

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rex G. Bennett,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 528 C.D. 2012
	:	Submitted: November 9, 2012
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: December 14, 2012

This case returns to us after remand in Bennett v. Unemployment Compensation Board of Review, 33 A.3d 133 (Pa. Cmwlth. 2011) (en banc; Brobson, J.) (Bennett I). Rex G. Bennett (Claimant), representing himself, petitions for review of an order of the Unemployment Compensation Board of Review (Board) that dismissed his appeal as untimely under Section 501(e) of the Unemployment Compensation Law (Law).¹ Claimant raises the issues of whether the Board capriciously disregarded competent evidence regarding the timeliness of his appeal and whether the Board denied Claimant due process of law. Additionally, Claimant requests this Court award him attorney fees and \$1,018,680 in punitive damages. Upon review, we affirm the Board’s order and deny the relief requested.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §821(e).

Following his separation from employment, Claimant filed for emergency unemployment compensation benefits. The local service center issued a notice of determination denying benefits because Claimant did not exhaust regular unemployment compensation. The local service center also issued notices of determination of fraud overpayment and penalty weeks. The determinations stated the deadline for filing an appeal was June 25, 2010.

Claimant filed an appeal via email. Unemployment compensation authorities received the email appeal on July 21, 2010. The referee held a hearing on the timeliness of Claimant's appeal. Claimant appeared at the hearing and presented uncontradicted testimony and evidence. Ultimately, the referee determined Claimant did not timely file his appeal and dismissed the appeal. Claimant appealed to the Board, which affirmed.

On appeal to this Court, we determined the Board capriciously disregarded Claimant's uncontradicted evidence. Bennett I. We vacated the Board's decision and remanded to the Board to reconsider its prior decision based on the entire record. Id. Specifically, we directed the Board to consider the evidence of record put forth by Claimant showing he filed a timely appeal by email and to make appropriate and necessary factual findings. Id.

On remand, the Board vacated its prior decision and made the following relevant findings of fact. A notice of determination denying benefits, mailed to Claimant on June 10, 2010, informed Claimant he had 15 days to file an

appeal; the final day to appeal the determination was June 25, 2010. The notice informed Claimant of the methods available to file a written appeal, including sending an email to L&I-UC-Appeals@state.pa.us.

Claimant emailed an appeal on June 24, 2010 to LI-UCAppeals@state.pa.us, which is an incorrect email address. The unemployment compensation authorities did not receive Claimant's appeal. Claimant sent an email to the local service center on July 21, 2010.

Unemployment compensation authorities did not misinform or mislead Claimant regarding his rights to appeal. The filing of the late appeal was not caused by fraud or its equivalent by administrative authorities, a breakdown in the appellate system or by non-negligent conduct.

The Board concluded Claimant omitted part of the email address when he attempted to file his appeal by email on June 24, 2010. As a result, unemployment compensation authorities did not receive Claimant's appeal within the 15-day appeal period prescribed by Section 501(e) of the Law. The Board dismissed Claimant's appeal as untimely. Claimant now petitions for review.²

² Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Spence v. Unemployment Comp. Bd. of Review, 29 A.3d 117 (Pa. Cmwlth. 2011).

Claimant contends the Board capriciously disregarded competent and uncontradicted evidence showing Claimant emailed his appeal before the expiration of the appeal deadline.

A review for capricious disregard of material, competent evidence is an appropriate component of appellate review in any case in which the question is properly raised before a court. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002). A capricious disregard occurs only when the fact-finder deliberately ignores relevant, competent evidence. Capasso v. Workers' Comp. Appeal Bd. (RACS Assocs., Inc.), 851 A.2d 997 (Pa. Cmwlth. 2004). A capricious disregard of evidence is a deliberate and baseless disregard of apparently reliable evidence. Id. Where substantial evidence supports the findings, and those findings in turn support the conclusions, it should remain a rare instance where an appellate court disturbs an adjudication based on capricious disregard. Wintermyer.

Pursuant to Section 501(e) of the Law, a party has 15 days to appeal a determination furnished by the Department of Labor & Industry (Department). The Department's regulations echo this 15-day time period. 34 Pa. Code §101.90. The Department's regulations further provide a party can file an appeal by email. 34 Pa. Code §101.82(b)(4). Section 101.82(b)(4) specifically provides:

Electronic transmission other than fax transmission. The date of filing is the receipt date recorded by the Department appeal office or the Board's electronic transmission system, if the electronic record is in a form capable of being processed by that system. A party filing by electronic transmission shall comply with Department instructions concerning format. A party filing an appeal by electronic transmission is responsible for using the

proper format and 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.

Id. (emphasis added.) This same language appears in the instructions for filing an appeal attached to the notices of determination. Certified Record (C.R.), Item No. 2.

