

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Christine Kunkle,	:	
Petitioner	:	
	:	
v.	:	No. 2200 C.D. 2012
	:	Submitted: April 19, 2013
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: May 15, 2013**

Christine Kunkle (Claimant), represented on appeal by counsel, challenges the order of the Unemployment Compensation Board of Review (Board) that affirmed a referee’s dismissal of her appeal as untimely filed from a service center’s determination under Section 501(e) of the Unemployment Compensation Law<sup>1</sup> (Law). She argues the referee and the Board erred in not allowing her to proceed “now for then” or *nunc pro tunc*. Upon review, we affirm.

The facts, as initially found by the referee and confirmed by the Board, are as follows:

1. On May 7, 2012 the Allentown Unemployment Compensation Service Center issued a determination denying benefits under Section 402(e) of the Law [43 P.S. §802(e)].

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

2. The Notice of Determination was mailed to [C]laimant's last known mailing address.
3. On May 8, 2012 [C]laimant received the ineligible Notice of Determination.
4. [C]laimant e-mailed the determination to her attorney to file an appeal on her behalf.
5. On May 12, 2012 the attorney notified [C]laimant the appeal was filed.
6. On June 4, 2012 the attorney notified [C]laimant due to a mistake the appeal had not been filed.
7. On June 28, 2012 [C]laimant contacted the Unemployment Compensation Service Center to address the filing of a late appeal.
8. On June 29, 2012 [C]laimant appealed the ineligible determination via e-mail.

Referee's Dec., 8/6/12, Findings of Fact (F.F.) Nos. 1-8.

Further, the referee determined:

In order for a [r]eferee to have jurisdiction to consider an appeal filed after the 15-day period, the party who filed the appeal must show that either fraud or a breakdown in the administrative process caused the late appeal, or that the party caused the appeal to be late through non-negligent conduct. ...

[C]laimant competently testified to the receipt of the Notice of Determination prior to the final appeal date. [C]laimant sought the assistance of an attorney to file the appeal. [C]laimant's attorney did not file an appeal within the required time period. [C]laimant was made aware of the attorney's failure to file the appeal on June 4, 2012. [C]laimant did not seek assistance from the Unemployment Compensation Service Center until June 28, 2012 at which time she was informed to file the appeal. The reason for the late appeal cannot be found to be

due to fraud or a breakdown in the administrative process. Therefore the Petition for Appeal must be dismissed in accordance with Section 501(e) of the Law.

Referee's Dec. at 2.

On Claimant's appeal, the Board affirmed, adopting and incorporating the referee's findings and conclusions. Claimant petitions for review.

On appeal,<sup>2</sup> Claimant contends it was not her fault her appeal was not filed on a timely basis. Rather, she relied entirely on her attorney's mistaken representation that he filed the appeal. Claimant asserts when her attorney discovered his mistake, it was beyond the deadline to appeal. She contends she took immediate action to pursue her claim for benefits, and requested a hearing on the timeliness issue. Claimant maintains she appeared at the referee's hearing and testified regarding what occurred. She asserts she should have been allowed to proceed with her appeal on a *nunc pro tunc* basis, as a result of her non-negligent actions. See Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979). Claimant argues she was denied the right to proceed with an appeal *nunc pro tunc* despite her uncontroverted testimony as to why she did not timely file an appeal.

Section 501(e) of the Law states, as relevant:

Unless the claimant ... files an appeal with the board, from the determination contained in any notice required to be furnished by the department ... within fifteen calendar days after such notice was delivered to him personally, or was mailed to his last

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<sup>2</sup> 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. Hessou v. Unemployment Comp. Bd. of Review, 942 A.2d 194 (Pa. Cmwlth. 2008).

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 ... denied in accordance therewith.

43 P.S. §821(e). “The requirement that an appeal be filed within fifteen days is jurisdictional, precluding either the Board or a referee from further considering the matter.” Gannett Satellite Info. Sys., Inc. v. Unemployment Comp. Bd. of Review, 661 A.2d 502, 504 (Pa. Cmwlth. 1995) (citation omitted).

Here, Claimant does not dispute she did not file an appeal by May 22, 2012, within 15 days of the service center’s May 7, 2012 determination, as required by Section 501(e). Rather, relying primarily on Bass, she contends she is entitled to appeal *nunc pro tunc* because of her counsel’s error in failing to file a timely appeal. We disagree.

The time for taking an appeal cannot be extended as a matter of grace or mere indulgence. Russo v. Unemployment Comp. Bd. of Review, 13 A.3d 1000 (Pa. Cmwlth. 2010). Thus, a petitioner bears a heavy burden to justify an untimely appeal. Blast Intermediate Unit #17 v. Unemployment Comp. Bd. of Review, 645 A.2d 447 (Pa. Cmwlth. 1994). An appeal *nunc pro tunc* may be allowed where the delay in filing the appeal was caused by extraordinary circumstances involving fraud or a breakdown in the administrative process or non-negligent circumstances related to the petitioner, her attorney or a third party. Russo.

In Bass, the Pennsylvania Supreme Court held that where an appeal is untimely filed as a result of the non-negligent conduct of the appellant’s attorney

or the attorney's staff, a late appeal may be permitted. There, the appellant's appeal was ready for filing a week before the appeal period expired, but was filed untimely because of an unforeseen illness of the attorney's secretary. In permitting a late appeal, a majority of the Supreme Court determined that neither the attorney nor his secretary acted negligently in failing to timely file the appeal. The Court also noted the appellant's failure to timely appeal was corrected in a very short time, and any prejudice to the opposing party was minimal. In such cases, the Supreme Court reasoned, a client should not suffer as a result his attorney's non-negligent failure to file a timely appeal. Id.; see also Perry v. Unemployment Comp. Bd. of Review, 459 A.2d 1342 (Pa. Cmwlth. 1983) (applying Bass, holding claimant permitted to file a late appeal where his attorney's law clerk's car broke down en route to the post office, thereby preventing a timely filing).<sup>3</sup> In Bass, the Court also noted, "[t]he negligence of an appellant, or an appellant's counsel, or an agent of appellant's counsel, has not been considered a sufficient excuse for the failure to file a timely appeal." Id. at 259, 401 A.2d at 1135 (emphasis added).

Claimant's reliance on Bass is misplaced. Here, Claimant did not establish non-negligent circumstances like those in Bass justifying the untimely filing of her appeal. Unlike Bass, where the secretary ultimately responsible for filing court papers suddenly fell ill and left work before filing the appeal, Claimant's counsel here offered no explanation as to why he failed to timely file Claimant's appeal. Indeed, Claimant's counsel did not appear at the referee's hearing to explain his failure to timely file the appeal. Further, Claimant offered

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<sup>3</sup> Thereafter, in Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996), the Supreme Court extended Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979), to situations in which an untimely appeal is caused by the non-negligent acts of the appellant himself.

no testimony that the untimely filing occurred because of non-negligent circumstances.<sup>4</sup> Thus, Bass is inapplicable here.

“[T]he simple failure by a party or her attorney to appeal as statute requires does not provide cause for allowing a late appeal.” DiJohn v. Unemployment Comp. Bd. of Review, 687 A.2d 1213, 1215 n.5 (Pa. Cmwlth. 1997). Indeed, an attorney’s negligence in filing an untimely appeal does not provide a sufficient basis upon which to grant *nunc pro tunc* relief. See SPS Techs. v. Workers’ Comp. Appeal Bd. (Marko), 907 A.2d 49 (Pa. Cmwlth. 2006); Schofield v. Dep’t of Transp., Bureau of Driver Licensing, 828 A.2d 510 (Pa. Cmwlth. 2003); Riddle v. Dep’t of Transp., 583 A.2d 865 (Pa. Cmwlth. 1990); see also Reed v. Unemployment Comp. Bd. of Review (Pa. Cmwlth., No. 1005 C.D. 2011, filed December 1, 2011).

In Schofield, this Court explained:

The Court [in Criss v. Wise, 566 Pa. 437, 781 A.2d 1156 (2001),] reiterated that the exception for allowance of an appeal *nunc pro tunc* in non-negligent circumstances is limited to

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<sup>4</sup> At the hearing, Claimant presented a June 4, 2012 e-mail from her counsel that states, as pertinent:

I just checked my Gmail database and I found your email from early [May] in which you attached a copy of the [notice of] determination letter. Gmail is really confusing about the way they chain together email streams. But the bottom line is, we had until May 22 to file an appeal to the Referee and we missed that date. I am going to file a *nunc pro tunc* appeal on this and I am sure we will permitted [sic] to go forward with our appeal. I sincerely apologize, but I just did not see the attachment hat [sic] was buried at the bottom of the email stream. ...

Certified Record, Referee’s Hearing, 8/3/12, Claimant’s Ex. 2. This is one excerpt from several long, confusing e-mail streams that touch on various legal and family issues raised by Claimant.

unique and compelling cases in which an appellant has clearly established that he attempted to file an appeal but was precluded from doing so due to unforeseeable and unavoidable events. Id. at 443, 781 A.2d at 1160. The principle that an attorney's negligence in filing an untimely appeal (as opposed to non-negligent circumstances such as illness) does not warrant the allowance of an appeal *nunc pro tunc* was recently reaffirmed by our Supreme Court in Alles v. Department of Transportation, Bureau of Driver Licensing, 565 Pa. 279, 773 A.2d 126 (2001) (*per curiam* opinion).

[The trial court] erred in concluding that [Commonwealth v. Stock, 545 Pa. 13, 679 A.2d 760 (1996),] required allowance of [the appellant's] untimely appeal. In Stock, the Supreme Court addressed the issue of whether counsel's failure to file an appeal in a summary case when requested, resulting in the loss of the appellant's constitutional right to appeal, amounted to extraordinary circumstances so as to merit an allowance of an appeal *nunc pro tunc*. Since the appellant in Stock could not vindicate his right to appeal through the Post Conviction Relief Act, the Supreme Court noted that 'it would be entirely unfair in the criminal context to permit Appellant's state constitutional right of an appeal to be extinguished solely on the basis of his counsel's failure to timely file the appeal where Appellant had requested an appeal to be filed.' 545 Pa. at 21, 679 A.2d at 764-65. Therefore, the Court concluded that counsel's failure to file a timely appeal as requested constituted extraordinary circumstances warranting an appeal *nunc pro tunc*. Our research has failed to reveal any cases where Stock has been interpreted and applied to allow a *nunc pro tunc* appeal in a civil case due to counsel's negligence in failing to file a timely appeal. Moreover, in light of the Supreme Court's recent reiteration in Criss and Alles of the principle that negligence of counsel does not justify allowance of an untimely appeal, we conclude common pleas erred in relying on Stock to permit Schofield to appeal *nunc pro tunc*.

Schofield, 828 A.2d at 512-13 (emphasis added).

In her counseled brief to this Court, Claimant offers no specific explanation for her attorney's failure to timely file the appeal. Rather, she asserts she "relied on her attorney's mistaken representation that he had filed the appeal." Pet'r's Br. at 5.

More importantly, in order to proceed with a *nunc pro tunc* appeal, an appellant must show the appeal was filed within a short time after learning of and having an opportunity to address the untimeliness, and the elapsed time period was of very short duration. Russo (citing Cook v. Unemployment Comp. Bd. of Review, 543 Pa. 381, 671 A.2d 1130 (1996)).

To that end, in Stanton v. Department of Transportation, Bureau of Driver Licensing, 623 A.2d 925, 927 (Pa. Cmwlth. 1993), this Court noted that a petitioner "must proceed with reasonable diligence once he knows of the necessity to take action." There, we held that an attorney's office manager, who was responsible for filing the appeal and missed the deadline due to illness, did not act with reasonable diligence when she waited 11 days after returning to work to file the appeal.

Here, Claimant learned her attorney did not file her appeal on June 4, 2012. F.F. No. 6; Referee's Hearing, Notes of Testimony (N.T.), 8/3/12, at 3. However, Claimant did not communicate with someone at the service center until June 28, 2012, and she did not file her appeal until June 29, 2012. F.F. Nos. 7, 8; N.T. at 1, 3. Thus, Claimant waited 25 days to file her appeal (10 days longer than the initial 15-day appeal period) after learning it was not timely filed. In her



counseled brief to this Court, Claimant offers no explanation for this delay. Under these circumstances, we do not believe Claimant acted with reasonable diligence. Cf. Unemployment Comp. Bd. of Review v. Ferraro, 348 A.2d 753 (Pa. Cmwlth. 1975) (even if determination was not sent to appellant, appeal would be untimely where no appeal was taken within the appeal period after the date the appellant admitted receiving actual notice of determination).

Accordingly, we reluctantly affirm.

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ROBERT SIMPSON, Judge

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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

**ORDER**

**AND NOW**, this 15<sup>th</sup> day of May, 2013, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

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ROBERT SIMPSON, Judge