

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marc D. Swartz,	:	
Petitioner	:	
	:	No. 397 C.D. 2010
v.	:	
	:	Submitted: August 27, 2010
Unemployment Compensation Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: October 19, 2010

Marc D. Swartz (Claimant) appeals from the February 16, 2010, order of the Unemployment Compensation Board of Review (Board), which dismissed his appeal as untimely filed pursuant to section 501(e) of the Unemployment Compensation Law (Law).¹ We affirm.

On September 22, 2008, Claimant was released from his employment with the Department of Homeland Security (Employer), and he applied for unemployment benefits on December 2, 2008. On December 30, 2008, the Altoona service center issued a notice of financial determination finding Claimant financially ineligible for benefits. (Board's Finding of Fact No. 1.) The determination was

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

mailed to Claimant on December 30, 2008, and it informed Claimant that January 14, 2009, was the last day on which to file an appeal from the determination. (Board's Findings of Fact Nos. 2, 4.) The determination was not returned as undeliverable by the postal authorities. (Board's Finding of Fact No. 3.)

Claimant filed an appeal from the December 30, 2008, determination by fax on February 18, 2009. (Board's Finding of Fact No. 5.) The faxed documents consisted of an appeal form, an appeal letter dated February 18, 2009, and an appeal letter dated January 5, 2009. (Reproduced Record (R.R.) at 5a-1 - 5a-3.) Claimant's January 5, 2009, appeal letter is marked with a date stamp indicating that it was received by the Altoona service center on February 18th. (R.R. at 5a-3.)

A hearing was scheduled before a referee for May 17, 2009; however, neither Claimant nor Employer appeared at the hearing, and the referee issued a decision dismissing Claimant's appeal as untimely. Thereafter, a series of appeals to the Board and remands to the referee ensued. Finally, by order dated November 20, 2009, the Board remanded the matter for a hearing on the timeliness of Claimant's appeal from the December 30, 2008, determination. The Board scheduled the hearing for January 4, 2010, and directed the referee to serve as the Board's hearing officer.

On January 4, 2010, neither Claimant nor Employer attended the hearing and no testimony was presented. However, Claimant's counsel appeared and argued that Claimant timely appealed the December 30, 2008, determination by letter dated January 5, 2009:

I wanted to point out to the Board's attention that previously marked as an exhibit here in this case was a document SC5, which is a January 5, 2009 letter. The letter is from ... [Claimant] and the letter in the first paragraph says I am writing to request an appeal of your Decision to deny me unemployment benefits. It indicates that the letter

was received by the Altoona Service Center and I believe the letter speaks for itself. The letter as I said was previously a matter of record and ... I will argue constitutes a valid appeal under the relevant law.

(R.R. at 26a-6.)

On February 16, 2010, the Board dismissed Claimant's appeal as untimely filed. The Board reasoned as follows:

In this case, the appeal was filed by fax on February 18, 2009, which was after the expiration of the statutory appeal period. The claimant alleges that he filed his appeal by letter dated January 5, 2009. The Board does not find this credible as the document was not received until February 18, 2009.

(R.R. at 27a-2.)

On appeal to this Court,² Claimant contends that Board erred by failing to find that he filed a timely appeal on January 5, 2009. Claimant argues that, pursuant to the mailbox rule, the January 5, 2009, letter is presumed to have been received by the service center, and the Board did not rebut the presumption that it was received.

Section 501(e) of the Law, 43 P.S. § 821(e), provides that an appeal from an adverse decision of a service center must be filed within fifteen calendar days after such notice was delivered to the party personally, or was mailed to the party's

² Our scope of review is limited to determining whether constitutional rights were violated, whether errors of law were committed, or whether necessary findings of fact are supported by substantial evidence. Schneider v. Unemployment Compensation Board of Review, ___ A.2d ___ (Pa. Cmwlth., No. 2238 C.D. 2009, filed June 18, 2010).

last known post office address.³ Vereb v. Unemployment Compensation Board of Review, 676 A.2d 1290 (Pa. Cmwlth. 1996). The fifteen-day time limit is mandatory

³ Section 501(e) of the Law is supplemented by the Board's regulations, which provide as follows:

§ 101.82. Time for filing appeal from determination of Department.

(a) A party seeking to appeal a Department determination shall file an appeal in the form and manner specified in § 101.81 (relating to filing of appeal from determination of Department) and this section on or before the 15th day after the date on which notification of the decision of the Department was delivered personally to the appellant or mailed to him at his last known post office address.

(b) A party may file a written appeal by any of the following methods:

(1) *United States mail*. The filing date will be determined as follows:

(i) The date of the official United States Postal Service postmark on the envelope containing the appeal, a United States Postal Service Form 3817 (Certificate of Mailing) or a United States Postal Service certified mail receipt.

(ii) If there is no official United States Postal Service postmark, United States Postal Service Form 3817 or United States Postal Service certified mail receipt, the date of a postage meter mark on the envelope containing the appeal.

(iii) If the filing date cannot be determined by any of the methods in subparagraph (i) or (ii), the filing date will be the date recorded by the Department, the workforce investment office or the Board when it receives the appeal.

....

(3) *Fax transmission*.

(i) The filing date will be determined as follows:

(Footnote continued on next page...)

and subject to strict application. Id. If an appeal is not filed within fifteen days of its mailing, the determination becomes final, and the Board does not have jurisdiction to consider the matter. Id.

In this case, the service center issued a determination denying Claimant benefits on December 30, 2008, and the fifteen day appeal period expired on January 14, 2009. The record does not show that Claimant filed an appeal by mail or other means of service on or before January 14, 2009. Instead, the Board found as fact that Claimant filed his appeal by fax on February 18, 2009, (Board's Finding of Fact 5),

(continued...)

(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.

(ii) A party filing an appeal by fax transmission is responsible for delay, disruption, interruption of electronic signals and readability of the document and accepts the risk that the appeal may not be properly or timely filed.

(iii) A fax transmission is timely filed if it is received by the Department appeal office, workforce investment office or Board before midnight on the last day of the appeal period in accordance with this subsection.

which was approximately thirty-five days after the last day to file a timely appeal. This finding is supported by substantial evidence and establishes that Claimant's appeal was untimely filed.

However, Claimant argues that he mailed an appeal on January 5, 2009, and that the same must be deemed timely filed under the mailbox rule. We disagree.

The mailbox rule operates as follows:

The common law 'mailbox rule' provides that the depositing in the post office of a properly addressed letter with prepaid postage raises a natural presumption that the letter reached its destination by due course of mail. In re Rural Route Neighbors, 960 A.2d 856 (Pa. Cmwlth. 2008). Thus, under the 'mailbox rule,' evidence that a letter has been mailed ordinarily will be sufficient to permit a fact finder to find that the letter was, in fact, received by the party to whom it was addressed. Id.

Roman-Hutchinson v. Unemployment Compensation Board of Review, 972 A.2d 1286, 1289 (Pa. Cmwlth. 2009). To trigger the presumption of receipt, the party asserting the presumption must produce evidence showing that the letter was signed in the usual course of business and placed in the regular place of mailing. In re Rural Route Neighbors, 960 A.2d 856 (Pa. Cmwlth. 2008).

Here, Claimant did not appear at January 4, 2010, hearing to testify. Consequently, we have no testimony from Claimant that he deposited the letter in the post office on January 5, 2009, that the letter was properly addressed, or that the letter contained the proper postage. Moreover, there is no documentary evidence in the record such as a certificate of mailing, an envelope with a postmark, or a certified mail receipt that proves the date of mailing. Although Claimant drafted an appeal letter and dated it January 5, 2009, without evidence of mailing, we cannot presume

that Claimant mailed the letter on that date. The presumption that a letter was received cannot be based on a presumption that the letter was properly mailed. Id.; Department of Transportation, Bureau of Driver Licensing v. Whitney, 575 A.2d 978 (Pa. Cmwlth. 1990). Therefore, this argument is without merit.

Accordingly, the Board's order is affirmed.

PATRICIA A. McCULLOUGH, Judge

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	:	
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ORDER

AND NOW, this 19th day of October, 2010, the February 16, 2010, order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

PATRICIA A. McCULLOUGH, Judge