



## Case Summary<sup>1</sup>

Irvin L. Brimmage, *pro se*, appeals the determination of the Review Board of the Indiana Department of Workforce Development that his appeal from a decision of an Administrative Law Judge was untimely filed. Because the record reflects that Brimmage filed his appeal more than twenty days late and this Court has “strictly construed” Indiana Code section 22-4-17-3, which sets forth the appeal deadline, to require dismissal for lack of jurisdiction where an appeal has not been timely filed, we affirm the Review Board’s dismissal of Brimmage’s appeal.

### Facts and Procedural History

Brimmage was terminated from The Hapak Companies, Inc. in June 2008 and made a claim for unemployment benefits. On October 9, 2008, a claims deputy for the Department of Workforce Development (“DWD”) determined that Brimmage was not discharged for just cause and was therefore entitled to unemployment benefits. On October 17, The Hapak Companies appealed the deputy’s determination. On December 5, the DWD mailed a Notice of Hearing to the parties which informed them that a telephonic hearing with Administrative Law Judge Sabrina K. Rahn was scheduled for December 16 at 10:30 a.m. Forty-five minutes were set aside for this hearing. Included with the Notice of Hearing was a form which instructed the parties to provide one telephone number where they could be reached if they wished to participate in the hearing. Brimmage indicated that he wished to participate in the hearing and provided

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<sup>1</sup> We hereby deny the Review Board’s October 6, 2009, Verified Motion for Amended Brief.

his telephone number. Appellee's App. p. A-7. The DWD received Brimmage's form on December 15. *Id.*

On December 16, 2008, ALJ Rahn called Brimmage at least six times to participate in the hearing, but Brimmage's number was busy each time. *Id.* at A-9. The Hapak Companies participated in the hearing. *Id.* The record reflects that the hearing began at approximately 10:38 a.m. and ended at 10:44 a.m. Tr. p. 3, 5. ALJ Rahn issued a decision dated December 16, 2008, and the mailing date of the decision was December 31, 2008. The decision provides:

**SUMMARY OF CASE:** On Friday, October 17, 2008, the Employer filed an appeal to the deputy's determination, mailed or otherwise delivered on Thursday, October 09, 2008. [ALJ] SABRINA K. RAHN conducted a hearing in INDIANAPOLIS, Indiana at 10:30 AM on Tuesday, December 16, 2008. The [ALJ] was unable to contact the claimant; therefore, the claimant did not participate in the hearing. The employer, F. Haydon Hapak—President/Owner, and Paul Nicolas—Operations Manager, participated by telephone.

Decision—Reversed.

**FINDINGS OF FACT:** The employer is a moving company. The claimant worked for the employer from January 14, 2008 to June 19, 2008 as a driver/mover. On June 19, 2008, the employer dispatched the claimant to do a local move. The claimant refused. The employer asked the claimant whether he was certain of his refusal and the claimant indicated that he was. The claimant was trained on local moves and had done local moves in the past.

**CONCLUSIONS OF LAW:** In a discharge case, the Employer bears the burden of proving that it discharged the Claimant for just cause as that term is defined in I.C. § 22-4-15-1(d). An individual who is discharged for just cause in connection with employment is ineligible to receive unemployment insurance benefits. Ind. Code § 22-4-15-1(a). Discharge for just cause in connection with employment includes discharge for refusing to obey a reasonable instruction. Ind. Code § 22-4-15-1(d)(5). *Sloan v. Review Bd. of Indiana Employment Sec. Div.*, 444 N.E.2d 862, 865 (Ind. Ct. App. 1983).

The employer's instruction was reasonable, as the claimant had performed this job function on previous occasions and had been trained to perform this job function. The claimant refused the employer's instruction. As such, the [ALJ] finds that the employer discharged the claimant for just cause.

**DECISION:** The deputy's initial determination dated October 9, 2008 is reversed. . . .

Appellee's App. p. B-3-B-4. The ALJ's decision also contains the following language: "This decision will become final unless the party receiving the adverse Decision appeals to the Review Board within eighteen (18) calendar days after the mailing date of this decision." *Id.* at B-2. Eighteen calendar days after December 31, 2008, was Sunday, January 18, 2009. Because this was a weekend day, Brimmage had until January 19, 2009, to file his appeal.

On December 22, 2008—which was after the ALJ's date of decision but before the date of mailing, Brimmage faxed the following letter to ALJ Rahn entitled "Request for Reconsideration by Claimant on Case Number 08-31610":

I, Irvin L. Brimmage, was available at my home phone number, (317)xxx-xxxx, at the time designated in Reference (1), which was outlined in the letter from the State of Indiana, Department of Workforce Development, Unemployment Insurance Appeals, Notice of Hearing. In this letter, a phone number was provided to your office, (317)xxx-xxxx, which I understood to be the number to call at 10:30 AM for this hearing. The letter also stated that 45 minutes was set aside by you for this hearing. I began to call your office number at 10:15 AM and continued to call until 10:45 AM. At each call, I received a message to hold, then I was disconnected. I have a single line and no voicemail, so if you were calling me at the same time that I was calling you, then you would have gotten a busy signal. Since I was unable to reach anyone by phone and still wanted urgently to participate in the hearing and provide my input, I then drove to your office and spoke with your administrative assistant. She attempted to call you several times before 11:00 AM. When she was unable to reach you, she sent you an email, at which time you responded to her by email at 11:00 AM, stating to the effect "The employer was on the conference call

and I called the number provided by the former employer. In 10 days, I will give my final verdict.”

