

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

PABLO ORTIZ,)	
)	
Appellant,)	
)	
v.)	C.A. No.: N14A-12-002 FSS
)	
ADECCO USA, INC. and)	
UNEMPLOYMENT INSURANCE)	APPEAL
APPEAL BOARD,)	
)	
Appellees.)	

Submitted for Decision: June 3, 2015
Decided: August 11, 2015

ORDER

Upon Appellees's Motion to Dismiss – GRANTED

1. Appellant properly pursued his unemployment benefits claim through the appeals process, up to the Unemployment Insurance Appeal Board. But, he filed his appeal to this court too late. Now, Appellees move to dismiss the appeal as untimely. Appellant basically argues he was physically incapacitated during the appeal time. As explained below, this argument is unavailing. The explanations are vague and unsubstantiated. And, most importantly, time is jurisdictional.

2. On May 15, 2014, a claims deputy disqualified Appellant-Employee from receiving benefits after finding he was terminated from Adecco USA, Inc. for just cause. Appellant arrived late and missed work for health reasons, but did

not substantiate that. So, Appellant appealed the determination. He was given a full hearing before an appeals referee and another one before the Board, itself.

3. Appellant testified at both hearings, during which he claimed his attendance issues were due to medical reasons. But, during neither hearing did Appellant offer anything to support that. Accordingly, the appeals referee and the Board affirmed the claims deputy's disqualification determination.

4. The Board's decision was mailed to Appellant September 25, 2014 and became final October 5, 2014. On December 9, 2014, almost two months after the deadline, Appellant appealed the Board's decision to this court, stating: "Have received [d]ocuments for appeal hearing."

5. On May 5, 2015, the Board moved to dismiss this appeal as untimely. Adecco joined the motion May 11, 2015. Appellant responded May 19, 2015, offering for the first time an explanation for the two-month delay:

I was misinformed on what I had to do regarding the Superior Court. The lady from unemployment told me something completely different and I was still in and out of the hospital so it made it almost impossible to reply on the requested [d]ate.

Appellant provides neither details nor corroboration.

6. The court is only considering Appellees’s Motion to Dismiss, which is based on the appeal’s timeliness.¹ Accordingly, addressing the merits is unnecessary and inappropriate.² The court does not have jurisdiction to do that until it has found the appeal here was timely, which it was not.

7. A Board’s decision is final ten days after it is mailed.³ A party then has ten days to appeal the final decision to this court.⁴ Failing to file an appeal within those ten days creates a jurisdictional defect that can only be excused by unusual circumstances attributable to court personnel, not the appellant.⁵

8. Based on the record, as mentioned, Appellant appealed almost two months after the Board’s decision was final. Regardless of who said what at the Department of Labor, the decision flatly states the appeal had to be filed here “within ten days after the decision . . . becomes final.” Appellant’s other excuse for the delay is that he was in and out of the hospital. But Appellant again offers nothing to

¹ Super. Ct. Civ. Rule 72(i): “The Court may order an appeal dismissed, sua sponte, or upon a motion to dismiss by any party. Dismissal may be ordered for untimely filing of an appeal”

² See *Draper King Cole v. Malave*, 743 A.2d 672, 673 (Del. 1999) (citing *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379 (1884)).

³ 19 *Del. C.* § 3322(a).

⁴ *Id.* § 3323(a): “Within 10 days after the decision of the Unemployment Insurance Appeal Board has become final, any party aggrieved thereby may secure judicial review thereof by commencing an action in the Superior Court . . . for the review of such decision”

⁵ See *Draper King Cole*, 743 A.2d at 673 (“When a party fails to perfect an appeal within the period mandated by statute, a jurisdictional defect is created that may not be excused in the absence of unusual circumstances that are attributable to court personnel and are not attributable to the appellant or the appellant’s attorney.”).

support this assertion. It is difficult to conceive how Appellant was so incapacitated from September 25th to December 9th that he could not file his appeal. Anyway, even taking Appellant at his word, although his hospitalization is unfortunate, the deadline here is jurisdictional.⁶ Therefore, the appeal is untimely.⁷

9. Appellant failed to prove a court error excusing his late appeal. His failure to meet the deadline for his own reasons, real or not, must be held against him. Accordingly, Appellant failed to invoke this court's jurisdiction. The Board's decision remains final.⁸

10. In closing, this outcome is hardly unjust. Although Appellant is not receiving a further review here, his claim is uncomplicated, and it was reviewed repeatedly by the administrative agency, including the Board, itself.

For the above reasons, Appellees's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

⁶ *Cf. Myers v. Brandywine Body Shop*, C.A. No. 08A-11-004-JRJ, 2009 WL 2714079, at *2 (Del. Super. Aug. 26, 2009). Although ultimately rejecting the hospitalization excuse for not being substantiated, *Myers* considered Appellant's excuse in the interests of justice because the untimely appeal was filed with the Board, not Superior Court. *Id.*

⁷ *See Henry v. Dept. of Labor*, 293 A.2d 578, 580 (Del. Super. 1972) ("The petitioner filed his Petition for Review 44 days after the mailing of the Board's decision. On the face of the record, the petitioner has failed to file a timely appeal.").

⁸ *See Draper King Cole*, 743 A.2d at 673 ("In the absence of a timely appeal, the decision of the Industrial Accident Board remains final.").

cc: Prothonotary
Victoria W. Counihan, Esquire
Paige J. Schmittinger, Esquire
Geoffrey G. Grivner, Esquire
Mr. Pablo Ortiz