

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronald J. Miller, :
 :
 : Petitioner :
 :
 : v. : No. 993 C.D. 2010
 :
 : Unemployment Compensation : Submitted: September 24, 2010
 : 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 SENIOR JUDGE KELLEY

FILED: December 22, 2010

Ronald J. Miller (Claimant) petitions for review from an order of the Unemployment Compensation Board of Review (Board), which affirmed the referee's decision dismissing Claimant's appeal on the basis that it was untimely. We affirm.

Claimant applied for unemployment compensation benefits. By notice of determination mailed on November 23, 2009, the Department of Labor and Industry, Office of Unemployment Compensation Benefits (Department) denied Claimant's application upon finding Claimant ineligible for benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law)¹ on the basis that he

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(b).

voluntarily terminated his employment without cause of a necessitous and compelling nature. The notice informed Claimant that the last day to file a timely appeal was December 8, 2009. Claimant filed a petition for appeal on January 9, 2010.

An evidentiary hearing on the timeliness of Claimant's appeal was held before a referee on February 9, 2010. The referee concluded that Claimant's appeal was untimely without justification. By order dated February 12, 2010, the referee dismissed Claimant's petition for appeal.

From this decision, Claimant filed an appeal with the Board. The Board made the following findings of fact. A notice of determination was issued to Claimant on November 23, 2009, denying benefits, and was mailed to Claimant that same date to his last known post office address. Claimant received the November 23, 2009 notice of determination. The notice informed Claimant that December 8, 2009 was the last day on which to file an appeal from the determination. Claimant filed his appeal by mail on January 9, 2010, as evidenced by the postmark appearing on the envelope, which contained the Claimant's appeal. Upon receiving the determination, Claimant did not look at it, but packed it along with his things and left the area to be with his sick grandmother. Claimant did not realize that there was a deadline for filing an appeal. Claimant was not misinformed or misled by the unemployment compensation authorities concerning his right or the necessity to appeal. Claimant's 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. By order dated May 6, 2010, the Board affirmed the referee's dismissal. This appeal now follows.²

² This Court's scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are not supported by

(Continued....)

Claimant contends his appeal should not have been dismissed as untimely where Claimant was misinformed or misled concerning the necessity to file an appeal and the filing of the late appeal was caused by a breakdown of the appellate system or by non-negligent conduct. We disagree.

Under the Law, failure to file an appeal within 15 days ordinarily mandates dismissal of the appeal. Section 501(e) of the Law, 43 P.S. §821. Section 501(e) of the Law provides:

(e) Unless the claimant or last employer ... 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) (emphasis added). The requirement that an appeal be timely filed is jurisdictional and the Board and its referees have no discretion to accept an untimely appeal. See Southeastern Pennsylvania Transportation Authority v. Unemployment Compensation Board of Review, 661 A.2d 505 (Pa. Cmwlth. 1995). The party initiating the appeal, Claimant herein, has the burden to prove that the appeal was timely filed. Id.

The 15-day time limit is mandatory and subject to strict application. Lin v. Unemployment Compensation Board of Review, 558 Pa. 94, 735 A.2d 697 (1999); Renda v. Unemployment Compensation Board of Review, 837 A.2d 685

substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Kirkwood v. Unemployment Compensation Board of Review, 525 A.2d 841 (Pa. Cmwlth. 1987).

(Pa. Cmwlth. 2003), petition for allowance of appeal denied, 581 Pa. 686, 863 A.2d 1151 (2004). However, where fraud or a breakdown in the administrative process is shown, an appeal from a denial of unemployment compensation benefits may be accepted after the 15th day on a *nunc pro tunc* basis. ATM Corp. of America v. Unemployment Compensation Board of Review, 892 A.2d 859 (Pa. Cmwlth. 2006).

An appeal *nunc pro tunc* is also permitted where the appeal was untimely because of “non-negligent circumstances,” either as they relate to appellant or his counsel, provided that the appeal is filed within a short time after the appellant or his counsel learns of and has an opportunity to address the untimeliness, the time period which elapses is of very short duration, and appellee is not prejudiced by the delay. Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996). The party seeking an appeal *nunc pro tunc* carries a heavy burden. Staten v. Unemployment Compensation Board of Review, 488 A.2d 1207 (Pa. Cmwlth. 1985).

In support of his position that the Board erred by not allowing his appeal *nunc pro tunc*, Claimant relies upon Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979) and Cook. In Bass, the appeal papers had been typed up and were ready for filing on Friday, July 7, six days prior to the expiration of the time allowed for filing the appeal; the papers were placed in a folder on the corner of the secretary's desk in the law office, along with other papers to be filed. However, during the late afternoon on that day, the secretary became ill and left work. When the secretary returned a week later, the appeal period had expired. This error was not discovered because the secretary was also the person in the office who was responsible for checking to make sure that all secretarial work was performed. The petition for permission to appeal *nunc pro tunc* was filed on Monday, July 17, four

days after the appeal period had expired. On these facts, the Supreme Court concluded that neither the attorney nor the secretary acted negligently and excused the untimely filing. Bass.

In Cook, the appeal was due May 8. The appellant made an appointment with an attorney for May 5, but suffered a heart attack and was hospitalized May 3. The appellant remained in the hospital until May 9. The Court held that the appellant was unable to perfect his appeal while hospitalized and thus had established a non-negligent excuse for the late filing. Cook.

These cases are readily distinguishable from the case at hand because the untimely filings were caused by non-negligent circumstances, which is not the case here. In this case, the last day to file an appeal with the referee was December 8, 2009. Claimant admitted that he received a copy of the notice of determination, which plainly advised Claimant of the appeal period. Notes of Testimony (N.T) at 2. However, Claimant neglected to open or read the notice. Id. As a result, Claimant did not file an appeal until January 9, 2010 – well beyond the statutory appeal period.

Claimant testified that he had never filed for unemployment compensation before and was not aware there were deadlines. N.T at 2. He further testified that when he received the notice, his grandmother was ill, requiring him to go to New York. Id. Claimant took the envelope containing notice of determination with him, but did not open it and therefore was not aware of the deadline. Id. Claimant testified he thought he had received a positive decision because the Department had given him a notice he was approved for a certain amount of benefits per week. Id. Claimant argues that the envelope should have indicated that time sensitive materials were enclosed.

While the Court certainly sympathizes with Claimant's plight, Claimant's failure to read the notice of determination, which plainly advised Claimant that his benefits were denied and the process by which he could challenge that determination, is not a non-negligent circumstance warranting the filing of an appeal *nunc pro tunc*. Claimant's lack of understanding about the legal process is not an extraordinary circumstance justifying a *nunc pro tunc* appeal. There is no requirement that an envelope containing a notice of determination must be marked urgent or containing time-sensitive material. Claimant did not establish any breakdown in the administrative process or prove that he was misled by unemployment compensation authorities regarding his right to appeal. Claimant's failure to file a timely appeal was due to his own negligence as he did not open the envelope, read the notice, and file an appeal in a timely fashion. Based upon our review, the Board properly dismissed Claimant's appeal as untimely filed.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 22nd day of December, 2010, the order of the Unemployment Compensation Board of Review, at Decision No. B-499457, dated May 6, 2010, is AFFIRMED.

JAMES R. KELLEY, Senior Judge