

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose V. Frayre, :
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 Petitioner :
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 v. :
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 Unemployment Compensation :
 Board of Review, : No. 1839 C.D. 2009
 Respondent : Submitted: January 15, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE JOHNNY J. BUTLER, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY JUDGE PELLEGRINI

FILED: February 16, 2010

Jose V. Frayre (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) dismissing his petition for appeal because it was not filed within 15 calendar days of the Notice of Determination (Determination) being mailed as required under Section 501(e) of the Unemployment Compensation Law (Law).¹ Because his untimeliness was not due

¹ 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 calendar days after such notice was delivered

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to fraud, a breakdown in the administrative process, or non-negligent conduct, Claimant failed to meet the requirements for a *nunc pro tunc* appeal, and we affirm the Board's dismissal.

On September 21, 2008, Claimant filed two separate claims for unemployment compensation benefits stemming from termination of his employment with both U.S. Security Associates and JFC Staffing.² On November 5, 2008, the Department of Labor and Industry (Department) mailed two separate determinations to Claimant denying both of his claims. Both determinations indicated the last day to timely appeal the determination was November 20, 2008. Claimant alleges he only received one appeal form, which was attached to the U.S. Security determination, and he understood this to mean he was only required to file one appeal form to cover both claims. Claimant filed a timely appeal of his U.S. Security claim on November 10, 2008. On his petition for appeal, Claimant only provided the work address for U.S. Security and only discussed his separation from employment with U.S. Security, not the JFC Staffing incident. On December 24, 2008, the Referee issued a Decision reversing the determination of the Department and approving benefits under Section 401(f) of the Law, 43 P.S. §801(f), for

(continued...)

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.

² Because the merits of these claims are not at issue in this opinion, their underlying facts will not be discussed.

Claimant's U.S. Security Claim. Claimant failed to file a timely appeal of his JFC Staffing claim.

In January of 2009, both Claimant and his attorney contacted the Unemployment Compensation Service Center (UCSC) inquiring as to why he was not receiving benefits on his U.S. Security claim.³ At that time, Claimant admitted he failed to file an appeal from the JFC Staffing determination. A Department representative informed both Claimant and his attorney that he needed to appeal this determination, and the necessary paperwork was sent to Claimant. On March 2, 2009, Claimant again contacted the Department stating he did not know he needed to file an appeal for both determinations. He was again informed that he should formally file an appeal of the JFC Staffing determination, which Claimant did on March 16, 2009.

Based upon these undisputed facts, the Referee dismissed Claimant's appeal because he failed to file within 15 days after receiving proper notification of the JFC Staffing determination as required by Section 501(e) of the Law. The Referee found that the determination informed Claimant that he only had 15 days to file an appeal if he disagreed with the determination, that the last day on which to file a valid appeal was November 20, 2008, and Claimant waited until March 16, 2009, to file his appeal. The Referee specifically found that Claimant "was not misinformed nor in any way misled regarding the right of appeal or the need to appeal." The provisions of Section 501(e) of the Law are mandatory, and the

³ According to the Department, Claimant was not receiving benefits because his employment with and termination from JFC Staffing for refusing to take a drug test occurred after his employment with U.S. Security was terminated. Therefore, his current unemployment was due to the refusal, not due to his employment being terminated with U.S. Security.

Referee had no jurisdiction to allow the appeal given the fact that it was filed after expiration of the statutory period. The Board found Claimant's late appeal was not caused by fraud, a breakdown in the appellate system, or by non-negligent conduct; therefore, it affirmed the decision of the Referee. This appeal followed.⁴

Claimant admits that his appeal of the JFC Staffing determination was not filed within the statutorily required 15 calendar days from the date of mailing. However, he contends the Board committed an error of law by failing to permit his appeal to be filed *nunc pro tunc* because the untimely filing was due to a breakdown in the administrative process. Our Supreme Court has recognized three exceptions to the statutory filing mandate which permit the Board to allow an untimely appeal to be filed *nunc pro tunc* – the presence of fraud; a breakdown in the administrative process; or if the late filing was the result of the non-negligent conduct of a claimant, claimant's attorney or his staff. *Cook v. Unemployment Compensation Board of Review*, 543 Pa. 381, 671 A.2d 1130 (1996). A breakdown in the administrative process occurs “where an administrative board or body is negligent, acts improperly or unintentionally misleads a party.” *Union Electric Corporation v. Board of Property Assessment, Appeals & Review of Allegheny County*, 560 Pa. 481, 746 A.2d 581 (2000). Claimant contends he was unintentionally misled by the UCSC when he was given two notices of determination but only one appeal form, and this lead him to believe he only needed to file a single form to contest both determinations. We disagree.

⁴ Our review is limited to determining whether the Board committed an error of law, whether constitutional rights were violated, or whether necessary findings of fact were supported by substantial evidence. *Hessou v. Unemployment Compensation Board of Review*, 942 A.2d 194 (Pa. Cmwlth. 2008).

Claimant admitted that he received Notices of Determination for both his U.S. Security and JFC Staffing claims on November 5, 2008. Both notices contained a conspicuous section directly below the actual determination entitled “APPEAL INSTRUCTIONS” which stated, “The last day to timely appeal this determination is: November 20, 2008.” This section went on to state that a claimant could use the appeal form provided with the determination *or submit a letter or e-mail* to institute his appeal, and listed what information had to be included in the appeal *regardless of the format the claimant chose*. Even if an appeal form was not attached to the JFC Staffing determination, this was not enough for Claimant to meet his burden of proving he was misled into believing he did not need to file an appeal, especially given the conspicuous, unambiguous language contained in the Notices of Determination. In addition, we have repeatedly held that a claimant’s failure to understand appeal procedures or his unfamiliarity with processes of the Board does not excuse an untimely filing. *Hessou v. Unemployment Compensation Board of Review*, 942 A.2d 194 (Pa. Cmwlth. 2008) (citing *Finney v. Unemployment Compensation Board of Review*, 472 A.2d 752 (Pa. Cmwlth. 1984)). Regardless of whether Claimant was unaware that failure to appeal his JFC Staffing determination could negatively affect his ability to collect benefits, this does not excuse his untimely filing. Finally, even if he received only one appeal form, that does not explain why he only discussed his separation from employment with U.S. Security and did not address the JFC Staffing incident.

Claimant also contends that the Board should have permitted him to file an appeal *nunc pro tunc* because his untimeliness was due to non-negligent conduct. However, our Supreme Court has indicated that when an appeal is untimely due to non-negligent conduct of a claimant or his attorney, an appeal may be allowed *nunc pro tunc* if it is “filed within a short time after the [claimant] or his counsel learns of

and has an opportunity to address the untimeliness, and the time period which elapses is of very short duration.” *Cook*, 543 Pa. at 385, 671 A.2d at 1131. Even if we characterize Claimant’s conduct as non-negligent, he cannot meet this standard. Claimant testified before the Referee that when he called the UCSC on January 3, 2009, a representative told him he was not receiving benefits because he failed to appeal the JFC Staffing determination and that the representative was going to mail him an appeal form. Claimant’s counsel admittedly spoke to a representative at the UCSC in January as well, and was told an appeal needed to be filed. Despite receiving this information in January, Claimant did not file his appeal until March 16, 2009 – two months after learning of and having an opportunity to address the untimeliness. Because of the extended time period which elapsed, much longer than the 15 days that he had to originally appeal, Claimant’s petition to file an appeal *nunc pro tunc* was properly denied.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

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ORDER

AND NOW, this 16th day of February, 2010, the order of the Unemployment Compensation Board of Review, dated August 20, 2009, is affirmed.

DAN PELLEGRINI, JUDGE