

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel V. Ward,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1900 C.D. 2009
	:	Submitted: January 22, 2010
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: March 12, 2010

Daniel V. Ward (Claimant) petitions for review from an order of the Unemployment Compensation Board of Review (Board) dismissing his appeal from a referee’s decision as untimely under Section 502 of the Unemployment Compensation Law (Law).¹ Claimant contends the Board erred in not considering his appeal, filed one day late as a result of non-negligent circumstances beyond his control, where it did not prejudice Claimant’s former employer, Controlled Climate Systems, Inc. (Employer). On review, we affirm the Board’s determination that Claimant did not establish good cause justifying a late appeal.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §822. Section 502 provides that a referee’s decision “shall be deemed the final decision of the [B]oard, unless an appeal is filed therefrom, within fifteen days after the date of such decision” 43 P.S. §822.

I. Background

Claimant worked for Employer as a full-time driver for approximately one week in December, 2008. On his last day of work, Claimant injured his foot and asked to go home early because he did not feel well. However, Claimant did not report a work injury or report to work the next work day. Assuming Claimant quit, Employer replaced him.

Following his separation from employment, Claimant filed for unemployment compensation benefits. The Duquesne UC Service Center (service center), ruled Claimant eligible for benefits under Section 402(e) of the Law, 43 P.S. §802(e) (ineligibility due to willful misconduct). Employer appealed. Following an evidentiary hearing, a referee issued a decision reversing the service center and ruling Claimant ineligible for benefits under Section 402(b) of the Law, 43 P.S. §802(b) (ineligibility due to a voluntarily quit without cause of a necessitous and compelling nature).

On March 19, 2009, the Board mailed the referee's decision to Claimant. He received it. The referee's decision advised Claimant he had 15 days to appeal and specified April 3, 2009 as the final date to appeal.

However, the envelope containing Claimant's appeal letter to the Board bore a postage meter mark of April 6, 2009. Following receipt of the appeal, the Board remanded to a referee for an evidentiary hearing on Claimant's contention his appeal was timely filed. An appeal to the Board is deemed timely filed if the date of the postmark or postage meter mark falls within the 15-day appeal period. 34 Pa. Code §101.82(b)(ii); Shea v. Unemployment Comp. Bd. of Review, 898 A.2d 31 (Pa. Cmwlth. 2006).

At the remand hearing, Claimant testified he did not have counsel at the hearing on the merits of his claim for benefits. Notes of Testimony (N.T.), 06/09/09, at 4. He received the referee's March 19, 2009 decision denying his claim. Id. Claimant first met with his attorney (Counsel) on March 31 and gave her the referee's decision. Id. at 5. Claimant called Counsel a few days later to remind her to file an appeal. Id. After that, Claimant had no part in filing the appeal. Id.

Counsel testified she met with Claimant and his parents on March 31, and they agreed she would represent Claimant in this matter and his workers' compensation claim. Id. at 6. Claimant gave Counsel the unemployment compensation paperwork, which indicated an appeal must be filed by April 3, 2009. Id.

On Friday, April 3, Counsel attempted to file the appeal electronically. Id. The Board did not receive the electronic appeal. Id. Counsel then prepared a written appeal to be mailed that day and placed it in her outbox at approximately 1:30 to 2:00 p.m. Id. The file clerk at Counsel's law firm usually collects the outgoing mail around 4:30-4:45 p.m., postmarks it via a private postage meter, and mails it. Id. Counsel left the office at approximately 3:30 p.m. on April 3. Id. When she returned on Monday, April 6, the appeal letter was still in her outbox. Id. Counsel mailed the appeal on April 6. Id.

Counsel argued at the hearing that Claimant should be granted leniency as to the timeliness of his appeal because the non-negligent acts of a third-party were responsible for the late filing. In support of her position, Counsel argued the Supreme Court's decision in Bass v. Commonwealth, 485 Pa. 256, 401

A.2d 1133 (1979), is highly analogous to this case. In Bass, the appellant's appeal was ready for filing a week before the appeal period expired, but was filed untimely due to an unforeseen illness of the attorney's secretary. In permitting a late appeal, the Bass majority concluded neither the attorney nor his secretary acted negligently in failing to timely file the appeal. The Court also noted the appellant's failure to timely appeal was corrected in a very short time, and any prejudice to the opposing party was minimal. In such cases, the Supreme Court reasoned, a client should not suffer as a result his attorney's non-negligent failure to file a timely appeal. Id.

Counsel also argued the Bass rationale applies in unemployment compensation appeals. See Cook v. Unemployment Comp. Bd. of Review, 543 Pa. 381, 671 A.2d 1130 (1996) (extending Bass and holding claimant, who filed appeal four days late because he was hospitalized at the time the appeal period expired, met his heavy burden of proving an adequate excuse to file a late appeal).

Here, in dismissing Claimant's appeal as untimely under Section 502 of the Law, the Board found Counsel failed to explain why the mail clerk did not mail Claimant's appeal on April 3, 2009. Bd. Dec., 08/24/09, at 2. The Board further found Claimant's late filing was not caused by fraud or its equivalent by the administrative authorities, a breakdown in the appellate system, or by non-negligent conduct. Id. In reviewing the reasons for Claimant's late appeal, the Board stated (with emphasis added):

[Counsel] established that she placed [Claimant's] appeal in the outgoing mailbox on April 3, 2009, and found [Claimant's] appeal was still sitting in the outgoing mailbox when she returned to the office on April 6, 2009. [Counsel] failed to explain why [Claimant's] appeal was

not mailed on April 3, 2009. [Counsel] has not provided testimony to establish that [Claimant's] appeal was untimely filed due to non-negligent conduct. [Claimant] has not established good cause for filing a late appeal. The provisions of [Section 502] of the Law are mandatory and the Board has no jurisdiction to accept an appeal filed after the expiration of the statutory appeal period absent limited exceptions not relevant herein. Therefore, [Claimant's] appeal from the [r]eferee's decision must be dismissed.

Id. at 2-3. Claimant petitions for review.²

II. Issues

Citing Bass and Cook, Claimant contends the Board erred in dismissing his appeal from the referee's decision as untimely because it resulted from non-negligent conduct beyond his control; a very short period of time elapsed between the appeal deadline and the filing of the appeal; and, the delay in filing the appeal caused no prejudice to Employer.

III. Discussion

Claimant asserts the facts here are similar to those in Bass. Here, as in Bass, a client communicated to his attorney his intent to appeal. The attorney prepared the appeal and put it on his secretary's desk for filing. The secretary then fell ill and missed several days of work. Upon returning to work, the secretary immediately took steps to file the appeal. The Bass Court found the circumstances there constituted a non-negligent failure to file a timely appeal after the client had

² Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Hessou v. Unemployment Comp. Bd. of Review, 942 A.2d 194 (Pa. Cmwlth. 2008).

made a decision to appeal. The Supreme Court noted an attorney not only represents a client, but is also considered an officer of the court for certain purposes and, “at least in those circumstances involving the non-negligent failure [of an attorney] to file an appeal, members of the public should not lose their day in court.” Bass, 485 Pa. at 260, 401 A.2d at 1135. “Society and the courts have recognized that events occur sometimes because of unexpected non-negligent causes. Just as the attorney would not be liable for damages to the bystander resulting from his non-negligent driving, his client should not suffer because the attorney, as a result of his [or his secretary’s] illness, was unable to file the appeal.” Id.

Here, Claimant asserts, Counsel acted with appropriate diligence in preparing the appeal paperwork on April 3 with the expectation that the appeal would be postmarked and mailed on that date in accordance with the customary practice of her firm. Claimant asserts Counsel’s placing the appeal in her outgoing mailbox for postmarking and mailing should be considered akin to the circumstances in Bass.

Section 502 of the Law requires that a party appeal to the Board within 15 days of a referee’s decision. 43 P.S. §822; Shea. This 15-day limit is mandatory; if an appeal is not filed within this period, the referee’s decision becomes final. Shea. Appeal periods are jurisdictional and cannot be extended as a matter of grace or indulgence. Id. Otherwise, there would be no finality to judicial action. Id. This applies even at the administrative level. Id. Therefore, an appeal filed even one day after the expiration of the 15-day appeal period in Section 502 must be dismissed as untimely. Id.

