

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Adam Magio,	:
Petitioner	:
	:
v.	: No. 1263 C.D. 2014
	:
Unemployment Compensation	:
Board of Review,	:
Respondent	:
Adam Magio,	:
Petitioner	:
	:
v.	: No. 1264 C.D. 2014
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Unemployment Compensation	:
Board of Review,	:
Respondent	:
Adam Magio,	:
Petitioner	:
	:
v.	: No. 1265 C.D. 2014
	:
Unemployment Compensation	:
Board of Review,	:
Respondent	:
Adam Magio,	:
Petitioner	:
	:
v.	: No. 1266 C.D. 2014
	: Submitted: April 24, 2015
Unemployment Compensation	:
Board of Review,	:
Respondent	:

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI

FILED: May 14, 2015

Adam Magio (Claimant) petitions *pro se* for review of the orders of the Unemployment Compensation Board of Review (Board) affirming the decisions of the Unemployment Compensation Referee (Referee) finding him ineligible for Emergency Unemployment Compensation (EUC) benefits under Section 402(b) of the Pennsylvania Unemployment Compensation Law (Law)¹ and Section 4001(b) of the Emergency Unemployment Act of 2008 (Act);² finding him ineligible for regular unemployment compensation (UC) benefits under Section 402(b) of the Law; imposing a fraud overpayment under Sections 4005(a), (b) and (c) of the Act;³ and imposing a fault overpayment under Section 804(a) of the Law.⁴ We affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(b). Section 402(b) provides, in relevant part:

An employe shall be ineligible for compensation for any week--

(b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature, irrespective of whether or not such work is in “employment” as defined in this act[.]

² Title IV of the Supplemental Emergency Appropriations Act of 2008, Act of June 30, 2008, P.L. 110-252, *as amended*, Section 4001(b), 26 U.S.C. §3304.

³ Section 4005 (b) of the EUC Act provides:

(b) Repayment.-In the case of individuals who have received amounts of [EUC] under this title to which they were not entitled,

(Footnote continued on next page...)

Claimant was employed part-time as a telephone representative for Civic Awareness (Employer)⁵ from March 7, 2012, until around April 27, 2012, when he quit. Before Claimant started working for Employer, Claimant had been receiving UC benefits effective May 2011 after his separation from employment with his previous employer and was subsequently deemed eligible for EUC benefits. When Employer presented Claimant with his last pay, Employer had Claimant sign a Paycheck and Procedure Verification form, which Employer uses for employees picking up their final paychecks, stating that he had terminated his own employment.

(continued...)

the State shall require such individuals to repay the amounts of such [EUC] to the State agency, except that the State agency may waive such repayment if it determines that-

(1) the payment of such [EUC] was without fault on the part of any such individual; and

(2) such repayment would be contrary to equity and good conscience.

Sections 4005(b) of the EUC Act, 26 U.S.C. §3304 Note.

⁴ 43 P.S. §874(a). Section 804(a) of the Law states in relevant part:

Any person who by reason of his fault has received any sum as compensation under this act to which he was not entitled, shall be liable to repay to the Unemployment Compensation Fund to the credit of the Compensation Account a sum equal to the amount so received by him and interest at the rate determined by the Secretary of Revenue[.]

⁵ Employer also operates under the name “Grand Scale Fundraising.”

After he left Employer, Claimant reopened his claim on June 3, 2012, based on his separation from Employer, alleging that he was no longer working for Employer due to a lack of work. He was subsequently determined eligible for EUC benefits effective May 7, 2013. Claimant then filed for and received \$4,664 in EUC benefits for the compensable weeks ending May 11, 2013, through December 21, 2013.

However, because it determined that Claimant had quit when Employer had continuing work available, the Department of Labor and Industry (Department) issued determinations: (1) denying EUC benefits beginning with the claim week ending May 5, 2012; (2) imposing a fraud overpayment of \$6,005 for the claim weeks ending May 5, 2012, through May 4, 2013; (3) denying regular benefits beginning with the waiting week ending June 9, 2012; (4) imposing a fault overpayment of \$6,240 for the claim weeks ending June 16, 2012, through December 8, 2012; (5) denying EUC benefits beginning with the compensable week ending May 11, 2013; and (6) imposing a fraud overpayment of \$4,664 for weeks ending May 11, 2013, through December 21, 2013.

Claimant appealed the Department's determinations. By four notices mailed February 20, 2014, the Referee scheduled Claimant's hearing for March 10, 2014, at 10:30 a.m. As Claimant's counsel would allegedly be out of the country on that date, counsel sent a continuance request by fax, with the banner indicating that the fax was sent at 9:46 a.m. and received by the Referee's office at 9:52 a.m. on March 10, 2014. The Referee denied the continuance request on the record, finding that it was not submitted in a timely manner. The Referee then held the

hearing on the substance of the appeal with George Belfiore, Employer's office manager, testifying as to the circumstances of Claimant's separation.

Based on Employer's evidence, the Referee issued four decisions affirming the Department's determinations and disposing of the appeals. Notably, the Referee found that Claimant failed to establish that his separation from work was due to a lack of work or was involuntary.⁶ He reasoned that given that Claimant voluntarily terminated his employment and then subsequently failed to establish that his reasons for leaving his employment rose to the level of a necessitous and compelling cause, benefits must be denied under Section 402(b) of the Law. Moreover, the Referee found that Claimant's EUC overpayment was properly characterized as fraud in accordance with Sections 4005(a), (b) and (c) as Claimant received benefits to which he was not entitled by knowingly

⁶ In two of his decisions, the Referee noted that:

Claimant's documentary evidence contained in the file indicating that his separation from employment with the present Employer was due to a lack of work. However, these documents are hearsay and insufficient to meet the Claimant's burden to establish the precise nature of the separation. Moreover, they were rebutted by the Employer's competent testimony and evidence establishing that continuing work was available to the Claimant after April 27, 2012, and that the Claimant had not been suspended or discharged from employment. As the Claimant failed to appear for the hearing to present sufficient competent testimony and evidence to establish that the reasons for his separation was due to the lack of work or involuntary separation, the Referee is left to conclude that the Claimant voluntarily left his employment.

(Referee's Decisions/Orders from Hearing Nos. 14-09-C-1270 and 14-09-C-1270, 3/13/2014, at 2, C.R. Item No. 12.)

misrepresenting the reason for his separation to the UC Service Center upon reopening his claim. The Referee calculated Claimant's overpayment as \$734.

Claimant appealed to the Board only raising the issue of the denial of the continuance. The Board affirmed the Referee's decisions and adopted the Referee's findings and conclusions, but modified the decision denying Claimant benefits under Section 402(b) of the Law (Referee's Decision/Order No. 14-09-C-1271), finding that beginning with the waiting week ending June 9, 2012, Claimant is ineligible for benefits only to the extent that his part-time earnings of \$136 per week exceeded his partial benefit credit of \$95.⁷ The Board additionally noted that counsel's continuance request was received less than an hour before the scheduled hearing. Claimant filed a request for reconsideration, which the Board denied. Claimant then filed the instant appeals of the Board's orders.⁸

I.

As to the merits, Claimant contends that the Board's determination that he quit his employment was based on "false evidence" because the Paycheck and Procedure Verification form never explicitly stated that he voluntarily quit his

⁷ The Board is the ultimate fact-finder in unemployment compensation cases. *Peak v. Unemployment Compensation Board of Review*, 501 A.2d 1383 (Pa. 1985). The Board's findings are conclusive on appeal so long as the record, taken as a whole, contains substantial evidence to support those findings. *Taylor v. Unemployment Compensation Board of Review*, 378 A.2d 829 (Pa. 1977).

⁸ Our scope of review of the Board's decision is limited to determining whether an error of law was committed, constitutional rights were violated, or whether the necessary findings of fact are supported by substantial evidence. *Rock v. Unemployment Compensation Board of Review*, 6 A.3d 646, 648 n.5 (Pa. Cmwlth. 2010).

employment with Employer, and, in any event, should not have been entered into evidence at the hearing as it was unauthenticated. Claimant also contends that he should not have to repay the EUC overpayment because that would create a financial hardship. However, as Claimant failed to raise these issues in his petition for appeal to the Board as required by Rule 1551(a) of the Pennsylvania Rules of Appellate Procedure,⁹ these issues are waived. *See also Grever v. Unemployment Compensation Board of Review*, 989 A.2d 400, 402 (Pa. Cmwlth. 2010); *Dehus v. Unemployment Compensation Board of Review*, 545 A.2d 434, 436-37 (Pa. Cmwlth. 1988).

⁹ Rule 1551(a) states:

(a) Appellate jurisdiction petitions for review. Review of quasijudicial orders shall be conducted by the court on the record made before the government unit. No question shall be heard or considered by the court which was not raised before the government unit except:

(1) Questions involving the validity of a statute.

(2) Questions involving the jurisdiction of the government unit over the subject matter of the adjudication.

(3) Questions which the court is satisfied that the petitioner could not by the exercise of due diligence have raised before the government unit. If, upon hearing before the court, the court is satisfied that any such additional question within the scope of this paragraph should be so raised, it shall remand the record to the government unit for further consideration of the additional question.

The court may in any case remand the record to the government unit for further proceedings if the court deems them necessary.

Pa. R.A.P. 1551(a).

II.

The only contention preserved for appeal is that the Referee abused his discretion by denying Claimant's request for a continuance of the hearing even though the request was made in a timely manner and for proper cause, thereby denying Claimant a fair hearing and violating his due process rights. Claimant contends his attorney requested a continuance by letter dated and faxed on March 7, 2014, rather than on March 10, 2014. In his brief, he suggests that the delay in the Referee's receipt of the continuance request may be due to a defect in the Referee's filing system and that the Referee did not receive the request on March 7, 2014, because the office failed to "place the fax in the proper file," and, thus, the Referee did "not see it until shortly before the hearing." (Petitioner's Brief at 16.)

However, there is no evidence in the record supporting Claimant's contention that his attorney requested a continuance by letter dated and faxed on March 7, 2014, and we are "bound by the facts certified in the record on appeal." *Tener v. Unemployment Compensation Board of Review*, 568 A.2d 733, 738 (Pa. Cmwlth. 1990). The only evidence in the record is the banner on counsel's fax requesting continuance which clearly indicates that it was faxed by counsel's office at 9:46 a.m. on March, 10, 2014, and received by the Referee's office at 9:52 a.m. that same day less than an hour before the scheduled hearing. In any event, "[a] party filing an appeal by fax transmission 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) (emphasis added). *See also Skowronek v. Unemployment Compensation Board of Review*, 921 A.2d 555, 558 (Pa. Cmwlth. 2007).

As to whether the Referee abused his discretion by refusing a continuance received less than an hour before the hearing, 34 Pa. Code §101.23(a) allows a continuance “only for proper cause and upon the terms as the tribunal may consider proper.” A claimant who desires a continuance due to his inability to attend a hearing has a duty to “immediately request a continuance in writing before the hearing.” *Flores v. Unemployment Compensation Board of Review*, 686 A.2d 66, 76 (Pa. Cmwlth. 1996) (citation omitted). The Unemployment Compensation Regulations further provides that, “[i]f a party notified of the date, hour and place of a hearing fails to attend a hearing without proper cause, the hearing may be held in his absence.” 34 Pa. Code at §101.51.

In *Cowfer v. Unemployment Compensation Board of Review*, 534 A.2d 560, 562 (Pa. Cmwlth. 1987), we noted that “last-minute requests for continuances will not be viewed favorably by this Court.” Moreover, in *Skowronek*, 921 A.2d at 558, we reasoned that “[i]f counsel was unavailable due to a previously scheduled appointment, there is no explanation as to why the request was not made prior to 6:30 p.m. on the last business day before the hearing.” Even the four notices of hearing sent to Claimant advised: “If you cannot attend the hearing for any reason, you may request a continuance (postponement) of the hearing. *You should do this as soon as possible.*” (Notices of Hearing, 2/20/2014, at 3, C.R. Item No. 8.) (emphasis added).

In this case, not only was the continuance request filed shortly before the scheduled hearing, the reason given for the request was not because of an emergency or unexpected event. Instead, Claimant’s counsel stated that he could

not attend because he was traveling abroad. Generally, such travel requires advance planning and counsel would know that he would be unavailable on March 10, 2014, and should have requested a continuance much earlier, given that notices for the hearing were sent on February 20, 2014.

Given that the request for a continuance was received less than an hour before the scheduled time and was not because of an unexpected event, the Referee did not abuse his discretion in denying the continuance, and absent an abuse of discretion, we will not override a referee's denial of a continuance. *Steadwell v. Unemployment Compensation Board of Review*, 463 A.2d 1298, 1300 (Pa. Cmwlth. 1983).

Accordingly, the Board's orders are affirmed.

DAN PELLEGRINI, President Judge

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ORDER

AND NOW, this 14th day of May, 2015, the orders of the Unemployment Compensation Board of Review, dated July 18, 2014, at Nos. B-EUC-14-09-C-1270, B-14-09-C-1271, B-14-09-C-1272, B-EUC-14-09-C-1273, are affirmed.

DAN PELLEGRINI, President Judge