

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David B. Farley,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2261 C.D. 2009
	:	
Unemployment Compensation Board	:	Submitted: April 16, 2010
of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: June 30, 2010

David B. Farley (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board), which affirmed the Unemployment Compensation Referee's (Referee) dismissal of his appeal from the eligibility, overpayment, and penalty determinations issued by the Unemployment Compensation Service Center (Service Center) in March of 2009. The Referee dismissed Claimant's appeal as untimely pursuant to Section 501(e) of the

Unemployment Compensation Law (Law).¹ Claimant argues before this Court that his appeal should not have been dismissed as untimely. For the reasons that follow, we affirm the Board's order.

Claimant filed for unemployment compensation benefits on August 3, 2008, after becoming separated from his employment with Geisinger Wyoming Valley (Employer). Claimant subsequently began receiving benefit payments in the amount of \$249.00 per week.

From January 12, 2009, to January 16, 2009, Claimant worked for Gould's ShurSave. On February 19, 2009, the Service Center issued a Notice of Determination (February Eligibility Determination) concluding that Claimant was disqualified from receiving benefits pursuant to Section 402(b) of the Law, 43 P.S. § 802(b),² beginning with the compensable week ending January 17, 2009, because

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 821(e). Section 501(e) provides as follows:

(e) Unless the claimant or last employer or base-year employer of the claimant *files an appeal* with the board, from *the determination contained in any notice* required to be furnished by the department under section five hundred and one (a), (c) and (d), *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 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.*

43 P.S. § 821(e) (emphasis added).

² Pursuant to Section 402(b) of the Law, an employee is disqualified from receiving benefits for any week “[i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.” 43 P.S. § 802(b).

he voluntarily quit his employment with Gould's ShurSave. Claimant timely appealed that determination.

Thereafter, the Service Center sent Claimant and Employer forms inquiring about Claimant's separation from Employer. Claimant and Employer completed and returned those forms to the Service Center in late February and early March of 2009, respectively. The forms submitted by Employer indicated that Claimant voluntarily quit his employment, while the forms submitted by Claimant indicated that his position had been eliminated. On March 11, 2009, the Service Center issued a Notice of Determination (March Eligibility Determination) concluding that Claimant was disqualified from receiving benefits pursuant to Section 402(b) of the Law beginning with the waiting week ending August 9, 2008, because he voluntarily quit his employment with Employer. That same day, the Service Center also issued a Notice of Determination of Overpayment of Benefits (Overpayment Determination) establishing a fault overpayment, in the amount of \$5,478.00, pursuant to Section 804(a) of the Law, 43 P.S. § 874(a),³ for the period

³ Section 804(a) provides as follows:

(a) Any person who by reason of his fault has received any sum as compensation under [the Law] to which he was not entitled, shall be liable to repay to the Unemployment Compensation Fund to the credit of the Compensation Account a sum equal to the amount so received by him and interest at the rate determined by the Secretary of Revenue as provided by section 806 of the act of April 9, 1929 (P.L. 343, No. 176), known as "The Fiscal Code," per month or fraction of a month from fifteen (15) days after the Notice of Overpayment was issued until paid. Such sum shall be collectible (1) in the manner provided in section 308.1 or section 309 of [the Law], for the collection of past due contributions, or (2) by deduction from any future compensation payable to the claimant under [the Law]: Provided, That interest assessed under this section cannot be recouped by deduction from any future compensation payable to the

(Continued...)

spanning from the compensable week ending August 16, 2008 to the compensable week ending January 10, 2009. On March 12, 2009, the Service Center issued a Notice of Penalty Weeks Determination (Penalty Determination) penalizing Claimant 24 weeks of benefits, pursuant to Section 801(b) of the Law, 43 P.S. § 871(b),⁴ for making a false statement or knowingly failing to disclose information for the purpose of obtaining or increasing his benefit payments. The last day to file a timely appeal from the March Eligibility Determination and the Overpayment Determination was March 26, 2009, and the last day to file a timely appeal from

claimant under [the Law]: Provided further, That no administrative or legal proceedings for the collection of such sum shall be instituted after the expiration of six years following the end of the benefit year with respect to which such sum was paid.

43 P.S. § 874(a).

⁴ Section 801(b) provides as follows:

(b) Whoever makes a false statement knowing it to be false, or knowingly fails to disclose a material fact to obtain or increase any compensation or other payment under [the Law] or under an employment security law of any other state or of the Federal Government or of a foreign government, may be disqualified in addition to such week or weeks of improper payments for a penalty period of two weeks and for not more than one additional week for each such week of improper payment: Provided, That no additional weeks of disqualification shall be imposed under this section if prosecution proceedings have been instituted against the claimant because of such misrepresentation or non-disclosure. The departmental determination imposing penalty weeks under the provisions of this subsection shall be subject to appeal in the manner provided in [the Law] for appeals from determinations of compensation. The penalty weeks herein provided for shall be imposed against any weeks with respect to which the claimant would otherwise be eligible for compensation, under the provisions of [the Law], which begin within the four year period following the end of the benefit year with respect to which the improper payment or payments occurred.

43 P.S. § 871(b).

the Penalty Determination was March 27, 2009. Claimant filed an untimely appeal from all three determinations on June 29, 2009.

The Referee conducted an evidentiary hearing regarding the timeliness of Claimant's appeal from the March Eligibility Determination, the Overpayment Determination, and the Penalty Determination, at which Claimant appeared and was represented by counsel. During the hearing, Claimant testified that he failed to file a timely appeal because he believed that any issues pertaining to his unemployment would be resolved through his timely appeal of the February Eligibility Determination and that there was no need to file a separate appeal. (Board Hr'g Tr. at 5-6.) Following the hearing, the Referee issued a decision and order dismissing Claimant's appeal as untimely pursuant to Section 501(e) of the Law. Claimant appealed the Referee's decision and order to the Board.

On October 22, 2009, the Board issued a decision and order in which it made the following findings of fact:

1. Notices of Determination (determination) were issued to the claimant on March 11, 2009, denying benefits and imposing a fault overpayment on March 12, 2009. The Department imposed penalty weeks.^[5]
2. Copies of these determinations were mailed to the claimant at his last known post office address on the same date.

⁵ We note that, although the Board found that a determination was issued imposing a fault overpayment on March 12, 2009, the Overpayment Determination indicates that it was issued on March 11, 2009, and the Penalty Determination indicates that it was issued on March 12, 2009.

3. The determinations mailed to the claimant were not returned to the authorities as undeliverable by the postal authorities, and in fact were received.
4. The notices informed the claimant that March 26 and March 27, 2009 were the last days on which to file an appeal from this determination.
5. The claimant filed his appeal by fax on June 29, 2009.
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.

(Board Decision, Findings of Fact ¶¶ 1-7.) Based on these findings, the Board concluded that the Referee properly dismissed Claimant's appeal as untimely pursuant to Section 501(e) of the Law. Claimant filed a request for reconsideration, which was denied by the Board. Claimant now petitions this Court for review of the Board's order affirming the Referee's dismissal of his appeal as untimely.⁶

Before this Court, Claimant argues that his appeal should not have been dismissed as untimely but, rather, should have been considered *nunc pro tunc*. We disagree.

⁶ This Court's "scope of review is limited to determining whether there has been a constitutional violation or an error of law or whether the necessary findings of fact are supported by substantial evidence." Blast Intermediate Unit #17 v. Unemployment Compensation Board of Review, 645 A.2d 447, 448 n.1 (Pa. Cmwlth. 1994).

Pursuant to Section 501(e) of the Law, a party must file an appeal from a notice of determination issued by the Service Center “within fifteen calendar days after such notice was delivered to him personally, or was mailed to his last known post office address.” 43 P.S. § 821(e). “The appeal provisions 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.” United States Postal Service v. Unemployment Compensation Board of Review, 620 A.2d 572, 573 (Pa. Cmwlth. 1993). However, an untimely appeal may be considered *nunc pro tunc* where the appellant establishes that the “administrative authority engaged in fraudulent behavior or manifestly wrongful or negligent conduct” amounting to a breakdown in the administrative process. Hessou v. Unemployment Compensation Board of Review, 942 A.2d 194, 198 (Pa. Cmwlth. 2008) (citing Bass v. Commonwealth, 485 Pa. 256, 259, 401 A.2d 1133, 1135 (1979)). An untimely appeal may also be considered *nunc pro tunc* where the appellant establishes that: the late appeal was due to “non-negligent circumstances, either as they relate to the appellant or his counsel”; the appeal was “filed within a short time after the appellant or his counsel learn[ed] of and ha[d] an opportunity to address the untimeliness”; “the time period which elapse[d] [was] of very short duration”; and the “appellee is not prejudiced by the delay.” Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 384-85, 671 A.2d 1130, 1131 (1996). The burden of justifying an untimely appeal is a heavy one. Blast Intermediate Unit #17 v. Unemployment Compensation Board of Review, 645 A.2d 447, 449 (Pa. Cmwlth. 1994).

Here, the March Eligibility Determination indicated at five different places (at least once on every page) that the last day to file a timely appeal therefrom was March 26, 2009. (March Eligibility Determination at 1-3.) Similarly, the Overpayment Determination indicated that the last day to file a timely appeal therefrom was March 26, 2009 (Overpayment Determination, March 11, 2009), and the Penalty Determination indicated that the last day to file a timely appeal therefrom was March 27, 2009. (Penalty Determination, March 12, 2009.) However, Claimant did not file his appeal from these determinations until June 29, 2009. Thus, Claimant's appeal was untimely by more than three months.

While Claimant acknowledges that he filed a late appeal, he contends that his late appeal was justified under the circumstances of this case. According to Claimant, the Service Center's issuance of the February Eligibility Determination pertaining to his separation from Gould's ShurSave, coupled with the Service Center's delay in issuing the March Eligibility Determination, the Overpayment Determination, and the Penalty Determination more than six months after his separation from Employer and well after he had started receiving benefits, caused confusion and ambiguity regarding his appeal rights. Claimant, thus, asserts that the unemployment authorities misled him as to his appeal rights, which amounted to an administrative breakdown or non-negligent circumstances beyond his control. Claimant further maintains that after attending the hearing on his appeal from the February Eligibility Determination and learning that he needed to file a separate appeal with regard to the March Eligibility Determination, the Overpayment Determination, and the Penalty Determination, he immediately appealed those

determinations. Claimant, therefore, contends that he was entitled to *nunc pro tunc* relief.

However, we agree with the Board that Claimant has failed to satisfy his heavy burden of proving that his late appeal was justified under the facts of this case. Claimant does not dispute that he received all of the determinations in question within a sufficient amount of time for him to timely appeal them if he chose to do so. Moreover, as the Board correctly points out, the determinations in question were all clear on their faces in setting forth the applicable appeal deadlines and were not misleading in any way.⁷

Although Claimant asserts that the Service Center's actions in issuing the February Eligibility Determination pertaining to Gould's ShurSave and waiting six months following his separation from Employer to issue the March Eligibility Determination, the Overpayment Determination, and the Penalty Determination created confusion and ambiguity regarding his appeal rights, we do not believe that such actions would have caused confusion and ambiguity to a reasonable person acting under the circumstances presented. The February Eligibility Determination was a separate determination that did not affect the requirements for filing a timely

⁷ To the extent that Claimant relies on this Court's decision in C.S. v. Department of Public Welfare, 879 A.2d 1274 (Pa. Cmwlth. 2005), such reliance is misplaced. In that case, this Court held that *nunc pro tunc* relief was warranted where an administrative notice, on its face, did not clearly set forth the appellant's appeal rights. Id. at 1280. Unlike in C.S., however, here the March Eligibility Determination, the Overpayment Determination, and the Penalty Determination, were all facially clear in advising Claimant of his appeal rights with regard to those determinations. Therefore, C.S. is distinguishable from the present case.

appeal from the other determinations issued by the Service Center. Unlike the February Eligibility Determination, which identified Gould's ShurSave as the employer involved, the March Eligibility Determination identified Employer. Also, the Overpayment Determination listed all of the weeks that Claimant had received benefits beginning with the compensable week ending August 16, 2008, which was prior to Claimant's employment with Gould's ShurSave, and the Penalty Determination referenced the Overpayment Determination. More importantly, the March Eligibility Determination, the Overpayment Determination, and the Penalty Determination were all issued after the February Eligibility Determination and Claimant's appeal thereof, and they contained separate appeal deadlines. Thus, Claimant was reasonably put on notice that these determinations were separate from the February Eligibility Determination and that he needed to file a separate appeal. If Claimant was at all confused regarding whether he needed to file a separate appeal with regard to the March Eligibility Determination, the Overpayment Determination, and the Penalty Determination, even though he had already timely appealed the February Eligibility Determination, he could have contacted the unemployment authorities and requested clarification or sought assistance from others. However, Claimant failed to take such action. Thus, Claimant did not take reasonable steps to perfect his appeal in a timely manner, and his alleged confusion does not justify his late appeal. See Dull v. Unemployment Compensation Board of Review, 955 A.2d 1077, 1080-81 (Pa. Cmwlth. 2008) (concluding that a late appeal was unjustified where the claimant failed to take reasonable steps to preserve her appeal rights by seeking assistance in reading documents she received from the unemployment authorities).

Furthermore, as the Board correctly observes, this Court has held that Section 401(f) of the Law, 43 P.S. § 801(f),⁸ requires the unemployment authorities to “review . . . the circumstances surrounding the termination of a prior employment when a [c]laimant earned less than six times [his] weekly benefit rate at a subsequent job from which [he] is separated.” Breslow v. Unemployment Compensation Board of Review, 517 A.2d 590, 592 (Pa. Cmwlth. 1986). Here, because Claimant did not earn more than six times his weekly benefit rate of \$249 (or \$1,494.00) during his employment with Gould’s ShurSave, the unemployment authorities were required to determine Claimant’s eligibility based on his separation from his prior employment with Employer. This is why the Service Center issued the determinations in question when it did. The Service Center was simply following the statutorily prescribed requirements for determining Claimant’s eligibility to receive benefits. Because the Service Center acted in accordance with the statutorily imposed requirements of Section 401(f), there was no breakdown in the administrative system, and the unemployment authorities did not act negligently. Therefore, while it is unfortunate that the Service Center’s denial of benefits may cause Claimant to suffer financial hardship during harsh economic times, we are constrained to conclude that Claimant was not entitled to *nunc pro tunc* relief and that his appeal was properly dismissed as untimely pursuant to Section 501(e) of the Law.

⁸ Section 401(f) provides, in pertinent part, that compensation will be payable to any employee who becomes unemployed and who “[h]as earned, subsequent to his separation from work under circumstances which are disqualifying under the provisions of subsections 402(b), 402(e), 402(e.1) and 402(h) of [the Law], remuneration for services in an amount equal to or in excess of six (6) times his weekly benefit rate.” 43 P.S. § 801(f).

Accordingly, the Board's order is affirmed.

RENÉE COHN JUBELIRER, Judge

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Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

ORDER

NOW, June 30, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge