IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Chicks Diner,	:	
Petitioner	:	
	:	
v.	:	No. 540 C.D. 2010
	:	SUBMITTED: August 20, 2010
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** October 14, 2010

Employer Chicks Diner petitions for review of the March 9, 2010 order of the Unemployment Compensation Board of Review (Board) that dismissed its appeal as untimely under Section 502 of the Unemployment Compensation Law (Law).[1] The sole issue on appeal is whether the Board erred in refusing to permit Employer to file an appeal *nunc pro tunc* where counsel mistakenly believed that his client had already submitted a timely appeal of the referee's decision to the Board when counsel filed additional documents with the Board two days after expiration of the appeal period. We agree with the Board that

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937), 2897, *as amended*, 43 P.S. § 822.

Employer failed to establish grounds for the Board to permit an appeal *nunc pro tunc* and, therefore, affirm.

Claimant Joseph G. Wilcom applied for unemployment compensation benefits on September 6, 2009, which the Scranton UC Service Center denied, and Claimant appealed. After a hearing on the merits, the referee made the following pertinent findings.

Claimant worked as a part-time dishwasher for Employer from February 2008 to September 1, 2009. Employer terminated Claimant's employment for calling off sick for a second day during Labor Day weekend 2009 without a doctor's excuse. Claimant was unaware of any rule requiring a doctor's excuse when missing consecutive days of work and, in any event, did not have health insurance, could not afford to see a doctor and could not afford a prescription even if he did see a doctor. Accordingly, the referee reversed the UC Service's Center's determination and granted Claimant benefits for waiting week ending September 12, 2009. The final date to appeal the October 26, 2009 decision was November 10, 2009.

Employer's counsel filed an appeal from the referee's decision on November 12, 2009.[2] The filing consisted of handwritten appeal papers signed by Mr. Ronald Chickillo, part owner of Chicks Diner, and some paperwork from counsel. In light of the timeliness issue, the Board remanded the matter to a referee for receipt of testimony in that regard.

[2] In Finding of Fact No. 9, the Board found that Employer's appeal was filed on November 24, 2009. Indeed, there is a November 23, 2009 letter from Employer's counsel in the certified record which may have caused confusion in this regard. Certified Record ("C.R."), Item No. 10. In any event, the Board now agrees that the appeal was filed on November 12, 2009, which would still be late. C.R., Item No. 9.

At the remand hearing, Mr. Chickillo admitted that he received the referee's decision on October 27, 2009. January 4, 2010 Remand Hearing, Notes of Testimony ("N.T.") at 3. He also admitted that he never sent his handwritten "appeal" to the Board, stating that he faxed the papers to his attorney's office on approximately October 29, 2009.[3] *Id*. at 4. Mr. Chickillo stated that he did so after conferring with his attorney's secretary, who stated that the attorney was in Philadelphia at the time but could handle this type of case for the diner. Counsel for Mr. Chickillo represented that "[t]he faxed paper work evidently sat at the office until November 12 with the understanding that the original document was sent to the Board." *Id*.

Ultimately, the Board dismissed Employer's appeal as untimely filed, finding as follows:

> 5. A copy of the Referee's decision was mailed to the employer at its last known post office address on the same date [October 26, 2009].
>
> 6. The decision was accompanied by notice advising that the interested parties had fifteen (15) days in which to file a valid appeal.
>
> 7. The decision mailed to the employer was not returned by the postal authorities as undeliverable.
>
> 8. The employer's appeal from the Referee's decision, in order to be timely, had to have been filed on or before November 10, 2009.
>
> . . .

[3] In both Employer's petition for review and appellate brief, counsel represents that Mr. Chickillo faxed the referee's decision and a copy his handwritten appeal to counsel's office on November 2, 2009.

> 10. The employer was not misinformed or misled by the unemployment compensation authorities concerning its right or the necessity to appeal.
>
> 11. The employer's filing of the late appeal was not caused by fraud or its equivalent by the administrative authorities, a breakdown in the appellate system, or by non-negligent conduct.
>
> 12. The employer's attorney believed that the employer had already sent a timely appeal to the Board when it filed the additional appeal documents on behalf of the employer.

Board's Findings of Fact Nos. 5-8, 10-12. Having concluded that Employer's proffered justification for filing a late appeal did not fall within any of the limited exceptions for accepting an appeal filed after expiration of the statutory appeal period, the Board dismissed Employer's appeal. Employer's appeal to this Court followed.

As an initial matter, we note that because the failure to file a timely appeal is a jurisdictional defect, courts cannot extend the time for taking an appeal as a matter of grace or mere indulgence. *Sofronski v. Civil Serv. Comm'n, City of Philadelphia*, 695 A.2d 921 (Pa. Cmwlth. 1997). The party seeking a late appeal, therefore, must justify the delay in filing the appeal. *Id*. The burden to do so "is a heavy one because the statutory time limit established for appeals is mandatory." *Hessou v. Unemployment Comp. Bd. of Review*, 942 A.2d 194, 198 (Pa. Cmwlth. 2008). In that regard, it is well established that "[a] *nunc pro tunc* appeal may be allowed where extraordinary circumstances involving fraud or some breakdown in the administrative process caused the delay in filing, or where non-negligent circumstances related to the appellant, his or her counsel or a third party caused the delay." *McClean v. Unemployment Comp. Bd. of Review*, 908 A.2d 956, 959 (Pa. Cmwlth. 2006) (citations omitted). Where non-negligent circumstances are at

issue, an appellant must establish that "non-negligent conduct *beyond his control* caused the delay." *Hessou*, 942 A.2d at 198 [citing *Bass v. Commonwealth*, 485 Pa. 256, 401 A.2d 1133 (1979) (emphasis added)]. Further, we note that "[t]he exception for allowance of an appeal *nunc pro tunc* in non-negligent circumstances is meant to apply only in unique and compelling cases in which the appellant has clearly established that she attempted to file an appeal, but unforeseeable and unavoidable events precluded her from actually doing so." *Criss v. Wise*, 566 Pa. 437, 443, 781 A.2d 1156, 1160 (2001). We turn now to the parties' respective arguments.

Counsel for Employer argues that the Board erred in determining that his mistaken belief that Mr. Chickillo already had submitted a timely appeal when counsel submitted additional documents two days after expiration of the appeal period did not constitute grounds for an appeal *nunc pro tunc*. In support of his assertion, counsel cites *Bass*, involving a situation where an attorney's secretary fell ill and failed to file an already prepared appeal, and *Cook v. Unemployment Compensation Board of Review*, 543 Pa. 381, 671 A.2d 1130 (1996), involving a claimant who, suddenly hospitalized with a serious illness within the appeal period, did not file an appeal until shortly after his release. Counsel maintains that the miscommunication at issue is just the sort of non-negligent circumstances that the Supreme Court has found necessary for *nunc pro tunc* appeals in past cases.

In response, the Board maintains that Employer failed to present sufficient evidence to meet the heavy burden of establishing grounds for an appeal *nunc pro tunc* via any alleged non-negligent circumstances that were beyond the control of either Employer or his counsel, such as in *Bass*. The Board asserts that counsel's incorrect belief that his client had already sent in a handwritten appeal to

the Board constituted negligent conduct on the part of both Employer and his counsel, not the non-negligent conduct contemplated by the Supreme Court. Accordingly, the Board contends that Employer forfeited its claim and that it should not be permitted to appeal *nunc pro tunc*.

We understand that the Board in its decision did not state that it found the behavior of Employer or his counsel to be negligent, but also note its determination that Employer did not satisfy the non-negligent conduct exception for an appeal *nunc pro tunc*. While we certainly agree that the mix-up was regrettable, a party's mistaken belief that an appeal was filed does not constitute the unique and compelling non-negligent circumstances necessary for allowance of appeal *nunc pro tunc*. *See McClean*, 908 A.2d 956 (no grounds for an appeal *nunc pro tunc* where there was no evidence that an electronic appeal was delivered to the Board prior to expiration of the appeal period, despite the fact that counsel never received a message that the email was "undeliverable.")

For the above reasons, therefore, we affirm the Board's dismissal of Employer's untimely appeal.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 14th day of October, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge