

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jennifer Haley,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 296 C.D. 2011
	:	
Unemployment Compensation	:	Submitted: October 14, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: December 29, 2011

Before this Court is the Petition for Review of Jennifer Haley (Claimant) from the Order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of the Unemployment Compensation (UC) Referee (Referee), affirming the decision of the UC Service Center, and denied Claimant UC benefits because of willful misconduct pursuant to Section 402(e) of the Unemployment Compensation Law (Law),¹ 43 P.S. § 802(e). The Board held that

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended.

Claimant's appeal from the Referee's decision was untimely because it was not filed within fifteen days of the Referee's decision.

Employer discharged Claimant for insubordination after she failed to stop arguing with another employee after both were instructed to desist. (Referee's Decision, Findings of Fact (Referee's FOF) ¶¶ 1, 2.) Although the other employee also continued to argue, that employee only received written discipline because she had no prior history of discipline. (Referee's FOF ¶¶ 9, 12.) Claimant had a prior history of discipline and Employer, therefore, discharged her. (Referee's FOF ¶¶ 3, 6-13.) After a hearing, the Referee's decision finding Claimant ineligible for benefits was mailed on October 26, 2010 and stated that the final date to appeal the decision was November 10, 2010. The Board received a faxed Petition for Appeal from Claimant on November 18, 2010. Claimant requested a hearing to explain why her appeal was not late, or why it should not be considered late, which the Board granted.

On January 10, 2011, a hearing was held before a Referee serving as the Board's hearing examiner. Following the hearing, the Board made the following findings of fact:

1. The claimant filed an application for unemployment compensation benefits on August 1, 2010.
2. The claimant's request for benefits was denied by the Department.
3. The claimant filed an appeal from this determination.
4. Following a hearing on the merits, the Referee issued a decision which denied the claimant benefits.

5. A copy of the Referee's decision was mailed to the claimant's last known post office address on the same date.
6. The decision was accompanied by notice advising that the interested parties had fifteen (15) days in which to file a valid appeal.
7. This notice also advised the interested parties that an appeal may be filed by mail addressed to: Department of Labor & Industry, UC Board of Review, Room 1119, 651 Boas Street, Harrisburg, PA 17121.
8. The decision mailed to the claimant was not returned by the postal authorities as undeliverable.
9. The claimant's appeal from the Referee's decision, in order to be timely, had to have been filed on or before November 10, 2010.
10. The claimant's appeal was filed on November 18, 2010, by fax.
11. The claimant was not misinformed or misled by the unemployment compensation authorities concerning her right or the necessity to appeal.
12. The claimant's 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 (Board's FOF) ¶¶ 1-12, February 4, 2011, R.

Item 18.) In its discussion, the Board stated that:

[t]he claimant testified that she initially intended to file her appeal by e-mail but, when she experienced difficulties, she called a telephone number that she found online and then was directed to mail the appeal to the Commonwealth Court, rather than to the Department. The claimant did not identify which telephone number or entity that she called for assistance.

(Board Decision at 2.) The Board testified that, even if it credited Claimant’s testimony, her conduct would not constitute non-negligent conduct justifying *nunc pro tunc* consideration of her appeal from the Referee’s decision. (Board Decision at 2.) Therefore, the Board dismissed Claimant’s appeal. (Board Decision at 3.) Claimant now appeals to this Court.²

We have attempted to discern Claimant’s arguments regarding the Board’s denial of her *nunc pro tunc* appeal. Claimant’s Statement of Questions Involved refers only to the merits of her claim. In the Argument section of her brief, Claimant states that “Claimant was not heard, as the Appeal was filed late because it was sent in to the wrong office.” (Claimant’s Br. at 9.) Given the context of Claimant’s argument, it is not clear whether this is an assignment of error rather than a recounting of the case’s procedural posture. (See Claimant’s Br. at 9 (mainly recounting the chronological procedural events in the case).)³ However, because this could be read as an argument that Claimant’s late appeal was justified

² “This Court’s review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or findings of fact were not supported by substantial evidence.” Carson Helicopters, Inc. v. Unemployment Compensation Board of Review, 960 A.2d 524, 526 n.6 (Pa. Cmwlth. 2008).

³ According to Rules 2116(a) and 2119(a), (e) of the Pennsylvania Rules of Appellate Procedure, a party must raise issues in the Statement of Questions Involved of her brief and discuss the issues in the Argument section of her brief; otherwise, those issues are waived. Pa. R.A.P. 2116(a), 2119(a), (e); Oliver v. Unemployment Compensation Board of Review, 5 A.3d 432, 440 (Pa. Cmwlth. 2010). While we are sympathetic to the sentiment Claimant expresses in her brief that she was unjustly denied UC benefits, it is unclear what legal or factual error she believes the Board made in dismissing her appeal from the Referee’s decision and order as untimely.

because she initially, but incorrectly, sent her appeal to this Court, we will construe it as such in order to address this matter.

In reviewing the Board's Decision and the record in this case, we can find no error in the Board's determination. Section 502 of the Law states that a referee's decision is final unless an appeal is filed within fifteen days. 43 P.S. § 822. This "statutory time limit for filing an appeal from a referee's determination is mandatory." Polakovic v. Unemployment Compensation Board of Review, 531 A.2d 852, 853 (Pa. Cmwlth. 1987). This time limit, imposed by the Legislature and codified in the Law, "may not be extended as a matter of grace or mere indulgence." Russo v. Unemployment Compensation Board of Review, 13 A.3d 1000, 1003 (Pa. Cmwlth. 2010). In order to file an untimely appeal *nunc pro tunc*, a claimant must show that the untimeliness of the appeal was caused "by extraordinary circumstances involving fraud or some breakdown in the administrative process, or non-negligent circumstances related to an appellant . . . or a third party." Id. (quoting Sofronski v. Civil Service Commission, 695 A.2d 921, 924 (Pa. Cmwlth. 1997)). Here, Claimant testified that after having difficulty filing her appeal online, she sent her appeal to the Commonwealth Court after being instructed to do so by someone she spoke to on the telephone. (Referee Hr'g Tr. at 5.) Claimant neither remembered what number she had called, nor did she specify with whom she spoke or even what entity she called. (Referee Hr'g Tr. at 5.) Without this information, it is impossible to say whether Claimant's failure to timely file her appeal was caused by a breakdown in the UC administrative system or by *non-negligent* circumstances related to the Claimant. Thus, the Board was

without authority to consider the merits of Claimant's appeal from the Referee's decision and order and properly refrained from doing so.

For these reasons, despite this Court's sympathy for the circumstances expressed in Claimant's brief, we are constrained to affirm the Order of the Board.

RENÉE COHN JUBELIRER, Judge

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Unemployment Compensation	:	
Board of Review,	:	
	:	
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ORDER

NOW, December 29, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge