

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony Stabene,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1159 C.D. 2009
	:	
Unemployment Compensation	:	Submitted: October 23, 2009
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: November 20, 2009

Anthony Stabene (Claimant), *pro se*, petitions for review from an order of the Unemployment Compensation Board of Review (Board), which affirmed the Referee's decision dismissing Claimant's appeal on the basis that it was untimely. We affirm.

Claimant applied for unemployment compensation benefits via the internet on January 14, 2009. By notice of determination mailed on February 17, 2009, the Department of Labor and Industry, Office of Unemployment Compensation Benefits (Department) denied Claimant's application upon finding Claimant ineligible for benefits pursuant to Section 402(e) of the Unemployment

Compensation Law (Law),<sup>1</sup> due to Claimant's violation of his employer's reporting off work policy. The notice informed Claimant that the last day to file a timely appeal was March 4, 2009. Claimant filed his appeal by mail and it was received by the Department on March 6, 2009.

An evidentiary hearing on the timeliness of Claimant's appeal was held before a Referee on April 6, 2009. Claimant testified that he mailed his appeal of the February 17, 2009, determination from his home on March 3, 2009, via first class mail, in an envelope that he obtained from his father. Claimant testified that the envelope had a postage sticker dated January 29, 2009. Claimant testified further that he believed that his appeal had to be sent by March 4, 2009. By decision mailed April 7, 2009, the Referee dismissed Claimant's appeal as untimely. From this decision, Claimant filed an appeal with the Board. Therein, Claimant contended that, in addition to erroneously using an outdated postage sticker which caused the post office to not post date the envelope, he mailed his appeal on March 3, 2009 to the wrong address.

The Board made the following findings of fact:

1. A Notice of Determination (determination) was issued to the claimant on February 17, 2009, denying benefits.
2. A copy of this determination was mailed to the claimant at his last known post office address on the same date.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e). Section 402(e) provides in pertinent part:

An employe shall be ineligible for compensation for any week---

(e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in the act.

3. There is no evidence to indicate that the determination sent to the claimant was returned as undeliverable by the postal authorities.
4. The claimant received the determination.
5. The notice informed the claimant that March 4, 2009, was the last day on which to file an appeal from this determination.
6. The claimant filed his appeal by mail. It was received by the Department on March 6, 2009.
7. The envelope in which the claimant mailed his appeal has a U.S. Postage sticker dated January 29, 2009.
8. The claimant was not misinformed or misled by the unemployment compensation authorities concerning his right or the necessity to appeal.
9. The 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.

Based on the foregoing findings, the Board concluded that Claimant's appeal was filed by mail and received by the Department on March 6, 2009, which was after the expiration of the statutory appeal period. The Board concluded that the U.S. postage sticker on the envelope dated January 29, 2009, was 19 days *before* the February 17, 2009, determination was issued; therefore, it was not a valid method to determine the date of mailing. The Board concluded further that absent a proper U.S. postmark, postage meter mark, or certificate of mailing, the Board must go by the date the appeal was received, March 6, 2009. The Board also pointed out that sending an appeal to the wrong address is not good cause for an untimely appeal.

Accordingly, by order mailed May 20, 2009, the Board affirmed the Referee's dismissal of Claimant's appeal. This *pro se* appeal now follows.<sup>2</sup>

Herein, Claimant argues that he accidentally sent his appeal to the wrong address which explains why the Department did not receive his appeal until March 6, 2006. Claimant contends that the Department did not take this into consideration when it received his appeal.<sup>3</sup>

Under the Law, failure to file an appeal within fifteen days ordinarily mandates dismissal of the appeal. Section 501(e) of the Law, 43 P.S. §821. Section 501(e) of the Law provides:

(e) Unless the claimant or last employer ... 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 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.

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<sup>2</sup> This Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003).

<sup>3</sup> Claimant also argues the merits of his underlying claim for unemployment compensation benefits. However, since the Board determined that his appeal was untimely, it did not consider the merits of this matter.

43 P.S. §821(e) (emphasis added). The Board's regulation at 34 Pa. Code §101.82(b) provides, as follows, with respect to determining the filing date of an appeal:

(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.

The requirement that an appeal be timely filed is jurisdictional and the Board and its referees have no discretion to accept an untimely appeal. See Southeastern Pennsylvania Transportation Authority v. Unemployment Compensation Board of Review, 661 A.2d 505 (Pa. Cmwlth. 1995). The party initiating the appeal, Claimant herein, has the burden to prove that the appeal was timely filed. Id.

The fifteen day time limit is mandatory and subject to strict application. Lin v. Unemployment Compensation Board of Review, 558 Pa. 94, 735 A.2d 697 (1999); Renda v. Unemployment Compensation Board of Review,

837 A.2d 685 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 581 Pa. 686, 863 A.2d 1151 (2004). The date of filing of an appeal is determined from the postmark appearing on the envelope in which the appeal form was mailed. Moran v. Unemployment Compensation Board of Review, 973 A.2d 1024 (Pa. Cmwlth. 2009). Section 101.82(b) of the Board's regulation does not recognize the placing of an appeal in the mail as the initiation of the appeal, but recognizes only the postmark date. Id.

As found by the Board, the envelope containing Claimant's appeal did not contain a U.S. Postal Service postmark, postage meter mark, or certificate of mailing, but instead contained a postage sticker dated 19 days before the Department's February 17, 2009, determination was mailed. There is no dispute that Claimant's appeal was actually received on March 6, 2009, which was two days after the appeal deadline. Pursuant to 34 Pa. Code §101.82(b), the Board did not err in concluding that the filing date of Claimant's appeal was March 6, 2009, the date the appeal was actually received by the Department.

In addition, Claimant's argument that his appeal should be considered timely because he mailed it to the wrong address also must fail. It is well settled that an appeal *nunc pro tunc* is permitted where the appeal was untimely because of "non-negligent circumstances." Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996). The party seeking an appeal *nunc pro tunc* carries a heavy burden.<sup>4</sup> Staten v. Unemployment Compensation Board of Review, 488 A.2d 1207 (Pa. Cmwlth. 1985).

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<sup>4</sup> Claimant does not argue that his appeal was filed late due to fraud or a breakdown in the administrative process. It is well settled that where to fraud or a breakdown in the administrative process is shown, an appeal from a denial of unemployment compensation benefits may be accepted after the fifteenth day, as set forth by statute, on a *nunc pro tunc* basis. ATM Corp. of

(Continued....)

In this case, the February 17, 2009, determination clearly directed Claimant to mail his appeal to the Allentown Service Center in Allentown, Pennsylvania. Instead, Claimant mailed the appeal to the Department in Harrisburg, Pennsylvania. Clearly, the mailing of an appeal to an incorrect address is negligent conduct when the claimant is properly notified of the correct address to which to send an appeal. Therefore, the Board correctly determined that mailing the appeal to an incorrect address did not provide Claimant with good cause for his untimely appeal.

Accordingly, the Board did not err in dismissing Claimant's appeal as untimely. The order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

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America v. Unemployment Compensation Board of Review, 892 A.2d 859 (Pa. Cmwlth. 2006).

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**ORDER**

AND NOW, this 20th day of November, 2009, the order of the Unemployment Compensation Board of Review, at Decision No. B-484132, dated May 20, 2009, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge