

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Leslie Aviles	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 374 C.D. 2013
	:	
Respondent	:	Submitted: August 16, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY

FILED: September 25, 2013

Leslie Aviles (Claimant) petitions this Court for review of the Unemployment Compensation Board of Review's (UCBR) February 15, 2013 order dismissing Claimant's appeal from the Referee's decision finding Claimant ineligible for unemployment compensation (UC) benefits under Section 402(b) of the Unemployment Compensation Law (Law).¹ The sole issue for this Court's review is whether the UCBR erred in finding that Claimant's appeal was untimely. We affirm.

Claimant was employed full-time by Ida's Learning Center (Employer) as an assistant teacher between June 2010 and November 30, 2011. She was involved in a car accident on December 1, 2011 and remained off work until December 5, 2011. Employer told Claimant that she would have to supply a physician's note outlining her work restrictions before she could return to work. Claimant failed to

¹ Act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b) (relating to unemployment due to voluntarily leaving work without cause of a necessitous and compelling nature).

provide Employer a physician's note. Employer concluded that Claimant quit her job.

Claimant subsequently filed an application for UC benefits. On April 16, 2012, the Philadelphia UC Service Center deemed Claimant ineligible for benefits under Section 402(b) of the Law. Claimant appealed and a hearing was held by a Referee. On May 30, 2012, the Referee mailed his decision affirming the UC Service Center's determination. The Referee's decision specifically provided: "You have the right to file a further appeal to this decision within fifteen (15) days of the date of mailing." Referee Dec. at 3. The decision also specified, in at least two places, that the last date for Claimant to file an appeal was June 14, 2012.

By November 30, 2012 letter, Claimant's counsel, Timothy R. Hough, notified the UCBR that:

On June 7, 2012, correspondence was forwarded to the [UCBR] (copy enclosed) advising that [C]laimant was appealing the Referee's Decision denying unemployment compensation benefits We have not heard back from your office relative to our client's appeal. Kindly advise the status of same at your earliest convenience.

Certified Record (C.R.) Item 9 at 2. Enclosed with that letter was a copy of a June 7, 2012 letter from Attorney Hough to the UCBR that declared: "This correspondence will serve to advise you that [Claimant] hereby appeals the Referee's Decision/Order finding [her] ineligible for unemployment compensation benefits" C.R. Item 9 at 3.

By December 13, 2012 letter, the UCBR responded that Claimant's November 30, 2012 appeal from the May 30, 2012 decision was untimely, but if he felt the appeal was timely or should be deemed timely for other reasons, he may request a hearing. On December 28, 2012, Attorney Hough requested a hearing, asserting that the June 7, 2012 letter "was deposited in the mail by [his] staff. It was

brought to the post office below [his] building denoted as the Penn Center Postal Station. We had no reason to believe that your office did not receive or had delayed receipt of that appeal letter. . . .” C.R. Item 11. The UCBR remanded the matter to the Referee. On January 30, 2013, the Referee held a hearing for Claimant to set forth the reasons why her appeal should be deemed timely. On February 15, 2013, the UCBR dismissed Claimant’s appeal as untimely. Claimant appealed to this Court.²

Claimant argues that the UCBR capriciously disregarded unrefuted substantial evidence that Claimant’s appeal was timely filed. Section 502 of the Law specifically states that a referee’s decision “shall be deemed the final decision of the [UCBR], unless an appeal is filed therefrom, within fifteen days” of the decision. 43 P.S. § 822. According to Section 101.82(b)(1) of the Department of Labor and Industry’s (Department) Regulations, when filing an appeal via United States mail:

² Because Claimant had the burden of proof [as to the timeliness of her appeal] and was the only party to present evidence, this Court’s review is limited to a determination of whether the [UCBR] capriciously disregarded competent evidence, whether there has been a constitutional violation, or whether the [UCBR] committed an error of law. The Court has articulated the standard for capricious disregard as follows:

When determining whether the [UCBR] capriciously disregarded the evidence, the Court must decide if the [UCBR] deliberately disregarded competent evidence that a person of ordinary intelligence could not conceivably have avoided in reaching a particular result, or stated another way, if the Board willfully or deliberately ignored evidence that any reasonable person would have considered to be important.

Wright v. Unemployment Comp. Bd. of Review, 41 A.3d 58, 62 n.5 (Pa. Cmwlth. 2011) (citation omitted) (quoting *Jackson v. Unemployment Comp. Bd. of Review*, 933 A.2d 155, 156 n.4 (Pa. Cmwlth. 2007)).

