

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Maxine Davis, :  
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Petitioner :  
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 :  
v. :  
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 :  
Unemployment Compensation Board :  
of Review, : No. 921 C.D. 2011  
Respondent : Submitted: September 16, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: October 11, 2011

Maxine Davis (Claimant) petitions *pro se* for review of an order of the Unemployment Compensation Board of Review (Board) dismissing her petition for appeal because she failed to timely file an appeal as required under Section 501(e) of the Unemployment Compensation Law (Law).<sup>1</sup> Because we find no error in the Board's decision, we affirm.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess. P.L. (1937) 2897, *as amended*, 43 P.S. §821(e). Section 501(e) of the Law provides:

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*

**(Footnote continued on next page...)**

Claimant was employed by Sodexho, Inc. (Employer) as a catering assistant with her last date of employment on May 8, 2010, when she left to open her own coffee and sandwich shop. On August 1, 2010, Claimant applied for unemployment benefits, stating that flood damage had forced her to temporarily close her business. Claimant received unemployment compensation of \$49.00 per week for the weeks ending August 14, 2010 through October 9, 2010. On October 22, 2010, the Unemployment Compensation Service Center (UCSC) issued a Notice of Redetermination which provided that Claimant was ineligible for benefits because she was self-employed<sup>2</sup> and established a non-fault overpayment for the compensation she had already received.<sup>3</sup>

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**(continued...)**

*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.

(Emphasis added). If an appeal is not filed within 15 days of mailing, the determination becomes final and the Board is without jurisdiction to consider the matter. *Renda v. Unemployment Compensation Board of Review*, 837 A.2d 685 (Pa. Cmwlth. 2003).

<sup>2</sup> Section 402(h) of the Law provides: “An employe shall be ineligible for compensation in any week — (h) In which he is engaged in self-employment.”

<sup>3</sup> Section 804(b)(1) of the Law provides, in relevant part:

Any person who other than by reason of his fault has received with respect to a benefit year any sum as compensation under this act to which he was not entitled shall not be liable to repay such sum but shall be liable to have such sum deducted from any future

**(Footnote continued on next page...)**

Because both parties failed to appear at the appeal hearing, the Referee issued a decision based on the record. The Referee determined that Claimant was self-employed when she filed her application and, although the business had temporarily closed, Claimant did not present any testimony or evidence to show that she was not self-employed. Because Claimant was self-employed, the Referee imposed a non-fault overpayment and denied benefits. Attached to the Referee's decision were instructions about how to file an appeal and the last date on which Claimant could file the appeal. Included in the instructions were a physical address, a fax number, and an e-mail address, which were all accepted means of filing. However, the instructions provide that a party filing by fax or e-mail is responsible for any delay or disruption in an electronic signal and accepts the risk that the appeal may not be properly or timely filed.

On March 14, 2011, Claimant filed an appeal to the Board, two months after the January 13, 2011 deadline. She attached a letter to her petition for appeal stating that she had previously filed the appeal by fax and e-mail on December 29, 2010,<sup>4</sup> but had just discovered she faxed the appeal to the wrong department. The Board dismissed the appeal as untimely and stated that if she

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**(continued...)**

compensation payable to him with respect to such benefit year, or the three-year period immediately following such benefit year.

Act of December 5, 1935, Second Ex. Sess. P.L. (1937) 2897, *as amended*, 43 P.S. §874(b)(1).

<sup>4</sup> It should be noted that the date of mailing of Referee's Decision and Order to Claimant was December 29, 2010.

disagreed, she could request a hearing on the timeliness issue, by letter, before April 7, 2011.<sup>5</sup> On April 2, 2011, Claimant sent a letter to the Board, again stating that she filed her appeal with the wrong department and requesting that her appeal be granted as timely filed. However, Claimant did not specifically request a hearing on the timeliness issue. The Board again dismissed Claimant's appeal as untimely. This appeal followed.

Initially, Claimant contends that, contrary to the Board's order, she did request a hearing on the timeliness issue. Claimant's April 2, 2011 letter requests a hearing on the timeliness issue. It reads:

I called and put in a request to get the original fax that was sent to their office in error, however I have not received any response as of date. I would in the meantime ask that giving [sic] the circumstances that my appeal do be granted as filed on time and processed as such.

(Record Item 12). If a hearing is not requested, 34 Pa. Code §101.6(a) provides that "the tribunal shall dismiss the appeal." Because Claimant did not request a

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<sup>5</sup> The Board's letter provides:

If you believe that you filed your appeal within the fifteen (15) day period or that it should be deemed timely for other reasons, *you must request the board by letter that a hearing be scheduled* to allow opportunity to set forth your reasons as to why you believe your appeal was timely filed. ... Unless the Board receives a reply, specifically requesting a hearing on the timeliness issue, postmarked *by April 7, 2011*, it will proceed to issue an appropriate order.

hearing on the timeliness issue as required by the regulation,<sup>6</sup> the Board properly dismissed Claimant's petition.

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, Judge

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<sup>6</sup> We note that the Pennsylvania Code provides that a party filing by fax transmission or by an electronic transmission other than fax "accepts the risk that the appeal may not be properly or timely filed." 34 Pa. Code §101.82(b)(3)-(4); *see also Skowronek v. Unemployment Compensation Board of Review*, 921 A.2d 555 (Pa. Cmwlth. 2007) (providing that Claimant's counsel was responsible for ensuring all necessary information was contained in a request submitted by fax). This same language appears in the instructions for filing an appeal attached to the Referee's decision. Claimant admits that she sent the appeal to the wrong fax and email address.

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**ORDER**

AND NOW, this 11<sup>th</sup> day of October, 2011, the order of the Unemployment Compensation Board of Review, dated April 12, 2011, is affirmed.

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DAN PELLEGRINI, Judge