**Before making your final verdict, I would still like the opportunity to express by [sic] side of this case to you by this letter. I plead with you to read the following paragraphs and reconsider all the information provided when making your final decision. I stand by all my statements and am very willing to speak with you in person, if you decide to give me that opportunity.**

Appellant’s App. p. E-4. The letter then provided Brimmage’s version of why he was terminated. The record does not reflect that ALJ Rahn received or considered this fax.

On February 9 or 10, 2009, approximately twenty days after the deadline to appeal had passed, Brimmage appealed the ALJ’s decision to the Review Board. On February 13, 2009, the Review Board dismissed Brimmage’s appeal as untimely:

An appeal by a claimant or employer from a decision of the [ALJ] will be dismissed when the [ALJ]’s decision is not appealed within the time specified by the Indiana Employment and Training Act.

IC 22-4-17-3 states in pertinent part:

The parties shall be duly notified of such decision and the reasons therefor, which shall be deemed to be the final decision of the Review Board, unless within fifteen (15) days after the date of notification or mailing of such decision, an appeal is taken by the Board or the Director or by any party adversely affected by such decision to the Review Board.

IC 22-4-17-14 provides in pertinent part:

(c) If a notice is served through the United States mail, three (3) days must be added to a period that commences upon service of that notice.

(d) The filing of a document with the appellate division or review board is complete on the earliest of the following dates that apply to the filing:

(1) The date on which the document is delivered to the appellate division or review board.

(2) The date of the postmark on the envelope containing the document if the document is mailed to the appellate division or review board by the United States Postal Service.

The Review Board finds that the appeal in the above entitled case was not filed within the time prescribed by the Indiana Employment and Training Act and, therefore, the attempted appeal is dismissed.

Appellee's App. p. B-5. Brimmage, *pro se*, now appeals.

### **Discussion and Decision**

Brimmage appeals the Review Board's dismissal of his appeal as untimely. He argues that ALJ Rahn did not allow him a "reasonable opportunity" to participate in the telephonic hearing because he was unable to reach her by phone. Brimmage then addresses the merits of whether he was terminated for just cause. These arguments, however, are ones to be made in a timely appeal, which this is not.

As noted in the Review Board's decision, Indiana Code section 22-4-17-3 provides:

Unless such request for hearing is withdrawn, an administrative law judge, after providing the notice required under section 6 of this chapter and affording the parties a reasonable opportunity for fair hearing, shall affirm, modify, or reverse the findings of fact and decision of the deputy.

(b) The parties shall be duly notified of the decision made under subsection (a) and the reasons therefor, which shall be deemed to be the final decision of the review board, *unless within fifteen (15) days after the date of notification or mailing of such decision, an appeal is taken by the commissioner or by any party adversely affected by such decision to the review board.*

(Emphasis added). Indiana Code section 22-4-17-14(c) adds three days to that deadline, for a total of eighteen days. This Court held that a claimant's untimely appeal to the Review Board was properly dismissed because the Review Board did not obtain

jurisdiction over the appeal in *Szymanski v. Review Board of Department of Workforce Development*, 656 N.E.2d 290, 293 (Ind. Ct. App. 1995). *See also Quakenbush v. Review Bd. of Ind. Dep't Workforce Dev.*, 891 N.E.2d 1051, 1053 (Ind. Ct. App. 2008). “[I]t is well settled that when a statute contains a requirement that an appeal or notice of the intention to appeal shall be filed within a certain time, strict compliance with the requirement is a condition precedent to the acquiring of jurisdiction, and non-compliance with the requirement results in dismissal of the appeal.” *Quakenbush*, 891 N.E.2d at 1053 (citing *Szymanski*, 656 N.E.2d at 293). Indeed, this Court has “strictly construed” Section 22-4-17-3 to require dismissal for lack of jurisdiction where an appeal has not been timely filed. *Szymanski*, 656 N.E.2d at 293 (citing cases).

ALJ Rahn mailed her decision on the merits on December 31, 2008, but Brimmage filed his appeal on February 9 or 10, 2009—which was over twenty days past the deadline. On appeal, Brimmage does not acknowledge that his appeal is late. Rather, he concentrates on what occurred during the proceedings before the ALJ.<sup>2</sup> Brimmage has provided no excuse for his tardy appeal of the ALJ’s decision to the Review Board, and based on the record before us, he cannot do so. The ALJ’s decision provided all necessary appeal information in the first paragraph. Appellee’s App. p. B-3.<sup>3</sup> The fax to

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<sup>2</sup> In his *reply* brief, Brimmage cites 646 Indiana Administrative Code 3-12-4(e), which was in effect at the time of the ALJ’s decision but expired on January 1, 2009, under Indiana Code chapter 4-22-2.5. This provision provided that if a party failed to appear at a hearing before an ALJ and applied within seven days from the date of mailing and showed good cause why the case should be reinstated, then it shall be reinstated. Once again, this is an argument to be made in a timely appeal. Moreover, we point out that “[n]o new issues shall be raised in the reply brief.” Ind. Appellate Rule 46(C).

<sup>3</sup> Specifically, the first paragraph provides:

This decision will become final unless the party receiving the adverse Decision appeals to the Review Board within eighteen (18) calendar days after the mailing date of this

ALJ Rahn, which we do not know if she received as it is not part of the record below, has nothing to do with Brimmage's failure to timely file an appeal of her decision. We therefore affirm the Review Board's dismissal of Brimmage's appeal as untimely. Because of this conclusion, we do not address Brimmage's other argument regarding whether he was unjustly fired.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.

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decision. The appeal must be in writing and signed by the appealing party. The appeal must contain the case number, the Claimant's social security number, and an explanation of the reason for appeal. If the appealing party has additional information or documents that were not available at the time of the ALJ hearing, a request to submit the additional evidence and the documents should be included with the letter of appeal to the Review Board. [address omitted].