

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John D. Plut, :  
Petitioner :  
 :  
v. : No. 2283 C.D. 2007  
 : Submitted: August 1, 2008  
Unemployment Compensation :  
Board of Review, :  
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOSEPH McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: October 14, 2008

John D. Plut (Claimant) petitions, *pro se*, for review of an adjudication of the Unemployment Compensation Board of Review (Board) that dismissed Claimant's appeal as untimely. The Board held that Claimant's travel, during which time he did not receive his mail, did not excuse his untimely appeal of the Unemployment Compensation Service Center's (UC Service Center) denial of unemployment compensation. We affirm.

Claimant, a Canadian citizen, worked as an electrical engineer for Noramtec Consultants, Inc. (Employer), under a temporary work permit (TN visa). The TN visa allowed Claimant to work and reside in the United States for a one-year period, so long as he continued to work for the employer who had sponsored the visa. On March 5, 2007, he left employment with Employer because of a dispute over the terms of his employment contract. Claimant applied for

unemployment compensation benefits that same day. Claimant promptly returned to Canada, as he was required to do under the conditions of his TN visa. On March 23, 2007, the UC Service Center issued a Notice of Determination finding Claimant ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law),<sup>1</sup> because he had voluntarily quit his job with Employer and had failed to provide a necessitous and compelling reason for quitting. The determination was sent to Claimant in Ontario, at the address he provided in his application for benefits. Claimant timely appealed the UC Service Center's determination.

On May 9, 2007, the Referee remanded the matter to the UC Service Center for findings on whether Claimant was entitled to benefits as an alien<sup>2</sup> and whether he was available for work.<sup>3</sup> On May 15, 2007, the UC Service Center again denied Claimant benefits, this time holding that Claimant had not provided the requisite verifications required in order for an alien to be eligible for unemployment compensation. The UC Service Center's second denial notice stated that Claimant's final day to appeal the determination was May 30, 2007.

---

<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§ 751 – 914. Section 402(b) of the Law provides that an employee shall be ineligible for compensation for any week “[i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.” 43 P.S. §802(b).

<sup>2</sup> Section 402.3 of the Law provides in relevant part:

- (a) Benefits shall not be paid on the basis of services performed by an alien unless such alien is an individual who has been lawfully admitted for permanent residence or otherwise is permanently residing in the United States under color of law . . . .

43 P.S. § 802.3.

<sup>3</sup> Section 401(d)(1) of the Law states, in relevant part, that “[c]ompensation shall be payable to any employe who is or becomes unemployed, and who ... [i]s able to work and available for suitable work.” 43 P.S. §801(d)(1).

Claimant was in Brazil looking for work during the months of May and June, and he did not make arrangements to have his mail forwarded to him from Ontario. He returned to Ontario on June 19, 2007. When he found the UC Service Center's denial of unemployment compensation, he appealed via fax on July 11, 2007. Claimant waited three weeks, he explained at the hearing, because he was confused about his appeal since he had already appealed one UC Service Center determination.

On September 14, 2007, the Referee conducted a telephonic hearing. The Referee informed Claimant that the Bureau, in its Notice of Hearing, had not designated the timeliness of Claimant's appeal as an issue. The Referee offered to allow Claimant to postpone the hearing to give him time to prepare a case on the threshold issue of whether his appeal was timely. However, Claimant chose to present evidence on the timeliness of his appeal rather than postpone the hearing.

On September 18, 2007, the Referee issued his determination that Claimant's appeal was untimely and that Claimant had not been misinformed or in any way misled regarding his appeal rights. Accordingly, the Referee dismissed Claimant's appeal, rendering the UC Service Center's determination final.<sup>4</sup>

---

<sup>4</sup> Section 501(e) of the Law provides:

- (e) 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 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.

43 P.S. §821(e).

Claimant appealed to the Board, and it affirmed the Referee's decision. Claimant then petitioned for this Court's review of the Board's adjudication.

