

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Velinda C. Stewart, :
Petitioner :
:
v. : No. 2374 C.D. 2008
: Submitted: June 26, 2009
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: July 21, 2009

Velinda C. Stewart (Claimant), representing herself, petitions for review from an order of the Unemployment Compensation Board of Review (Board) that dismissed as untimely her appeals from two notices of determination. Claimant argues she should be granted appeals nunc pro tunc (late appeals by permission) because the local UC service center lost her initial, timely filed, faxed appeals and a service center representative orally acknowledged the center's problem with its fax machine and then granted her permission to resubmit her appeals, which would be deemed timely. Discerning no merit in these assertions, we affirm.

In April 2008, Alpern Rosenthal (Employer) suspended Claimant without pay for two weeks for misconduct and inappropriate behavior. Claimant sought unemployment compensation benefits for the period of her suspension.

Benefits were initially granted, but they were subsequently terminated, resulting in a determination of a non-fault overpayment of \$580.00, dated June 27, 2008. Certified Record (C.R.) at Item #4. The notice of determination of overpayment indicated July 14 as the final day to timely appeal. Id.

In June 2008, following Claimant's return from suspension, Employer discharged Claimant for making an inappropriate gesture toward coworkers during work hours. Claimant again applied for unemployment compensation benefits. In a notice of determination mailed June 26, 2008, the service center denied benefits, concluding Employer discharged Claimant for willful misconduct. The determination indicated July 11, 2008 was the final day to timely appeal.

Claimant filed appeals to both determinations by fax on July 23, 2008. Claimant's appeals were consolidated for a hearing before a referee limited to the question of the timeliness of the appeals.¹

At the hearing, Claimant testified she actually faxed her appeals on July 9 from a friend's workplace that does not provide a paper record of fax transmissions. She testified that at the time, she believed the service center received her faxed appeals. Claimant testified that during a follow-up communication, she learned the service center never received her fax. Claimant testified a service center representative told her there may have been a transmission error that prevented her faxed appeals from arriving. Claimant testified this

¹ Neither the referee nor the Board addressed the merits of Claimant's appeals. Accordingly, neither shall we.

representative acknowledged problems with the center's fax machine and gave Claimant permission to file her late appeals, which would be considered timely.

The referee subsequently issued a decision dismissing Claimant's appeals as untimely pursuant to Section 501(e) of the Unemployment Compensation Law² (a claimant must file an appeal within 15 days after the notice of determination is mailed or delivered). Claimant appealed, and the Board affirmed, adopting and incorporating the referee's findings and conclusions. Notably, the Board specifically discredited Claimant's testimony describing her conversation with the service center representative. Claimant now appeals to this Court.

On appeal,³ Claimant argues the Board erred in failing to grant her late appeals by permission. Claimant asserts the service center representative's admission of fault regarding the failed fax transmission and subsequent grant of permission to resubmit her appeals constitutes a breakdown in the administrative process sufficient to justify her untimely appeals. We disagree.

In unemployment compensation proceedings, the Board is the fact-finder and is empowered to resolve conflicts in the evidence and to determine the

² Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §821.

³ Our review is limited to determining whether necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

credibility of witnesses. McCarthy v. Unemployment Comp. Bd. of Review, 829 A.2d 1266 (Pa. Cmwlth. 2003). In making these determinations, the Board may accept or reject the testimony of any witness, in whole or in part. Id. The Board's findings are conclusive and binding on appeal if the record, when viewed as a whole, contains substantial evidence to support them. Curran v. Unemployment Comp. Bd. of Review, 752 A.2d 938 (Pa. Cmwlth. 2000). In reviewing the Board's decision, we examine the evidence in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can reasonably be drawn from the evidence. Feinberg v. Unemployment Comp. Bd. of Review, 635 A.2d 682 (Pa. Cmwlth. 1993).

An appeal of a notice of determination must be filed within 15 days after the date the determination was delivered personally to the applicant or mailed to her at her last known post office address. See 34 Pa. Code §101.82. The appeal may be filed by U.S. Mail, common carrier, fax transmission, electronic transmission other than fax, or personal delivery. Id. A claimant appealing by fax “is responsible for delay, disruption, 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); Mountain Home Beagle Media v. Unemployment Comp. Bd. of Review, 955 A.2d 484 (Pa. Cmwlth. 2008). Further, notices of determination include a warning of this risk, which Claimant acknowledged reading. Notes of Testimony, 8/11/08, (N.T.) at 6.

By filing her appeals by fax, Claimant assumed the risk her transmission would fail. Mountain Home Beagle Media. The date of filing of a

faxed appeal “is the date that it is acknowledged as received by a representative of the Department or Board not the date of the fax.” Id. at 486-87 (citation and footnote omitted). The service center acknowledged receipt of Claimant’s faxed appeals on July 23, well beyond either the July 11 or July 14 deadlines. Certified Record (C.R.), Item #4 and #6. Thus, Claimant’s appeals were untimely. Mountain Home Beagle Media.

Untimely appeals may be considered on the merits if a claimant can show the administrative authority engaged in fraudulent behavior or manifestly wrongful or negligent conduct, or the claimant shows that non-negligent conduct beyond her control caused the delay. Hessou v. Unemployment Comp. Bd. of Review, 942 A.2d 194 (Pa. Cmwlth. 2008). Also, late appeals may be permitted if a claimant can show an administrative breakdown where an administrative board or body was negligent, acted improperly or unintentionally misled a party. Id. A claimant carries a heavy burden to show that fraud or its equivalent caused the late filing of her appeals. Id.

Here, the only evidence Claimant presented to justify her late appeals by permission was her uncorroborated testimony regarding her alleged conversation with a service center representative, which the Board discredited. Absent credible evidence of an administrative breakdown sufficient to justify late appeals by permission, we discern no error in the Board’s refusal to grant Claimant’s appeal nunc pro tunc. Id. Therefore, we affirm.

ROBERT SIMPSON, Judge

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ORDER

AND NOW, this 21st day of July, 2009, the order of the
Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge