

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Katrina D. Mayberry,	:	
Petitioner	:	
	:	
v.	:	No. 1966 C.D. 2007
	:	
Unemployment Compensation	:	Submitted: April 4, 2008
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
 HONORABLE DAN PELLEGRINI, Judge
 HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: May 5, 2008

We consider the appeal of Katrina Mayberry (Mayberry) from the order of the Unemployment Compensation Board of Review (Board) that dismissed her appeal as untimely. We affirm the Board.

Mayberry filed for unemployment compensation benefits following the termination of her employment by Manor Care Health Services (Manor Care) for failing to comply with “call off” procedures when missing work. The Bureau of Unemployment Compensation (Bureau) awarded benefits after determining that Manor Care did not meet its burden of demonstrating that Mayberry failed to comply with those procedures. The Board appealed and, on May 9, 2007, after a hearing held on May 2, 2007, Referee Reesa L. Rose reversed the Bureau, determining that Mayberry had committed willful misconduct under Section 402(e)

of the Pennsylvania Unemployment Compensation Law (Law)¹, 43 P.S. §802(e), by not following her employer’s prescribed procedures. Section 502 of the Law, 43 P.S. §822, requires that an appeal of the Referee’s decision must be filed within fifteen days of that decision; Mayberry filed an appeal, acting *pro se*, on July 18, 2007. In her appeal, Mayberry explained her late filing by saying that she had retained an attorney who had failed to file an appeal for her in spite of his repeated assurances that he had. She made no claim of any error on the part of the Bureau or its employees. The Board dismissed Mayberry’s appeal as untimely in a Decision and Order dated September 19, 2007. This appeal followed.

The questions we are asked to consider are whether the fraudulent conduct of Mayberry’s attorney excuses her failure to file a timely appeal pursuant to Section 502 of the Law, and whether the Board’s dismissal of her appeal acted as a denial of her due process rights.²

Mayberry first urges us to reverse the Board because she alleges what could be fraud or similar compelling circumstances.

Section 502 of the Law provides that an appeal from a decision of a Referee must be filed within fifteen days after the date of the decision. “The fifteen-day period in which to file an appeal is mandatory. If an appeal is not filed within that time limit, the determination becomes final, thereby depriving the Board of jurisdiction over the matter.” *UGI Utilities, Inc. v. Unemployment Compensation Board of Review*, 776 A.2d 344, 347 (Pa. Cmwlth. 2001). An

¹ Act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, *as amended*.

² Our standard of review is limited to determining whether constitutional rights have been violated, an error of law has been committed, or whether factual findings are supported by substantial evidence. *Brunswick Hotel & Conference Center, LLC v. Unemployment Compensation Board of Review*, 906 A.2d 657 (Pa.Cmwlth. 2006).

appeal *nunc pro tunc* may be allowed “when a delay in filing the appeal is caused by extraordinary circumstances involving ‘fraud or some breakdown in the court’s operation through a default of its officers.’” *Cook v. Unemployment Compensation Board of Review*, 543 Pa. 381, 383-384, 671 A.2d 1130, 1131 (1996) (quoting *Bass v. Commonwealth of Pennsylvania, Bureau of Corrections, et al.*, 485 Pa. 256, 259, 401 A.2d 1133, 1135 (1979)). This Court has repeatedly refused to extend the deadline for the filing of an appeal where there has been fraud or misconduct on the part of a party’s attorney. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 536 Pa. 633, 637 A.2d 293 (1993), *Hentz v. Civil Service Commission of the City of Philadelphia*, 481 A.2d 998 (Pa. Cmwlth. 1984).

In *Hentz*, the appellant was dismissed from his position with the Philadelphia Police Department on charges of conduct unbecoming an officer. On July 9, 1982, the Commission issued a decision which modified the discipline imposed and ordered a demotion together with a probation period of one year. Hentz failed to appeal from the Commission's decision within the thirty-day period required under local rule 146 III. On December 17, 1982, Hentz filed an appeal *nunc pro tunc* with the court of common pleas, stating as grounds for his late filing the misconduct of his former attorney in fraudulently informing him that an appeal had, in fact, been timely filed. The trial court denied the petition and Hentz appealed to this Court. We denied the appeal, finding, “[g]enerally, the *negligence* of an appellant's attorney has not been considered sufficient excuse for the failure to file a timely appeal. An extension to the required period during which an appeal may be filed is justified only where there is fraud or some breakdown in

the court's operation through default of its officers.” *Id.* at 999 (citations omitted, emphasis in original).

In *Hughes*, the petitioner was denied appointment to the State Police Academy because of high school drug use. Hughes hired an attorney after the Background Investigation Review Board denied his appeal. This attorney told Hughes that he had filed an appeal, the appeal had been granted and that he was scheduled to start training in an upcoming class. When Hughes discovered that the attorney had been disbarred and had been lying to him, he retained another attorney to file an appeal *nunc pro tunc*. Quoting *Hentz*, 481 A.2d at 1000, we said “a policy of extending appeal times on the basis of the fraud or misconduct of a party’s own attorney would tend to encourage such abuses, and could not, therefore, be logically supported.” 619 A.2d at 392.

Our Supreme Court, in *Bass*, quoted above, extended this rule by holding that the *non-negligent* conduct of an appellant's attorney would also justify an appeal *nunc pro tunc*. Since *Bass*, this Court has permitted the filing of untimely appeals in a number of cases where the delay was beyond the control of the appellant or his attorney. *Perry v. Unemployment Compensation Board of Review*, 459 A.2d 1342 (Pa. Cmwlt. 1983) (mechanical failure of law clerk's car); *Tony Grande, Inc. v. Workmen's Compensation Appeal Board (Rodriguez)*, 455 A.2d 299 (Pa. Cmwlt. 1983) (sudden hospitalization of counsel); *Walker v. Unemployment Compensation Board of Review*, 461 A.2d 346 (Pa. Cmwlt. 1983) (failure of post office to forward notice of referee's decision). Mayberry, however, has brought no cases to our attention extending the holding in *Bass* to include

delays caused by the *fraudulent* conduct of an appellant's attorney. Mayberry's claim that her attorney's fraud should excuse her late filing is without merit.³

Mayberry also asserts that in denying her appeal the Board denied her due process because due process protection includes a right to be heard on appeal. We agree. The right to be heard on appeal, however, like the right to be heard before a court of record or an administrative body, is subject to the rules of procedure or the administrative rules governing those forums. Mayberry was not denied her right to due process; she failed, for reasons we may not excuse, to exercise that right.

Accordingly, the Order of the Unemployment Compensation Board of Review dismissing Mayberry's appeal is affirmed.

JAMES GARDNER COLINS, Senior Judge

³ If, in fact, her attorney engaged in "fraudulent" conduct, we advise Mayberry to contact the Disciplinary Board of our Supreme Court.

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Board of Review,	:	
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ORDER

AND NOW, this 5th day of May, 2008, the Order of the Unemployment Compensation Board of Review in this matter is AFFIRMED.

JAMES GARDNER COLINS, Senior Judge