, such determination "shall be final and compensation shall be paid or denied in accordance therewith." "This fifteen-day time limit is mandatory

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<sup>3</sup> This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704.

and subject to strict application.” *Renda v. Unemployment Comp. Bd. of Review*, 837 A.2d 685, 695 (Pa. Cmwlth. 2003), *appeal denied*, 581 Pa. 685, 863 A.2d 1151 (2004). Failure to appeal timely an administrative agency’s action is a jurisdictional defect, and the time for taking an appeal cannot be extended as a matter of grace or mere indulgence. *Sofronski v. Civil Svc. Comm’n, City of Philadelphia*, 695 A.2d 921, 924 (Pa. Cmwlth. 1997). Thus, a petitioner carries a heavy burden to justify an untimely appeal. *Blast Intermediate Unit #17 v. Unemployment Comp. Bd. of Review*, 645 A.2d 447, 449 (Pa. Cmwlth. 1994). As a result, an appeal *nunc pro tunc* may be allowed where the delay in filing the appeal was caused by extraordinary circumstances involving fraud or some breakdown in the administrative process or non-negligent circumstances related to the petitioner, his counselor, or a third party. *Cook v. Unemployment Comp Bd. of Review*, 543 Pa. 381, 383-84, 671 A.2d 1130, 1131 (1996). With regard to non-negligent circumstances that may justify an appeal *nunc pro tunc*, a claimant must establish that: “(1) the appeal was filed late as a result of non-negligent circumstances, either on appellant’s part or on the part of his counsel, (2) the appeal was filed shortly after the expiration date and (3) the appellee was not prejudiced by the delay.” *Kenneth S. Hartman, Inc. v. Office of Unemployment Comp. Tax Svcs.*, 928 A.2d 448, 452 (Pa. Cmwlth. 2007).

In the case at hand, Claimant argues that the Board erred in determining that his request for an appeal was untimely. Claimant notes that the Supreme Court interpreted non-negligent circumstances that may justify an appeal *nunc pro tunc* to include an appellant’s unexpected illness and hospitalization which resulted in a late filing. *Cook*, 543 Pa. at 385-86, 671 A.2d at 1132. In *Cook*, four days before the appeal was due to be filed, the claimant collapsed,

requiring hospitalization. The claimant spent three days in intensive care, then four days in an ordinary room. The Supreme Court noted that during that time period, the claimant was unable to leave the hospital, did not have his notice of determination with him, and his diagnosis on discharge supported a determination that he was seriously ill when he was admitted. As a result, he filed his appeal four days late. The Supreme Court concluded that the claimant established non-negligent circumstances justifying the late filing.

Similarly, in *Bass v. Pennsylvania Bureau of Corrections*, 485 Pa. 256, 401 A.2d 1133 (1979), the Supreme Court concluded that a secretary's illness constituted a non-negligent circumstance that excused the filing of an untimely appeal. In *Bass*, an attorney instructed his secretary to type the appeal papers six days prior to the expiration of the appeal period, which she did. She then placed the appeal in a folder for filing, along with other papers that were to be filed at the courthouse. That same day, the secretary became ill before the appeal was filed. She returned to work one week later to discover that the appeal had not been filed. She then filed the appeal, although after the expiration of the appeal period.

Claimant in this matter likens his circumstances to the claimant in *Cook*, arguing that the circumstances are analogous because he was unexpectedly required to travel to Virginia to care for his mother who broke her hip. He contends that the "exigent circumstances" that required his departure were not in any way caused by his negligence.<sup>4</sup> Claimant notes that he filed the appeal

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<sup>4</sup> Claimant complains that the Referee did not ask if Claimant had the ability to contact postal authorities or the level of care required by his mother, asserting that those circumstances may have altered the Referee's determination. We note that it was not the Referee's duty to prove Claimant's case. Rather, Claimant bore the burden to establish circumstances showing a timely appeal or entitling him to *nunc pro tunc* relief. Moreover, nothing in the record indicates that the Referee in any way prevented Claimant from developing the record regarding the circumstances surrounding his untimely appeal.

immediately upon his return, only three days after the expiration of the appeal period. Furthermore, there would be no prejudice to Employer. We disagree.

The circumstances of the case at hand differ significantly from those in *Cook* and also *Bass*. In both of those cases, the person responsible for moving forward with the appeal at that stage of the process was the individual whose illness delayed the timely filing of the appeal. In *Cook*, the claimant was suddenly incapacitated as a result of a serious medical condition just days before the deadline for filing the appeal and the day before a scheduled appointment with his attorney to discuss the appeal. In *Bass*, although the claimant was not the individual whose illness caused the delay, the secretary who was responsible for preparing the appeal document and filing it became ill, thereby delaying the filing. Here, the person who became ill, Claimant's mother, had no responsibility regarding the filing of the appeal. Neither Claimant nor an individual charged with the responsibility to file an appeal on his behalf suffered a serious illness inhibiting their ability to file Claimant's appeal.

Although Claimant suggests that his urgent need to travel to Virginia to care for his mother was the cause of his late filing, the real cause of his late filing was that he took no steps regarding receipt of his mail before or during his absence. Although Claimant contends that because he lived alone there was no one that could receive his mail for him, he offers no reason for his failure to contact postal authorities or unemployment compensation authorities to alert them of his absence or to provide an alternative address. Had Claimant taken those reasonable steps and still not received the Notice of Determination in time to file a timely appeal, then a more persuasive argument could be made that non-negligent circumstances exist to support an appeal *nunc pro tunc*.

Because Claimant suffered no incapacitating illness himself and made no effort to ensure that he received the Notice of Determination in a timely manner during his absence, we cannot conclude that Claimant established non-negligent circumstances justifying the filing of an appeal *nunc pro tunc*. The Board, therefore, properly dismissed Claimant's appeal as untimely.

Accordingly, the order of the Board is affirmed.

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P. KEVIN BROBSON, Judge