Nonetheless, the Board may consider an untimely appeal in limited circumstances. Hessou v. Unemployment Comp. Bd. of Review, 942 A.2d 194 (Pa. Cmwlth. 2008). However, the appellant carries a heavy burden to justify an untimely appeal. Id. The appellant can meet this burden by establishing, among other things, non-negligent conduct beyond his control caused the delay. Id.

As discussed above, the Supreme Court in Bass held that where an appeal is untimely filed as a result of non-negligent conduct of the appellant's attorney or attorney's staff, a late appeal may be permitted. See Perry v. Unemployment Comp. Bd. of Review, 459 A.2d 1342 (Pa. Cmwlth. 1983) (applying Bass, holding claimant permitted to file a late appeal where his attorney's law clerk's automobile broke down en route to the post office, thereby precluding a timely filing).

In Cook, the Court extended Bass to situations where an untimely appeal is caused by the non-negligent acts of the appellant himself. In Cook, an unemployment compensation case, the service center denied the claimant's application for benefits under Section 402(e) (willful misconduct). The claimant contacted an attorney and scheduled an appointment. However, prior to the appointment, the claimant collapsed and was hospitalized in a cardiac care unit. He then remained hospitalized in ordinary care until one day after the appeal period expired. Three days after his release, the claimant filed his appeal.

Nevertheless, the referee in Cook dismissed the appeal as untimely. The Board and Commonwealth Court affirmed. In reversing and permitting the claimant to file a late appeal, the Supreme Court determined this Court construed Bass too narrowly. In Cook, the Court reasoned, "[i]t would be anomalous ... to

allow [a late appeal] because of the non-negligent acts of a third party but not allow it in the case of non-negligent acts of appellant himself.” 543 Pa. at 345, 671 A.2d at 1131.

However, Claimant’s reliance on Cook and Bass in the present case is misplaced. Claimant failed to establish any non-negligent circumstances similar to those in Cook or Bass justifying the untimely filing of Claimant’s appeal. Unlike Bass, where the secretary ultimately responsible for filing court papers suddenly fell ill and left work before filing the appeal, Counsel here offered no explanation as to why her law office failed to mail Claimant’s appeal on April 3, 2009. Consequently, Cook and Bass are inapplicable here.

Claimant further contends the Board erred by not considering his appeal because it was postmarked only one day late. He asserts such a short delay did not prejudice Employer.

We disagree. Cook and Bass only permit a late appeal where the untimely appeal is caused by non-negligent conduct or circumstances. In Cook, the Supreme Court stated (with emphasis added):

We believe a better statement of the rule in Bass is that where an appeal is not timely because of non-negligent circumstances, either as they relate to appellant or his counsel, and the appeal is filed within a short time after the appellant or his counsel learns of and has an opportunity to address the untimeliness, and the time period which elapses is of very short duration, and appellee is not prejudiced by the delay, the court may allow [a late appeal].”

543 Pa. at 384-85, 671 A.2d at 1131.

Clearly, the test for excusing a late appeal is conjunctive. The appellant must first establish that non-negligent conduct, either by himself or by counsel, caused the untimely appeal. A late appeal may be permitted where the appellant also establishes: the appeal was filed within a short time after the appellant or counsel learned of the untimeliness, the delay is of short duration and the delay did not prejudice the appellee.

Here, Claimant failed to meet the first and most important prong of the test: that non-negligent conduct or circumstances caused his untimely appeal. Unlike the cases on which Claimant relies, here there was no proof of sudden, unexpected illness or car trouble. In fact, there was no proof of what happened on the afternoon of April 3 after Claimant's attorney left her office. While we sympathize with Claimant and his attorney, the matter is a jurisdictional one, not one of grace. Consequently, we conclude the Board properly dismissed Claimant's appeal as untimely. Accordingly, we affirm.

ROBERT SIMPSON, Judge

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 12th day of March, 2010, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge