

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marissa Cevallos, :
Petitioner :
 :
v. : No. 155 C.D. 2011
 : Submitted: June 24, 2011
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: December 29, 2011

Marissa Cevallos (Claimant) petitions for review from the order of the Unemployment Compensation Board of Review (Board) that affirmed a referee's decision to dismiss as untimely her appeal by facsimile (fax) transmission. Claimant argues a fax transmission sheet generated by her fax machine establishes the timeliness of the appeal. Upon review, we vacate the Board's decision and remand for a determination that directly addresses Claimant's evidence of an attempted timely appeal by fax and, if necessary, evidence on the merits of Claimant's appeal.

On August 9, 2010, the local service center mailed its notice of determination to Claimant, informing her she was ineligible for unemployment benefits under Section 402(b) of the Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S.

§ 802(b) (voluntary quit). The determination indicated Claimant could fax an appeal, but explained that faxes were considered filed as of the date identified on the Department of Labor and Industry's (Department) receiving fax machine. It also provided, "If you appeal by fax, you are responsible for any delay, disruption, or interruption of electronic signals and the readability of the appeal, and you accept the risk that the appeal may not be properly or timely filed." Determination at 2, Certified Record, Item No. 4. The determination also advised Claimant the last day to timely appeal was August 24, 2010.

Claimant's counsel faxed Claimant's appeal to the Department. The Department did not have a record of receiving Claimant's faxed appeal until September 16, 2010. A referee scheduled a hearing to address whether Claimant's appeal was late. At the hearing, Claimant and her counsel testified. Employer did not attend.

Claimant's counsel testified he initially faxed Claimant's appeal to the Department on August 18, 2010, with an accompanying cover letter. Claimant and Claimant's counsel both testified that each repeatedly telephoned the Department to learn the status, but neither was able to get a response. Notes of Testimony, (N.T.) 11/3/10 at 5. These telephone calls began "approximately 2 weeks from the faxing" of the appeal on August 18, 2010. Claimant's Br. at 14.

Claimant's counsel testified that on September 16, 2010, he faxed a letter to the Department asking why there was no response to the appeal. Included with this fax was the appeal, the cover letter and a fax confirmation page of the

fax.¹

At the hearing, the referee stated, "I'm going to consider this appeal as timely filed because of what you're telling me." N.T. at 5. The referee scheduled a new hearing, at which Claimant testified on the substantive issues in her appeal. Employer did not appear.

After the hearing, the referee dismissed the appeal as untimely. The Board affirmed. The Board found: Claimant filed an appeal on September 15, 2010; Claimant was not misinformed or misled by the unemployment compensation authorities concerning her right to appeal; and, the late filing was not caused by fraud or its equivalent by the administrative authorities, a breakdown in the appellate system, or by non-negligent conduct. Claimant appealed to this Court, arguing the evidence supports the timeliness of her appeal.²

The law on this issue is well established. See, e.g., George v. Unemployment Comp. Bd. of Review, 767 A.2d 1124 (Pa. Cmwlth. 2001). An appeal from a service center's determination must be filed "within fifteen calendar

¹ The fax confirmation page showed that a fax to the Department's fax number on "8/18" was "OK." Certified Record (C.R.), Item No. 5.

It is unclear if Claimant's fax from September was transmitted on September 15, 2010, or September 16, 2010. While there may be some ambiguity as to the exact date the document was faxed in September, it is clear it was faxed well after the August 24, 2010 appeal deadline.

² We are limited to determining if the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Ductmate Industries, Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

days after such notice was delivered to him [or her] personally, or was mailed to his [or her] last known post office address." Section 501(e) of the Law, 43 P.S. § 821(e). A statutory appeal period is mandatory and may not be extended as a matter of grace or mere indulgence. Union Elec. Corp. v. Bd. of Prop. Assessment, Appeals & Review of Allegheny County, 560 Pa. 481, 746 A.2d 581 (2000). Failure to timely appeal an administrative agency's decision constitutes a jurisdictional defect. Sofronski v. Civil Serv. Comm'n, 695 A.2d 921 (Pa. Cmwlth. 1997).

The filing date for a faxed appeal is determined as follows under 34 Pa. Code § 101.82(b)(3)(i):

(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.

A faxed appeal is timely filed, "if it is received by the Department appeal office, workforce investment office or the Board before midnight on the last day of the appeal period." 34 Pa. Code § 101.82(b)(3)(iii).

The date and time stamp placed by the sender's fax machine is

inherently unreliable. George. Thus, "[a] party filing an appeal by fax transmission is responsible for delay, disruption, or interruption of electronic signals and readability of the document and accepts the risk that the appeal may not be properly or timely filed." 34 Pa. Code § 101.82(b)(3)(ii).

The facts in this case are similar to those in Mountain Home Beagle Media v. Unemployment Compensation Board of Review, 955 A.2d 484 (Pa. Cmwlth. 2008). There, the Department received an employer's faxed appeal one week after the deadline. At the hearing, the employer presented a facsimile confirmation sheet and a two-page appeal, which bore the imprint placed by the sender's fax machine indicating the employer faxed the appeal one day prior to the deadline. The Board relied on the date the Department acknowledged receipt of the appeal, which was one week late. Citing applicable precedent and Board regulations, this Court affirmed the Board's dismissal of the appeal as untimely.

Here, Claimant relies on identical evidence as did the employer in Mountain Home Beagle. Our cases hold that a sender's fax machine stamp is unreliable because dates and times may be readily changed on fax machines and fax transmission sheets. Mountain Home Beagle; George. Our cases also hold that "where the appeal is transmitted by fax, the date of filing is the date that it is acknowledged as received by a representative of the Department or Board not the date of the fax." Mountain Home Beagle, 955 A.2d at 486 (quoting George, 767 A.2d at 1128 n.8).

Notwithstanding the foregoing authority, a divided *en banc* panel of

this Court recently addressed this area of the law in Wright v. Unemployment Compensation Board of Review, ___ A.3d ___ (Pa. Cmwlth., No. 2739 C.D. 2010, filed December 16, 2011). In Wright, a claimant representing himself filed an appeal by fax. He presented testimonial and documentary evidence that his appeal by fax was timely, but the compensation authorities had no record that it was received timely. Rather, only a later faxed appeal was in the file, and that appeal was not received within the 15-day period. While the referee accepted the claimant's evidence and found that the appeal was timely, the Board subsequently determined the appeal was untimely. Significantly, the Board's findings of fact did not expressly address the claimant's evidence of his attempted timely appeal by fax.

On further appeal, we reversed on the timeliness issue. The Court reasoned that while the Board was free to reject the claimant's evidence of an attempted timely appeal by fax, it needed to address the evidence and not ignore it.

The current case is in some minor ways different from the situation in Wright;³ however, it shares one major similarity. In both cases the Board did not expressly address the evidence that the claimant attempted a timely appeal by fax. While the Board is free to reject the evidence as not credible, or to determine that despite the efforts of Claimant's counsel the attempted timely appeal by fax was

³ In this case, the referee dismissed the appeal as untimely, whereas in Wright v. Unemployment Compensation Board of Review, ___ A.3d ___ (Pa. Cmwlth., No. 2739 C.D. 2010, filed December 16, 2011) (en banc), the referee found the faxed appeal was timely. Also, in this case there was documentary evidence in the form of a fax confirmation page, whereas in Wright there was no fax confirmation page. Instead, the claimant in Wright offered an account log created by the sender's telephone/facsimile carrier.

not received by the compensation authorities, the Board should address the evidence in a straightforward manner if it intends to dispose of the controversy on that basis. This seems to be the new direction charted by the majority of the *en banc* panel in Wright.

Therefore, consistent with Wright, we vacate the Board's decision and remand for a determination that directly addresses Claimant's evidence of an attempted timely appeal by fax and, if necessary, evidence on the merits of Claimant's appeal.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marissa Cevallos,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 155 C.D. 2011
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 29th day of December, 2011, the order of the Unemployment Compensation Board of Review is **VACATED and REMANDED** for further proceedings consistent with the foregoing opinion.

Jurisdiction is relinquished.

ROBERT SIMPSON, Judge