

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John W. Ficca,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1963 C.D. 2010
	:	SUBMITTED: February 4, 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
PRESIDENT JUDGE LEADBETTER**

FILED: May 3, 2011

Claimant John W. Ficca petitions *pro se* for review of the August 3, 2010 order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of the referee to dismiss his appeal as untimely under Section 501(e) of the Unemployment Compensation Law (Law),¹ providing, in pertinent part, that unless a claimant files an appeal from a determination within fifteen calendar days after it was mailed to his last known post office address, such determination shall be final. We affirm.

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

Claimant worked for Employer Glaxo Smith Kline from October 1990 until May 2009 when Employer terminated his employment due to downsizing. Claimant applied for and received unemployment compensation benefits. In October 2009, Claimant also applied for social security disability benefits and received notice in January 2010 that his application was to be granted retroactive to September 2009. Subsequently, the Department of Labor and Industry (Department) issued two notices of determination finding: 1) a fault overpayment under Section 804(a) of the Law, 43 P.S. § 874(a); and 2) his ineligibility for benefits under Section 401(d)(1) of the Law, 43 P.S. § 801(d)(1) (not able and available for work due to medical reasons). The notices were mailed to Claimant at his last known address on January 28th and 29th and contained provisions advising him that February 12th and 16th, respectively, were the last days on which to file appeals.

In May 2010, the referee held a hearing in order to address the timeliness of Claimant's combined appeal from both determinations, docketed at 10-09-G-1856.² Claimant's then counsel represented that he had filed an appeal by fax on February 16, 2010, referencing a document marked "-IND. XMT JOURNAL" reflecting that date and the UC Service Center's fax number. It did not in any way reflect what was sent. Counsel conceded, moreover, that even if he was able to prove that he had filed an appeal by fax on February 16th, only that part of the appeal relating to the January 29th determination would be timely. To

² The referee also referenced appeal number 10-09-G-1857, Claimant's March 30, 2010 appeal from an April 1, 2010 denial of his request for a waiver of repayment of the overpayment of benefits. In a June 2, 2010 decision, the referee dismissed the appeal dated March 30, 2010, in light of the fact that an appeal cannot be made before a determination is issued. Certified Record (C.R.), Item No. 11, Referee's June 2, 2010 Decision.

that end, counsel attempted to establish via Claimant's testimony that due to the similarity between the two notices of determination and the fact that the appeal as to the January 28th determination was merely four days late, the referee should exercise gracious indulgence and consider the untimeliness to be a *de minimis* issue.

Although suggesting during the hearing that she would accept the appeal of the January 29th determination as timely, ultimately, the referee rejected Claimant's attempt to establish even that he had filed that appeal by fax on February 16th, finding that "the only record of an appeal by the claimant is the faxed transmission [of] March 30, 2010."³ Referee's May 19, 2010 Decision at 2. In that regard, she quoted the regulation applicable to ascertaining the filing date of a faxed appeal,⁴ noting that "[a] party filing an appeal by fax transmission is responsible for delay, disruption, interruption of electronic signals and readability

³ Claimant's counsel had faxed numerous documents to the Indiana UC Service Center on March 30th, including what he characterized as a February 16th appeal from the January 28th and 29th determinations.

⁴ Such a date shall be determined as follows:

(A) The date of receipt imprinted by the Department, the workforce investment office or the Board's fax machine.

(B) If the Department, the workforce investment office or the Board's fax machine does not imprint a legible date, the date of transmission imprinted on the faxed appeal by the sender's fax machine.

(C) If the faxed appeal is received without a legible date of transmission, the filing date will be the date recorded by the Department appeal office, the workforce investment office or the Board when it receives the appeal.

34 Pa. Code § 101.82(b)(3)(i)(A)-(C).

We note that although prior counsel submitted multiple documents and facsimile transmittal sheets, the only transmittal sheet and document bearing a date imprint by a fax machine was the claimant questionnaire, imprinted with the date of March 30th.

of the document and accepts the risk that the appeal may not be properly or timely filed.” 34 Pa. Code § 101.82(b)(3)(ii). Accordingly, determining that “[t]he 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,”⁵ the referee dismissed Claimant’s appeal. The Board affirmed and denied Claimant’s request for reconsideration.⁶ Claimant’s timely petition for review to this Court followed.

In his petition for review, Claimant requests that we “reverse the denial on the timeliness issue,” characterizing timeliness as a “technicality.” Claimant’s September 21, 2010 Petition for Review. The timeliness of an appeal, however, is not a mere technicality. Indeed, because the failure to file a timely appeal is a jurisdictional defect, courts cannot extend the time for taking an appeal as a matter of grace or mere indulgence. *Sofronski v. Civil Serv. Comm’n, City of Philadelphia*, 695 A.2d 921 (Pa. Cmwlth. 1997). The party seeking a late appeal, therefore, must justify the delay in filing the appeal. *Id.* The burden to do so “is a heavy one because the statutory time limit established for appeals is mandatory.” *Hessou v. Unemployment Comp. Bd. of Review*, 942 A.2d 194, 198 (Pa. Cmwlth. 2008). In that regard, it is well established that “[a] *nunc pro tunc* appeal may be allowed where extraordinary circumstances involving fraud or some breakdown in the administrative process caused the delay in filing, or where non-negligent circumstances related to the appellant, his or her counsel or a third party caused the

⁵ Finding of Fact No. 6.

⁶ In rendering its decision and order, the Board adopted and incorporated the referee’s findings and conclusions in their entirety. Credibility and evidentiary weight are determined by the Board, and its findings of fact are conclusive on appeal when the record, in its entirety, contains substantial evidence to support those findings. *Guthrie v. Unemployment Comp. Bd. of Review*, 738 A.2d 518 (Pa. Cmwlth. 1999).

delay.” *McClellan v. Unemployment Comp. Bd. of Review*, 908 A.2d 956, 959 (Pa. Cmwlth. 2006). Where non-negligent circumstances are at issue, an appellant must establish that “non-negligent conduct beyond his control caused the delay.” *Hessou*, 942 A.2d at 198 [citing *Bass v. Commonwealth*, 485 Pa. 256, 401 A.2d 1133 (1979)].

Claimant seems to be arguing that his appeal should be deemed timely because he provided all of the documentation to his counsel on February 9, 2010 and it was his counsel who failed to file the appeal on time. Further, Claimant notes that at the hearing, the referee accepted that his appeal from at least the January 29th determination was timely based upon counsel’s representation. Finally, opining that there does not seem to be much difference between the two notices of determination at issue, Claimant maintains that the appeal from the January 28th decision should be accepted for “good cause” because it was only four days late.

As an initial matter, we note that contrary to Claimant’s assertion, in rendering her decision, the referee did not accept that his appeal from the January 29th determination was timely, finding instead that “[t]he Department first received the claimant’s appeal by fax on March 30, 2010.” Finding of Fact No. 5. This finding was adopted by the Board, the ultimate fact finder in Unemployment Compensation proceedings. Accordingly, the combined appeal of *both* notices of determination was untimely, thereby rendering the determinations final. Section 501(e) of the Law.

Furthermore, we agree that Claimant failed to prove the requisite grounds for an appeal *nunc pro tunc*. Claimant assumed any risk inherent in attempting to file an appeal by fax and, unfortunately, the date on a fax

confirmation is not determinative of the date of filing. *Mountain Home Beagle Media v. Unemployment Comp. Bd. of Review*, 955 A.2d 484 (Pa. Cmwlth. 2008).

For the above reasons, therefore, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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	:	
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ORDER

AND NOW, this 3rd day of May, 2011, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge