

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark Stevens,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1353 C.D. 2013
	:	
Unemployment Compensation	:	Submitted: February 28, 2014
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: April 3, 2014

Mark Stevens (Claimant) petitions for review of an Order of the Unemployment Compensation (UC) Board of Review (Board) dismissing his appeal from a Notice of Determination (Determination) as untimely pursuant to Section 501(e) of the UC Law (Law).¹ On appeal, Claimant argues that he made every effort to perfect a timely appeal and that the late filing of his appeal was the

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 821(e) (providing, in relevant part, that an appeal from a Determination must be filed with the Board within fifteen calendar days after the Determination is mailed to the claimant's last known post office address).

result of a breakdown in the appellate system and/or non-negligent conduct. Upon review, we are constrained to affirm.

Claimant was employed by Harrahs Philadelphia Casino (Employer). (Internet Initial Claims, R. Item 2.) Claimant filed an internet claim for UC benefits stating that he was discharged from his employment as an assistant shift manager for a rule violation. (Internet Initial Claims.) Employer responded to the claim, after which the UC Service Center issued the Determination finding Claimant ineligible for UC benefits pursuant to Section 402(e) of the UC Law.² (Notice of Determination, R. Item 4.) The Determination was mailed on March 5, 2013, and the last day to file a timely appeal therefrom was March 20, 2013. (Notice of Determination.) The UC Service Center received Claimant's appeal from the Determination on March 27, 2013. (Claimant Attorney's Petition for Appeal from Determination, Dated 3/27/2013 w/ Attachments (Petition for Appeal from Determination), R. Item 5.)

A hearing was scheduled before a UC Referee (Referee) to consider whether Claimant filed a timely appeal from the Determination pursuant to Section 501(e) of the Law and whether Claimant's discharge from his employment was due to willful misconduct. (Notice of Continuance of Hearing/Notice of Hearing, R. Item 9.) Both Claimant and Employer appeared at the Referee's hearing. In addition to hearing testimony regarding the merits of Claimant's appeal, the Referee heard

² 43 P.S. § 802(e) (providing, in relevant part, that an employee is ineligible for UC benefits for any week the employee's unemployment is due to willful misconduct connected with the employee's work).

testimony from Claimant and his attorney regarding the circumstances surrounding the filing of Claimant's appeal.

Claimant testified that he received the Determination, mailed March 5, 2013, and that he filed an appeal from the Determination on March 12, 2013. (Hr'g Tr. at 9, R. Item 10.) Claimant testified that, during a meeting with his attorney on March 12, 2013, they drafted an appeal letter which his attorney then faxed to the UC Service Center at the number provided on the Determination. (Hr'g Tr. at 9.) Claimant subsequently contacted the UC Service Center when he did not receive any communication regarding his appeal. (Hr'g Tr. at 9.) With respect to his contact with the UC Service Center, Claimant testified as follows:

I had contacted Unemployment and they said if you don't hear anything from seven more days [sic], I can't remember the exact date, Your Honor, but they said if you don't hear anything in seven more mailing days, contact your attorney and he will contact us. So, that's what I did. And there should be a note of that phone call probably in the call records somewhere.

(Hr'g Tr. at 10.) A computer printout of Claimant's Claim Record was entered into the record, without objection, during the Referee's hearing as Exhibit 19.

(Hr'g Tr. at 6.) This Claim Record documents a phone call on March 21, 2013 from Claimant to the UC Service Center. (Claim Record, R. Item 1.)

During Employer's cross-examination of Claimant, it was revealed that the transmission verification report received by Claimant's attorney when he faxed the appeal on March 12, 2013, indicated that he faxed the appeal letter to number 717-

299-75557 rather than to the correct fax number of 717-299-7557. (Hr'g Tr. at 10-11.)

Claimant's attorney testified that he was the individual that faxed Claimant's appeal to the UC Service Center on March 12, 2013. (Hr'g Tr. at 12.) Claimant's attorney testified further:

I was the person that actually operated the machine, so if it was a misdial it was my responsibility for the misdial. And since it, I got a transmission verification report, I didn't, to be honest with you, not look to see if the number was correct on the transmission report. So, that would be my responsibility. But, we did obviously make an attempt on that particular date as the – and when it came to our attention, we faxed it again on the 27th of March with the second letter[.]

(Hr'g Tr. at 12.) Claimant's attorney agreed that it appeared that the fax transmission that he sent from his office on March 12, 2013 was not sent to the correct fax number. (Hr'g Tr. at 12.) Claimant's attorney agreed further that even though the fax transmission verification report indicates that the fax was successfully transmitted, it would be a correct assumption that the fax was successfully transmitted to number 717-299-7555 and not the UC Service Center's fax number of 717-299-7557. (Hr'g Tr. at 12.)

The Referee dismissed Claimant's appeal as untimely pursuant to Section 501(e) of the Law and did not address the merits of Claimant's appeal. Claimant appealed to the Board arguing that his reliance on advice received from the UC Service Center's representative on March 20, 2013 resulted in the dismissal of his appeal as untimely. (Claimant Attorney's Petition for Appeal from Referee's

Decision/Order and Request for Remand Hearing, Dated 6/6/2013 w/ Attachments (Petition for Appeal from Referee's Decision), R. Item 12.) Claimant argued further that this constituted "a breakdown of the procedural process which should result in the allowance of the appeal to be heard on the merits." (Petition for Appeal from Referee's Decision.)

The Board made the following findings of fact:

1. A Notice of Determination (determination) was issued to the claimant on March 5, 2013, denying benefits.
2. A copy of this determination was mailed to the claimant at his last known post office address on the same date.
3. The claimant received the determination.
4. The notice informed the claimant that March 20, 2013, was the last day on which to file an appeal from this determination.
5. On March 12, 2013, the claimant's attorney attempted to fax the claimant's appeal.
6. The correct fax number is 717-299-7557.
7. The claimant's appeal was faxed to 717-299-7557.
8. The Department did not receive the faxed appeal.
9. On March 21, 2013, the claimant contacted the Department.
10. The claimant's claim record indicated that: "CLMT INFO THAT HIS LAWYER FAX APL DOCS. . .INFO CLMT NO ANNO SHOWING THAT WE RECV IT YET."
11. The claimant's attorney re-faxed the claimant's appeal on March 27, 2013.

12. The claimant's appeal was received by the Department on March 27, 2013.

13. There is no evidence that the claimant was misinformed or misled by the unemployment compensation authorities regarding his right or the necessity to appeal.

(Board Op., Findings of Fact (FOF) ¶¶ 1-13.) Based on the foregoing findings, the Board determined that Claimant's attorney's "failure to fax the appeal to the correct fax number contributed to the untimely appeal" and that "[s]uch a mistake does not qualify as non-negligent conduct." (Board Op. at 2.) The Board considered Claimant's contention, set forth in his Petition for Appeal from Referee's Decision, that there was a breakdown in the appellate process because his reliance on the advice of a UC representative when he contacted the UC Service Center on March 20, 2013, caused him not to take any further steps to perfect his appeal on that date. However, the Board stated that it reviewed Claimant's Claim Record and it showed that Claimant did not contact the UC Service Center until March 21, 2013, which was the day after the appeal period had expired. The Board determined that "[b]ecause the claimant did not contact the Department until after the appeal . . . period, his argument is without merit." (Board Op. at 2.) Accordingly, the Board dismissed Claimant's appeal as untimely because "[t]he 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." (Board Op. at 3.) Claimant now petitions this Court for review.³

³ "Our review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence." Lopresti v. Unemployment Compensation Board of Review, 55 A.3d 561, 562 n.2 (Pa. Cmwlth. 2012).

On appeal, Claimant argues that his untimely appeal should be permitted because it was caused by non-negligent conduct and/or a breakdown in the appellate system. Claimant contends that his appeal was inadvertently faxed to the wrong fax number on March 12, 2013, and that he and his attorney were unaware of this fact because the transmission verification report indicated that the fax had been successfully transmitted to the UC Service Center. Claimant contends further that he made every effort to perfect the appeal in a timely fashion and acted with due diligence with regard to contacting the UC Service Center regarding the status of his appeal. Claimant asserts that the subsequent filing of his appeal on March 27, 2013 was in accordance with advice that he received from a UC representative on March 20, 2013. Claimant contends that had he been advised to resend his appeal on March 20, 2013, he would have followed those instructions. Claimant argues that there has been no prejudice to Employer because it participated in a full hearing on the merits and the delay of seven days is brief given the factual circumstances presented in this matter. Therefore, Claimant contends, his untimely appeal should be permitted and this matter remanded for a decision on the merits.

Section 501(e) of the Law provides as follows:

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). Importantly for this appeal, “[t]his [fifteen-]day time limit is mandatory and subject to strict application.” Renda v. Unemployment Compensation Board of Review, 837 A.2d 685, 695 (Pa. Cmwlth. 2003). Once a determination becomes final, the Board does not have jurisdiction to consider the matter. Id.

The Board’s regulations permit several methods for filing appeals, including by fax transmission. 34 Pa. Code § 101.82(b)(3). When filing an appeal by fax transmission, the party filing the appeal “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). However, as has been explained by this Court:

“An appeal *nunc pro tunc* may be permitted when a delay in filing the appeal is caused by extraordinary circumstances involving fraud, administrative breakdown, or non-negligent conduct, either by a third party or by the appellant.” Mountain Home Beagle Media v. Unemployment Compensation Board of Review, 955 A.2d 484, 487 (Pa. Cmwlth. 2008). However, “[t]he burden to establish the right to have an untimely appeal considered is a heavy one.” Hessou v. Unemployment Compensation Board of Review, 942 A.2d 194, 198 (Pa. Cmwlth. 2008). An appellant must show that either “the administrative authority engaged in fraudulent behavior or manifestly wrongful or negligent conduct” or that “non-negligent conduct beyond [the appellant’s] control caused the delay.” Id.

Lopresti v. Unemployment Compensation Board of Review, 55 A.3d 561, 563 (Pa. Cmwlth. 2012).

Here, we are required to conclude, as the Board did, that mistakenly faxing Claimant’s appeal letter to the incorrect fax number due to misdialing does not

qualify for *nunc pro tunc* relief. Claimant's attorney misdialed the fax number and did not verify that he had faxed the appeal to the correct number. Unfortunately, this is not the type of non-negligent conduct that was beyond the control of Claimant or Claimant's attorney. The transmission verification report provided by Claimant's attorney as proof that the appeal was faxed on March 12, 2013 clearly shows that the appeal was faxed to an incorrect number, 717-299-75557. (Petition for Appeal from Determination.)

Claimant also argues that he was misinformed or misled by the UC Service Center when he called after not receiving a confirmation that they had received his appeal and he was told to wait a week to see if he received the confirmation. The gist of Claimant's argument on appeal appears to be that he contacted the UC Service Center on March 20, 2013, the day his appeal was due and had the representative not told him to wait a week before taking action, he would have resent his appeal that day and it would have been timely. However, Claimant did not testify before the Referee that he contacted the UC Service Center on *March 20, 2013*. This assertion was set forth for the first time by Claimant's attorney in Claimant's Petition for Appeal from Referee's Decision. Instead, Claimant testified that he could not remember the date and that he was sure the call center records would show the correct date. (Hr'g Tr. at 10.) Claimant's Claim Record does show that he called the UC Service Center, but on *March 21, 2013*, the day after the appeal period had expired. (Claim Record at 1; FOF ¶¶ 9-10.) The notation of that phone call indicates that the UC representative informed Claimant on March 21, 2013 that there was no annotation showing that the UC Service Center had received his faxed appeal documents. (Claim Record at 1; FOF ¶ 10.)

There is further indication in the record that during that call, the UC representative instructed Claimant to call back if he did not receive confirmation of his appeal by March 27, 2013 and that Claimant was “OK WITH ANSWERS GIVEN.” (Claim Record at 1.) There is no indication in the record that if Claimant did not receive confirmation by March 27, 2013, that he was instructed to *resend* his appeal on March 27, 2013 and that, if he did so, the appeal would be considered timely filed. Moreover, even if Claimant had resent his appeal on March 21, 2013, it still would have been untimely. As such, there is no evidence in the record to support a finding that Claimant’s untimely appeal was caused by a breakdown in the appellate system.

Accordingly, we cannot hold that the Board erred by concluding that Claimant’s appeal was untimely. Therefore, we are constrained to affirm the Board’s Order dismissing Claimant’s appeal as untimely pursuant to Section 501(e) of the Law.

RENÉE COHN JUBELIRER, Judge

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ORDER

NOW, April 3, 2014, the Order of the Unemployment Compensation Board of Review entered in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge