

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Yancy Naughton, :
 :
 Petitioner :
 :
 v. : No. 2455 C.D. 2010
 :
 Unemployment Compensation : Submitted: June 10, 2011
 Board of Review, :
 Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: July 28, 2011

Yancy Naughton (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) dismissing his appeals as untimely pursuant to Section 501(e) of the Unemployment Compensation Law (Law).¹ We affirm.

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

(Continued....)

On January 26, 2010 and January 27, 2010, Notices of Determination were issued by the Erie UC Service Center in which it was determined, inter alia, that: Claimant was not entitled to receive unemployment compensation (UC) benefits pursuant to 402(h) of the Law²; Claimant was not entitled to receive Emergency Unemployment Compensation (EUC) benefits under Sections 4001(b) and (c) of the EUC Law³; Claimant had received an overpayment of \$12,452.00 in UC benefits to which he was not entitled; and Claimant had received an overpayment of \$12,452.00 in EUC benefits to which he was not entitled. The

... 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.

² Section 402(h) of the Law provides, in pertinent part:

An employe shall be ineligible for compensation for any week—

* * *

(h) In which he is engaged in self employment: Provided, however, That an employe who is able and available for full-time work shall be deemed not engaged in self-employment by reason of continued participation without substantial change during a period of unemployment in any activity ... undertaken while customarily employed by an employer in full-time work whether or not such work is “employment” as defined in this act and continued subsequent to separation from such work when such activity is not engaged in as a primary source of livelihood. Net earnings received by the employe with respect to such activity shall be deemed remuneration paid or payable with respect to such period as shall be determined by rules and regulations of the department.

43 P.S. § 802(h).

³ Title IV of the Supplemental Appropriation Act of 2008, Public Law 110-252, 122 Stat. 2323, § 4001(b), (c), 26 U.S.C. § 3304 Note.

notices stated that the last day that Claimant could appeal these determinations were February 10, 2010 and February 11, 2010, respectively.

On February 12, 2010, Claimant submitted a petition for appeals of these determinations. A hearing on the two appeals was scheduled for March 17, 2010. On March 15, 2010, Claimant requested a continuance of the hearing. Neither Claimant nor an employer appeared for the hearing. See N.T. 3/17/10⁴ at 1. As a result, the Referee proceeded to the hearing without receiving testimony. Id.

On March 18, 2010, the Referee mailed two decisions to Claimant in which she made the following relevant findings of fact:

1. On 01/26/2010 and 01/27/2010, determinations were issued disqualifying the claimant for unemployment compensation benefits.
2. Copies of these determinations were mailed to the claimant's last known post office address on the above date[s].
3. The Notices of Determination were not returned by the postal authorities as being undeliverable.
4. The Notices of Determination informed the claimant that there were fifteen (15) days from the dates of those determinations in which to file appeals if the claimant disagreed with the determinations. The last days on which valid appeals could be filed from those determinations were 02/10/2010 and 02/11/2010.
5. The claimant did not file an appeal on or before 02/10/2010 [or 02/11/2010], but waited until 02/12/2010.

⁴ "N.T. 3/17/10" refers to the transcript of the hearing conducted before the Referee on March 17, 2010.

6. The claimant was not misinformed nor in any way mislead regarding the right of appeal or the need to appeal.

Certified Record (CR) Item No. 12 at 1, 5.

Based on the foregoing, the Referee made the following relevant conclusion:

Section 501(e) of the Law provides that a Notice of Determination shall become final and compensation shall be paid or denied in accordance therewith unless an appeal is filed within the fifteen-day period after proper notification of said determination has been given to all affected parties. The provisions of this Section of the Law are mandatory and the Referee has no jurisdiction to allow an appeal filed after the expiration of the statutory appeal period. The claimant's appeal[s are], therefore, dismissed.

CR Item No. 12 at 1, 5. Accordingly, the Referee issued an order dismissing each of Claimant's appeals. Id. at 2, 6.

On March 29, 2010, Claimant filed two appeals of the Referee's decisions with the Board in which he requested another hearing. On May 4, 2010, the Board issued two orders remanding the matter for a new hearing to the Referee acting as a hearing officer.

Another hearing on the two appeals was scheduled for May 26, 2010. Neither Claimant nor an employer appeared for the hearing. See N.T. 5/26/10⁵ at 1. The Referee noted that Claimant had requested a continuance of the hearing into June or later in the summer, but that his request was denied. Id. As a result, the Referee proceeded to the hearing without receiving testimony. Id. at 1-2. On

⁵ "N.T. 5/26/10" refers to the transcript of the hearing conducted before the Referee on May 26, 2010.

July 7, 2010, the Board issued two orders remanding the matter for a second hearing to the Referee acting as a hearing officer.

Another hearing on the two appeals was scheduled for August 11, 2010. Neither Claimant nor an employer appeared for the hearing. See N.T. 8/11/10⁶ at 1. As a result, the Referee proceeded to the hearing without receiving testimony. Id. at 1.

On September 16, 2010, the Board issued two orders adopting and incorporating the Referee's decisions of March 18, 2010, and affirming the Referee's orders. On September 30, 2010, Claimant submitted a request for reconsideration to the Board to reschedule a hearing for his case. On October 21, 2010, the Board issued an order denying Claimant's reconsideration request. Claimant then filed the instant petition for review from the Board's orders.⁷

The sole claim raised by Claimant in this appeal is that the Board erred in determining that he filed an untimely appeal without good cause. However, our review of the record in this case demonstrates that the allegation of error raised in this appeal was not raised by Claimant in his petition for review.

To the contrary, the petition for review filed by Claimant in this Court states the following, in pertinent part:

2. The Board of Review committed an error of law when it denied Mr. Naughton's Request for

⁶ "N.T. 8/11/10" refers to the transcript of the hearing conducted before the Referee on August 11, 2010.

⁷ This Court's scope of review in an unemployment compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992).

Reconsideration^[8] regarding the timeliness of his unemployment appeals.

⁸ Requests for reconsideration are governed by Section 101.111 of the Board's regulations which provides, in pertinent part:

(a) Within 15 days after the issuance of the decision of the Board, ... any aggrieved party may request the Board to reconsider its decision and if allowed, to grant further the opportunity to do the following:

- (1) Offer additional evidence at another hearing.
- (2) Submit written or oral argument.
- (3) Request the Board to reconsider the previously established record of evidence.

(b) The requests will be granted only for good cause in the interest of justice without prejudice to any party.... The request for reconsideration and the ruling of the Board shall be made a part of the record and subject to review in connection with any further appeal to the Commonwealth Court.

34 Pa. Code § 101.111.

As this Court has previously noted:

Because the decision to grant or deny a request for reconsideration is a matter of administrative discretion, this Court's review of that decision is limited to determining whether the Board abused its discretion. *Georgia Pacific Corporation v. Unemployment Compensation Board of Review*, [630 A.2d 948 (Pa. Cmwlth. 1993)]. An abuse of discretion occurs if the Board's decision demonstrates evidence of bad faith, fraud, capricious action or abuse of power. *Id.* In addition, the Board's own regulations provide that it may grant a request for reconsideration and rehearing only where there is "good cause" to do so and that ruling is subject to review by this Court. 34 Pa. Code § 101.111; *Bennett v. Unemployment Compensation Board of Review*, [470 A.2d 203 (Pa. Cmwlth. 1984)]. In determining whether "good cause" exists, the Board must consider whether the party requesting consideration has presented new evidence or changed circumstances or whether it failed to consider relevant law. *Georgia Pacific Corporation.*

Enslie v. Unemployment Compensation Board of Review, 740 A.2d 775, 779 (Pa. Cmwlth.

(Continued....)

Petition for Review at 1.

Because Claimant did not raise the foregoing allegation of error regarding the Board's decision in the petition for review that he filed in this Court, this claim has been waived for purposes of appeal. Pa.R.A.P. 1513(d); Werner v. Zazyczny, 545 Pa. 570, 681 A.2d 1331 (1996) (Commonwealth Court was correct in refusing to consider issues not fairly comprised in objections raised in petition for review); Jimoh v. Unemployment Compensation Board of Review, 902 A.2d 608 (Pa. Cmwlth. 2006) (issue not raised in the stated objections in the petition for review nor "fairly comprised therein" is waived and will not be addressed by this Court); Tyler v. Unemployment Compensation Board of Review, 591 A.2d 1164 (Pa. Cmwlth. 1991) (same).

Accordingly, the orders of the Board are affirmed.

JAMES R. KELLEY, Senior Judge

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ORDER

AND NOW, this 28th day of July, 2011, the orders of the Unemployment Compensation Board of Review, dated September 16, 2010 at Nos. B-506345 and B-506346, are AFFIRMED.

JAMES R. KELLEY, Senior Judge