ATTORNEY FOR APPELLANT:

WILLIAM L. WILSON
Anderson Agostino & Keller PC
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JANINE STECK HUFFMAN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

NICOLE NELSON,

Appellant-Defendant,

vs.

REVIEW BOARD OF THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT and MADISON CENTER, INC.,

Appellees-Plaintiffs.

No. 93A02-1105-EX-431

APPEAL FROM THE REVIEW BOARD OF THE DEPARTMENT OF WORKFORCE DEVELOPMENT
The Honorable Steven F. Bier, Chairperson
Cause No. 11-R-1935

December 22, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Nicole Nelson (Nelson) appeals the dismissal of her appeal to the Review Board of the Indiana Department of Workforce Development (the Review Board) on grounds that she did not initiate the appeal in a timely fashion. Nelson presents the following issue for our review: Did the Review Board err in concluding that Nelson's appeal of the unemployment benefits repayment order was not timely filed?

We affirm.

The underlying facts as found by the administrative law judge (ALJ) are as follows:

> The claimant worked for the employer from August 22, 2007 to March 15, 2009. The claimant was a full-time mental health technician. The claimant's duties were to monitor residents on units and supervise kids.
>
> On March 15, 2009 the claimant asked her supervisor … for a break. The claimant was asked to wait since there was another coworker on break. At 8:55 p.m. the claimant cleaned out her workspace and left work. On 03/25/2009 the claimant brought in her resignation letter to Human Resources.

Appellant's Appendix at 2. Nelson thereafter filed for unemployment insurance benefits and, on April 22, 2009, a claims deputy determined Nelson was eligible to receive benefits. On May 4, 2009, the employer appealed the deputy's decision and a telephonic hearing was conducted on October 5, 2009 before an ALJ. The employer participated in the hearing but Nelson did not. The ALJ reversed the deputy's decision, issuing the following relevant conclusions of law:

> An individual who voluntarily leaves employment without good cause in connection with the employment is ineligible to receive unemployment insurance benefits. … According to the Indiana Court of Appeals in *Best Chairs Inc. v. Review Bd. of Indiana Dep't of Workforce Dev.*, 895 N.E.2d 727, 730 (Ind. Ct. App. 2008):
>
> > The employee has the burden of establishing that the voluntary

> termination of employment was for good cause, meaning that the employee must show that:
>
> > (1) the reasons for leaving employment were such as to impel a reasonably prudent person to terminate employment under the same or similar circumstances; and (2) the reasons are objectively related to the employment. This second component requires that the employee show her reasons for terminating employment are job-related and objective in nature, excluding reasons which are personal and subjective.
>
> The Indiana Court of Appeals indicated in *Moore v. Review Bd. of Employment Sec. Div.*, 461 N.E.2d 737, 739 (Ind. Ct. App. 1984), that where the party with the burden of proof fails to appear or present any evidence, then that party cannot sustain its burden of proof.
>
> The evidence shows that this claimant voluntarily left employment with this employer, making the claimant the party with the burden of proof. The claimant did not appear at the hearing to present evidence, and as a result there is no substantial evidence of record from the party with the burden of proof that shows that the separation was for good cause in connection with the work.

Appellant's Appendix at 1-2. The ALJ further determined that Nelson was disqualified from receiving unemployment benefits "[e]ffective the week ending April 18, 2009." *Id*. at 2.

On October 22, 2009, notice was mailed to Nelson that the ALJ's decision would become final unless she appealed to the Review Board "within eighteen (18) calendar days after the mailing date of [the ALJ's decision]" *Id*. at 1. On March 31, 2011, the IDWD sent Nelson a "Billing Notice for Overpaid Unemployment Compensation" notifying Nelson that she must reimburse the IDWD $6402.00 for overpayment of unemployment benefits.

On April 15, 2011, Nelson filed an appeal of the October 5, 2009 decision of the ALJ that Nelson was not entitled to benefits. In the cover letter accompanying her appeal, Nelson claimed she had "filed [her] appeal on October 26, 2009", but had heard nothing about it since that time. *Id*. at 8. On April 19, 2011, the Review Board dismissed Nelson's appeal

upon the ground that it was not timely filed. Nelson initiated the instant appeal on May 11, 2011 challenging the Review Board's dismissal.

When reviewing a worker's compensation decision, we are bound by the Review Board's factual determinations, which may not be disturbed unless the evidence is undisputed and leads inescapably to a contrary conclusion. *Indiana Spine Group, PC v. Pilot Travel Ctrs., LLC*, 93S02-1102-EX-90, 2011 WL 5593656 (Ind. Nov. 17, 2011). We will examine the record "only for any substantial evidence and reasonable inferences that can be drawn therefrom to support the [Review] Board's findings and conclusion." *Id.*, slip op. at 2. To the extent the issue involves a conclusion of law based upon undisputed facts, however, we conduct a de novo review. *Indiana Spine Group, PC v. Pilot Travel Centers, LLC*, 93S02-1102-EX-90, 2011 WL 5593656.

Nelson frames the issue in this case as follows: "The Review Board erred when it dismissed Nelson's appeal of the unemployment benefits repayment order as untimely when the Board had not ruled upon Nelson's two-year-old appeal of the determination that Nelson was not eligible for unemployment benefits." *Appellant's Brief* at 1. We conclude that with respect to the dispositive issue in this case, Nelson's formulation of the issue begs the question. The dispositive issue is whether Nelson initiated a valid appeal of the ALJ's decision in the first place. The pertinent evidence on that question, as set out above, shows that the ALJ rendered a decision after an October 5, 2009 telephonic hearing at which Nelson did not appear. Of course, this meant that Nelson did not present evidence on the question presented by her employer's appeal of the deputy's determination, i.e., whether she voluntarily left her employment for good cause. Because Nelson bore the burden of proof on

this issue, *see Y.G. v. Review Bd. of Ind. Dep't of Workforce Dev.*, 936 N.E.2d 312 (Ind. Ct. App. 2010), her failure to present evidence resulted in a decision against her. *See Moore v. Review Bd. of Emp't Sec. Div.*, 461 N.E.2d 737.

Nelson was notified of the adverse ruling and informed that she had eighteen calendar days to appeal the ruling, or until November 9, 2009. According to the Review Board's records, Nelson was not heard from again until April 15, 2011, shortly after she was notified by the IDWD that she owed $6402.00 in overpaid unemployment compensation. At that point, Nelson filed her notice of appeal, challenging the ALJ's October 19, 2009 ruling. In a letter accompanying the appeal, Nelson briefly discussed the merits of the ALJ's decision, and also offered an explanation for why she had not participated in the October 5, 2009 telephonic hearing. After the Review Board reviewed the file and dismissed her appeal as untimely, Nelson appealed that ruling to this court. Nelson filed her appendix on September 14, 2011. It included a copy of a U.S. Postal Service certified mail receipt and delivery confirmation (the Receipt) reflecting that Nelson mailed something to the IDWD on October 27, 2009 and it was delivered two days lated, on October 29. The Receipt was not in the materials submitted to the Review Board. Contemporaneous with the filing of her appendix, however, Nelson also filed a "Motion to Modify Record", asking this court to permit her to append the Receipt to the record in this case. Nelson contended it "may be the only evidence that the Review Board received Nelson's appeal, and therefore it is necessary to this Court's consideration of her appeal." Motion to Modify Record at 1. We granted the motion on September 27, 2011.

The limitation period for appealing a decision to the Review Board is statutorily set.

Ind. Code Ann. § 22-4-17-3(b) (West, Westlaw through end of 2011 1st Regular Sess.), provides that parties have fifteen days after the date of notification or mailing of a decision to appeal to the Review Board. I.C. § 22-4-17-14(c) (West, Westlaw through end of 2011 1st Regular Sess.) extends that period by three days if notice is served through the United States mail. This court has held,

> it 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 v. Review Bd. of Ind. Dep't of Workforce Dev., 891 N.E.2d 1051, 1053 (Ind. Ct. App. 2008). Nelson does not dispute that the timely filing of an appeal to the Review Board is a jurisdictional prerequisite in cases such as this. She contends, however, that she *did* timely file notice of her appeal. She claims that on October 26, 2009, she mailed a notice of her intention to appeal the ALJ's October 20 decision. She urges us to consider the Receipt as proof of that claim, thus rendering her appeal timely. She contends, therefore, that the Review Board failed to act on her appeal, and indeed has yet to consider her appeal on the merits.

As set out above, the Receipt reflects that Nelson mailed something to the IDWD on October 27 and that said item was delivered to the address provided on October 29. There is no evidence, however, as to *what* was delivered and no evidence that the addressee actually received it.[1] Does this evidence prove that Nelson timely filed a notice of her intent to appeal

[1] As the Review Board points out, such evidence might include a signed, certified return receipt confirming delivery, or a copy of a document pertaining to this case stamped "Received" on or about October 29, 2009.

the ALJ's decision? We conclude that it does not.

The record contains what purports to be a letter from Nelson to the Review Board, dated October 26, 2009, which easily would suffice as a notice of appeal. There is nothing on the face of the letter, however, that indicates this was the document that was mailed to the IDWD as memorialized on the Receipt. If this document was authenticated in some way as the one mailed to the IDWD on October 27, 2009, the outcome might well be otherwise. Indeed, we have indicated that we are inclined to view good-faith efforts to timely file a notice of appeal as complying with I.C. § 22-4-17-3 and I.C. § 22-4-17-14 even in the face of arguable technical deficiencies. *See, e.g., Quakenbush v. Review Bd. of Ind. Dep't of Workforce Dev.*, 891 N.E.2d at 1054-55 (Ind. Ct. App. 2008) (a faxed notice of appeal sent in a timely manner to the wrong fax number or address within the divisions of the IDWD was deemed to be timely filed; "where papers clearly challenging the decision of the ALJ are sent to the Appellate Division rather than the Review Board, those papers constitute an appeal…. The [IDWD] may not take advantage of its size and compartmentalization to frustrate this appeal because it was sent to the 'wrong' subdivision"). Unlike the situation in *Quakenbush*, there is no proof of what Nelson mailed to the IDWD at the end of October, either in Nelson's possession or in the records of the IDWD. Thus, there is no evidence establishing that Nelson appealed the ALJ's decision in a timely manner.

Even assuming for the sake of argument that Nelson did timely file an appeal, she is not entitled to a reversal on the merits. Nelson does not dispute that she voluntarily left her employment. "The purpose of the unemployment compensation act is to provide benefits to those who are involuntarily out of work, through no fault of their own, for reasons beyond

their control." *Davis v. Review Bd. of Ind. Dep't of Workforce Dev.*, 900 N.E.2d 488, 492 (Ind. Ct. App. 2009) (quoting *Wasylk v. Review Bd. of Ind. Emp't Sec. Div.*, 454 N.E.2d 1243, 1245 (Ind. Ct. App. 1983)). A stricter standard is imposed on those who voluntarily quit working. *Davis v. Review Bd. of Ind. Dep't of Workforce Dev.*, 900 N.E.2d 488. An employee who voluntarily leaves employment without good cause in connection with the work is not entitled to unemployment compensation benefits. *See* Ind. Code Ann. § 22–4–15–1(a) (West, Westlaw through end of 2011 1st Regular Sess.); *Davis v. Review Bd. of Ind. Dep't of Workforce Dev.*, 900 N.E.2d 488. The employee bears the burden of establishing that he or she quit for good cause. *Davis v. Review Bd. of Ind. Dep't of Workforce Dev.*, 900 N.E.2d 488. "Good cause" in this context means the employee's reasons for terminating must be objective and job-related. It is only when the employer's demands on, or conduct toward, the employee are so unreasonable and unfair that a reasonably prudent person would be impelled to terminate that "good cause" exists for voluntary termination. *Id*. To prevail, the employee must demonstrate that her reasons for terminating employment are job-related and objective in nature, and not reasons that are merely personal and subjective in nature. *M & J Mgmt., Inc. v. Review Bd. of Dep't of Workforce Dev.*, 711 N.E.2d 58 (Ind. Ct. App. 1999).

Nelson did not appear at the October 5 hearing before the ALJ and therefore presented *no* evidence as to the reasons for voluntarily terminating her employment. Obviously, this means she did not carry her burden of proof on this critical issue. *See Moore v. Review Bd. of Emp't Sec. Div.*, 461 N.E.2d 737. We understand that Nelson argues that she explained her absence from the telephonic hearing in the letter she purportedly sent to the IDWD on

October 26, *viz*.:

> I responded to the original notification on September 22, 2009 stating I could not answer the phone at 10:00 AM because I was at work on a new job with students. I stated, I am available any time after 3:30 P.M. or on any scheduled day off and I wanted to be a part of this call [i.e., the October 5 telephonic hearing]. I never was contacted. Attachment (A) This was received on September 24, 2009 and signed for by M. Bauman. Attachment (B)

Appellant's Appendix at 3. The Appendix does not include Attachments (A) and (B) alluded to in the letter, so we do not know the nature of those items or whether they would tend to corroborate her claims.

This court has recognized that due process rights are implicated with respect to a claimant's right to be present at an unemployment hearing. We have held, however, that "a party to an unemployment hearing may voluntarily waive the opportunity for a fair hearing where the party received actual notice of the hearing and failed to appear at or participate in the hearing." *Art Hill, Inc. v. Review Bd. of Ind. Dep't of Workforce Dev.*, 898 N.E.2d 363, 368 (Ind. Ct. App. 2008). To escape the rigors of waiver, a claimant who fails to appear at a hearing for which she received adequate notice must demonstrate good cause for her absence. *See id*.

Nelson's explanation for her absence from the telephonic hearing lacks proof or verification. Essentially, we have little more than her own self-serving claim that she notified the IDWD in some unexplained manner that she could not attend a hearing at the time it was originally scheduled to occur. Even assuming that she did send such notice, we note that Nelson failed to follow-up on the matter as the date of the hearing approached and she had received no response to her communiqué. In the absence of such a response, any

assumption on Nelson's part that her "notification" had been received, much less acted upon, was unreasonable and made at her own considerable peril. Examining Nelson's claims as a whole, we conclude that she has failed to establish that she was absent for good cause from the telephonic hearing. Accordingly, the record properly before the Review Board contained no evidence tending to show that Nelson voluntarily left her employment for good cause related to the employment. The failure of proof on this critical issue would have been fatal to Nelson's appeal even assuming it was timely filed.

Judgment affirmed.

RILEY, J., and MATHIAS, J., concur.