On appeal,<sup>5</sup> Claimant contends that the Referee erred in raising the issue of the timeliness of his appeal when it was not so designated on the Notice of Hearing. Claimant further contends that the Board erred in not considering all evidence underlying his claim that he was eligible for benefits under Section 402.3 of the Law. Claimant requests this Court to remand this case to the Board to address the merits of Claimant's appeal. In the alternative, Claimant contends that his failure to file a timely appeal should be excused, and he should be allowed to file an appeal *nunc pro tunc*.

We consider, first, Claimant's contention that the Referee improperly considered the issue of timeliness because it was not an issue identified in the Notice of Hearing. The Board argues that its regulations permit the Referee to address issues not listed in the Notice of Hearing with the consent of the parties. The pertinent Board regulation provides as follows:

When an appeal is taken from a decision of the Department, the Department shall be deemed to have ruled upon all matters and questions pertaining to the claim. In hearing the appeal the tribunal shall consider the issues expressly ruled upon in the decision from which the appeal was filed. However, any issue in the case may, with the approval of the parties, be heard, if the speedy administration of justice, without prejudice to any party, will be substantially served thereby.

34 Pa. Code §101.87. Here, Claimant gave this approval.

---

<sup>5</sup> This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or findings of fact were not supported by substantial evidence. *Lee Hospital v. Unemployment Compensation Board of Review*, 637 A.2d 695, 697 (Pa. Cmwlth. 1994).

The record contains the following colloquy between the Referee and Claimant:

R. We didn't designate by putting the number 47 or some other type of designation on our Hearing Notice to let you know that the timeliness of the appeal, the validity and timeliness, would be an issue. We didn't do that. We missed, apparently the Service Center missed the issue as well. So the question is are you prepared to address this without having that formally designated to you?

C. Yes.

R. And if you, okay, that's a yes, that's fine. That's, I'll consider that as a knowing and valid consent and waiver of the defect.

C. You're here right now and I'm willing to address all things.

Notes of Testimony, September 14, 2007, at 5 (N.T.\_\_\_\_). Claimant consented at the hearing to have the Referee decide the timeliness issue without continuing the question to another day.<sup>6</sup>

Although the Referee gave Claimant the option to postpone the hearing on the issue of timeliness, the Referee did not give Claimant a chance to

---

<sup>6</sup> Moreover, Claimant failed to preserve this issue by not raising it in his Petition for Review with this Court. Pennsylvania Rule of Appellate Procedure 1513(d) states in relevant part:

An appellate jurisdiction petition for review shall contain: ... (5) a general statement of the objections to the order or other determination; and (6) a short statement of the relief sought.... The statement of objections will be deemed to include every subsidiary question fairly comprised therein.

PA. R.A.P. 1513(d). *See also Jimoh v. Unemployment Compensation Board of Review*, 902 A.2d 608 (Pa. Cmwlth. 2006) (claimant's arguments regarding his immigration status and eligibility for benefits were not contained in his Petition for Review, nor fairly comprised therein, and thus were waived under PA. R.A.P. 1513).

refuse to decide the timeliness issue. In *DiLenno v. Unemployment Compensation Board of Review*, 429 A.2d 1288, 1289 (Pa. Cmwlth. 1981), this Court held that the timeliness of an appeal is a “jurisdictional prerequisite.” It is axiomatic that an objection to the lack of subject matter jurisdiction can never be waived and may be raised at any stage of a case, even by a court on its own motion. *Department of Transportation, Bureau of Traffic Safety v. Forte*, 371 A.2d 526, 527 (Pa. Cmwlth. 1977). The Referee could not waive jurisdiction; accordingly, the Referee did not err in considering the issue of timeliness.

Claimant next contends that the Board erred in not considering all evidence underlying his claim that he qualified for benefits under Section 402.3 of the Law, 43 P.S. §802.3. What Claimant fails to recognize, however, is that the Board lacked jurisdiction to reach the merits of his case because of his untimely appeal. *DiLenno*, 429 A.2d at 1289 (timeliness of an appeal is jurisdictional in nature). Simply, the Board could not decide Claimant’s issue because it lacked jurisdiction.

Finally, Claimant contends that even if his appeal was not timely, he should be allowed to file an appeal *nunc pro tunc*. In asserting this claim, Claimant argues that his late appeal should have been excused due to extenuating circumstances. Claimant’s argument lacks merit.

Appeals *nunc pro tunc* are permitted when the appeal delay results from extraordinary circumstances involving fraud or some breakdown in the administrative process. *McClean v. Unemployment Compensation Board of Review*, 908 A. 956, 959 (Pa. Cmwlth. 2006). In *Bass v. Commonwealth*, 485 Pa. 256, 401 A.2d 1133 (1979), this standard was relaxed somewhat, allowing a *nunc pro tunc* appeal where the delay was caused by the non-negligent act of a third

party and was promptly corrected. Most recently, in *Cook v. Unemployment Compensation Board of Review*, 543 Pa. 381, 671 A.2d 1130 (1996), our Supreme Court extended the *Bass* principles to allow a *nunc pro tunc* appeal where the non-negligent conduct was that of the appellant:

We believe a better statement of the rule in *Bass* is that where an appeal is not timely because of non-negligent circumstances, either as they relate to appellant or his counsel, and the appeal is filed within a short time after the appellant or his counsel learns of and has an opportunity to address the untimeliness, and the time period which elapses is of very short duration, and appellee is not prejudiced by the delay, the court may allow an appeal *nunc pro tunc*.

*Id.* at 384-85, 671 A.2d at 1131.

In this case, Claimant's absence from his residence in Ontario during the appeal period does not excuse his late appeal. This case is similar to *Hanin v. Unemployment Compensation Board of Review*, 377 A.2d 1062 (Pa. Cmwlth. 1977). In that case, claimant appealed a denial of unemployment compensation more than one month after the deadline and requested authority to appeal *nunc pro tunc*. The claimant explained that he had been out of the state seeking employment and that he had mailed courtesy cards to the Board from cities which he had visited in order to keep his unemployment compensation claim open. This Court held that these facts did not justify his failure to timely appeal the denial of benefits that was sent to the Claimant's address of record.

As in *Hanin*, Claimant did not meet his burden of proving extenuating circumstances for not timely filing his appeal. Claimant traveled to Brazil to seek employment but did not make arrangements for his mail to be forwarded or

checked by another person. *Hanin* established that Claimant's failure to collect mail from his address of record does not justify a late appeal.

Additionally, after Claimant returned from Brazil and found the UC Service Center's determination, he waited three additional weeks before filing his appeal. According to the Board, Claimant attributed this further delay "to the fact that he was confused regarding his appeals that were pending." Board Opinion, Finding of Fact No. 9.<sup>7</sup> However, Claimant's claim of confusion is belied by the fact that he spoke via telephone from Brazil to the UC Service Center on May 14, 2007, and was informed that a determination denying his claim was being issued.<sup>8</sup> Claimant simply cannot meet his high burden of proving that he was entitled to appeal *nunc pro tunc*.

For all of the foregoing reasons, we affirm the Board's adjudication.

---

MARY HANNAH LEAVITT, Judge

---

<sup>7</sup> Claimant does not challenge this finding. Because Claimant does not challenge the Board's finding of fact, it is binding upon this Court. *Salamak v. Unemployment Compensation Board of Review*, 497 A.2d 951, 954 (Pa. Cmwlth. 1985).

<sup>8</sup> The Transcript of Testimony before the Referee details this conversation:

R. All right. Well, was there any discussion in that conversation about whether a determination was going to be issued?

C. I really can't recall in that regard, but I asked them what the status of my appeal was and they elaborated, yes, I guess there was because they told me that the determination was and it wasn't approved because of the fact of the missing information of alien status was not available.

N.T. 11-12.



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John D. Plut, :  
 :  
 Petitioner :  
 :  
 v. : No. 2283 C.D. 2007  
 :  
 :  
 Unemployment Compensation :  
 Board of Review, :  
 Respondent :

**ORDER**

AND NOW, this 14<sup>th</sup> day of October, 2008, the order of the Unemployment Compensation Board of Review dated November 2, 2007, in the above-captioned matter is hereby AFFIRMED.

\_\_\_\_\_  
MARY HANNAH LEAVITT, Judge