The filing date will be determined as follows:

(i) The date of the official United States Postal Service postmark on the envelope containing the appeal, a United States Postal Service Form 3817 (Certificate of Mailing) or a United States Postal Service certified mail receipt.

(ii) If there is no official United States Postal Service postmark, United States Postal Service Form 3817 or United States Postal Service certified mail receipt, the date of a postage meter mark on the envelope containing the appeal.

(iii) If the filing date cannot be determined by any of the methods in subparagraph (i) or (ii), the filing date will be the date recorded by the Department, the workforce investment office or the [UCBR] when it receives the appeal.

34 Pa. Code § 101.82(b)(1). This Court has held:

If an appeal is not filed within fifteen days of the determination's mailing date, the UCBR and its referees do not have jurisdiction to rule on the merits of the case. The statutory time limit for filing an appeal is mandatory in the absence of fraud or manifestly wrong or negligent conduct of the administrative authorities, and the claimant bears a heavy burden to justify an untimely appeal.

Roman-Hutchinson v. Unemployment Comp. Bd. of Review, 972 A.2d 1286, 1288 n.1 (Pa. Cmwlth. 2009) (citation omitted).

At the remand hearing, Attorney Hough's associate Dianne L. Elliott (Attorney Elliott) testified that her office received the Referee's decision on June 6, 2012 by fax from Claimant. C.R. Item 15, Notes of Testimony (N.T.) at 5. Attorney Elliott claimed that she drafted the appeal letter, Attorney Hough signed it, and she gave it to Attorney Hough's assistant/office manager Kate Winters (Winters) on June 7, 2012 to mail. C.R. Item 15, N.T. at 6. Attorney Elliott further related that at Attorney Hough's request, Attorney Elliott drafted and sent the November 30, 2012 letter. C.R. Item 15, N.T. at 6.

Winters confirmed that Attorney Elliott gave her the June 7, 2012 appeal letter and requested that she get it out in the mail immediately. C.R. Item 15, N.T. at 7. Winters specifically remembered mailing the letter because she “was running out the door and [] was asked to come back” for it. C.R. Item 15, N.T. at 7. Winters stated that she deposited the June 7, 2012 letter at the post office at 2 Penn Center, located at 15th and John F. Kennedy Boulevard, in the concourse.

The Referee took notice that November 30, 2012 was “the first date that the [Department recorded] as the appeal date.” C.R. Item 15, N.T. at 7. We acknowledge that “[w]hat is, or is not, in the [UCBR]’s record . . . is not always dispositive.” *Wright v. Unemployment Comp. Bd. of Review*, 41 A.3d 58, 64 (Pa. Cmwlth. 2011).

[An appeal’s] absence in the record, at best, gives rise to an inference that [c]laimant did not file a timely appeal in this case. At a hearing on timeliness, where the [UCBR]’s record does not include an appeal that the claimant claims he or she filed, a claimant can only establish the steps the claimant took to lodge a timely appeal. The claimant does not have within his or her power the ability to explain why the appeal in question is not in the [UCBR]’s record.

Id. Here, Attorney Elliott and Winters supplied evidence of the steps they purportedly took to file Claimant’s appeal. However, because “there [was] no documentary evidence . . . such as a certificate of mailing, an envelope with a postmark, or certified mailing receipt that proves the date of mailing. . . . [and] there [was] no evidence that the letter contained proper postage” on June 7, 2012, the UCBR discredited the testimony that Claimant’s appeal was timely filed. UCBR Op. at 2. “[T]he [UCBR] is the ultimate fact-finder, free to accept or reject as credible Claimant’s and [s]ender’s testimony.” *Wright*, 41 A.3d at 63. Consequently, because the UCBR considered and expressly addressed Claimant’s evidence, we hold that the UCBR did not capriciously disregard competent evidence.

Pursuant to Section 101.82(b)(1)(iii) of the Department's Regulations, the UCBR was constrained to deem November 30, 2012 as Claimant's appeal date, which was well after the 15-day appeal period expired. Under the circumstances, the UCBR was without jurisdiction to decide the merits of Claimant's case and, therefore, committed no error in dismissing Claimant's appeal for untimeliness.

Accordingly, the UCBR's order is affirmed.

ANNE E. COVEY, Judge