It is well-settled the statutory time limit for filing an appeal is mandatory and subject to strict application. Id. However, a party may proceed nunc pro tunc, or “now for then,” with an untimely appeal, if he establishes extraordinary circumstances, such as an administrative breakdown, fraud, or some other conduct beyond his control, which are not attributable to his own negligence, caused the delay. Hessou v. Unemployment Comp. Bd. of Review, 942 A.2d 194 (Pa. Cmwlth. 2008). An appellant bears a heavy burden in seeking to justify an untimely appeal. Pa. Tpk. Comm’n v. Unemployment Comp. Bd. of Review, 991 A.2d 971 (Pa. Cmwlth. 2009). If an appeal is not timely filed, the determination becomes final and the Board loses jurisdiction to consider the matter. Id.

In Wright v. Unemployment Compensation Board of Review, 41 A.3d 58 (Pa. Cmwlth. 2011), a divided en banc panel examined the intricacies of the timeliness of faxed appeals, which is instructive here. There, a claimant representing himself filed an appeal by fax. Wright. The claimant offered testimonial and documentary evidence, including a phone/fax record of transmission created by the telephone carrier, that his appeal by fax was timely. Id.

The compensation authorities had no record the fax was timely received. Id. Rather, only a later-faxed appeal, which was not received within the 15-day period, was in the file. Id.

While the referee accepted the claimant's evidence and found the appeal was timely, the Board subsequently determined the appeal was untimely. Id. Significantly, the Board's findings of fact did not expressly address the claimant's evidence of his attempted timely appeal by fax. Id.

On further appeal, we reversed on the timeliness issue. Id. This Court opined that the absence of an appeal document in the Board's record merely creates an inference that the Board did not receive the document. Id. We reasoned although the Board was free to reject the claimant's evidence of an attempted timely appeal by fax, the Board needed to address the evidence and not ignore it. Id. We concluded the record created before the referee supported the referee's finding that claimant successfully transmitted his appeal before the deadline. Id.

Here, on remand, the Board expressly addressed and considered Claimant's evidence and testimony. Claimant testified he filed his appeal by email on June 24, 2010. Referee's Hearing, Notes of Testimony, 8/16/10, at 3. Claimant presented a copy of the June 24, 2010, email. C.R., Item No. 5, Claimant's Ex. No. 1. The Board found Claimant emailed the June 24, 2010, appeal to LI-UCAppeals@state.pa.us, not L&I-UC-Appeals@state.pa.us, which is the exact address provided in the instructions on the notice of determination. Bd. Op., 2/28/12, F.F. Nos. 5-6. The Board further found the Department did not receive Claimant's June 24, 2010, email appeal. Bd. Op., 2/28/12, F.F. No. 7.

Claimant also presented a copy of the July 21, 2010, email appeal, which shows the same incorrect address as the June 24, 2010, appeal. C.R., Item No. 5, Claimant's Ex. No. 2. The Board found Claimant emailed the appeal on July 21, 2010. Bd. Op., 2/28/12, F.F. No. 8. The Department's document shows receipt of the July 21, 2010, email. C.R., Item No. 3. The document also appears to show a possible variation in the email addresses.³

Nevertheless, even if Claimant sent both emails to the same incorrect email address, the record does not contain any evidence the Department received Claimant's email within the statutory time period. Claimant did not offer a read receipt or other confirming information for either email. Cf. Wright (the claimant's evidence included a document from his telephone carrier showing the fax was successfully transmitted to the fax number on the notice of determination on the date in question). Although the absence of an appeal document in the Board's record merely creates an inference that the Board did not receive the document, the Board did not find Claimant's evidence showing he emailed the appeal to an incorrect address sufficient to overcome this inference.

Despite Claimant's efforts to file his appeal by email on June 24, 2010, the record shows Claimant emailed the appeal to an incorrect address, and the Department did not receive Claimant's appeal within the 15-day appeal period.

³ The July 21, 2010, email shows the inclusion of an ampersand, "To: L&I, UC-Appeals", whereas the forwarded June 24, 2010, email shows "To: LI-UC-Appeals@state.pa.us". C.R., Item No. 3. This variation could explain why the Department received July 21, 2010, email and not the June 24, 2010, email.

The Board's findings are supported by the record and support a conclusion that Claimant's appeal was untimely.

Moreover, Claimant did not establish a right to proceed nunc pro tunc, or "now for then," because Claimant's own mistake in sending the email caused the untimeliness of his appeal. Claimant does not dispute he sent the appeal to the incorrect email address. By sending it to an incorrect address, Claimant did not "comply with Department instructions concerning format." 34 Pa. Code §101.82(b)(4). Claimant assumed the risk "the appeal may not be properly or timely filed." Id. Thus, we discern no error in the Board's determination that Claimant's appeal was untimely.

Claimant also contends that the Board denied him due process of law by not holding an evidentiary hearing on the fraud overpayment determination. Claimant failed to file a timely appeal. As a result, the Board lacked jurisdiction to consider the merits of his appeal. See Pa. Tpk. Comm'n. Therefore, the Board's failure to hold an evidentiary hearing on the merits of Claimant's untimely appeal does not constitute a denial of due process.

For all the foregoing reasons, we affirm the order of the Board. In light of this determination, we also deny Claimant's request for attorney fees and punitive damages.

ROBERT SIMPSON, Judge

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 14th day of December, 2012, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge