1992

Norm Miller Used Cars v. Department of Employment : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

NORM MILLER USED CARS, Appellant-Petitioner, vs. DEPARTMENT OF EMPLOYMENT SECURITY, Appellee-Respondent.	Case No. 92-0630-CA

BRIEF OF PETITIONER

PETITION FOR REVIEW
from the Board of Review
of the Industrial Commission of Utah,
Department of Employment Security

Argument Priority Classification: (7)

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None.

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §35-4-10(i) (1953, as amended).

STATEMENT OF THE ISSUES

The issues presented by this petition and the applicable standard of appellate review are as follows:

(1) Whether or not the Board of Review erred in affirming the Administrative Law Judge's decision that the Petitioner, Norman Miller dba Norm Miller Used Cars (hereinafter referred to as "Miller"), did not have good cause to file a late appeal. Standard of Review: Whether Board of Review's decision is supported by substantial evidence when viewed in light of the whole record before the Court and is reasonable. Utah Code Ann. §63-46b-16(4) (1953, as amended); Armstrong v. Dep't of Employment Security, 834 P.2d 562 (Utah App. 1992).

(2) Whether or not the Board of Review erred in affirming the Administrative Law Judge's decision that Mr. Miller did not have good cause to request rescheduling of the March 9, 1992 hearing. Standard of Review: Whether Board of Review's decision is supported by substantial evidence when viewed in light of the whole record before the Court and is

reasonable. Utah Code Ann. §63-46b-16(4) (1953, as amended); Armstrong v. Dep't of Employment Security, 834 P.2d 562 (Utah App. 1992).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Constitutional Provisions:

None.

Statutes:

Utah Code Ann. §35-4-10(a),(b),(d),(e),(h), and (i).

Utah Code Ann. §63-46b-16(4)

Ordinances:

None.

Rules:

UAC R562-6c-7

UAC R562-6c-8

UAC R562-6c-10.1.a

UAC R562-6c-10.2.a

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STATEMENT OF THE CASE

The case before the Court results from an Audit Determination dated October 23, 1991 in which the respondent, Department of Employment Security of the Industrial Commission of Utah, assessed the petitioner, Norman Miller dba Norm Miller Used Cars, contributions, interest, and penalties in the sum of $6,054.90 for unreported wages during the years 1988 through 1990.

Mr. Miller did not file a written appeal until December 11, 1992. A hearing was set for March 9, 1992 which Mr. Miller failed to attend. On March 27, 1992 Mr. Miller mailed a written request to reschedule the hearing. On May 13, 1992 a hearing was held before the administrative law judge, Kenneth A. Major, on whether or not good cause existed for Mr. Miller's late appeal and for his failure to appear at the March 9, 1992 hearing. The Administrative Law Judge concluded that Mr. Miller did not have good cause to reschedule a hearing, and, in the alternative, did not file a timely appeal and did not have good cause for late filing.

Mr. Miller then appealed to the Board of Review who affirmed the decision of the Administrative Law Judge and the case is now before the Court on a Petition for Review.

STATEMENT OF RELEVANT FACTS

The following facts are material to a consideration of the questions presented:

(1) On or about October 23, 1991, the Department of Employment Security mailed a Notice of Audit Determination, together with Schedules of Unreported Wages for the years 1988 through 1990, to Mr. Miller at P.O. Box 392, Lehi, Utah 84043-0392. Decision of Administrative Law Judge as set forth in Record for Petition for Review and as adopted by Board of Review (hereinafter referred to as "ALJ/Record on Appeal"), p. 37.

(2) The Notice of Audit Determination assessed contributions, interest, and penalties in the sum of $6,054.90, and notified Mr. Miller that the decision became final within ten (10) days unless Mr. Miller filed a written appeal. ALJ/Record on Appeal, p. 37; Record on Appeal 7-8.

(3) On November 1, 1991 Mr. Miller called the field auditor, James Alexander (hereinafter referred to as the "auditor"), and notified him that he had just received the Notice of Audit Determination from his accountant. ALJ/Record on Appeal, p. 37.

(4) The auditor explained to Mr. Miller that he would be required to file a written appeal specifying the reasons

for the appeal. The auditor also granted Mr. Miller an extension to file the appeal, the time of which is not supported by substantial evidence. Hearing Transcript, p. 5-8; Record on Appeal, 30-33; Record on Appeal, p. 9 (Exhibit 6a).

(5) Mr. Miller called the auditor again at which time the auditor reiterated the procedure to file a written appeal; however, when such calls occurred was not determined. Hearing Transcript, p. 8; Record on Appeal, p. 33.

(6) Mr. Miller mailed a letter of appeal on December 11, 1991 setting forth the reasons for his appeal. ALJ/Record on Appeal, p. 37.

(7) The Department of Employment Security sent notice to Mr. Miller notifying him that a hearing was set for the matter on March 9, 1992 at the Provo Job Service Office; however, when notice was sent was not established in the proceedings. Record on Appeal, p. 19 (Exhibit A-1).

(8) The notice of hearing included instructions which notified Mr. Miller that if he failed to attend the hearing, a decision on the matter would nevertheless be issued and that he would have seven days within which to request that the hearing be rescheduled. ALJ/Record on Appeal, p. 36.

(9) Mr. Miller erroneously recorded hearing date on his calendar for March 19, 1992 rather than March 9, 1992. ALJ/Record on Appeal, p. 36.

(10) Mr. Miller failed to appear at the March 9, 1992 hearing, and immediately upon discovering the error a few days later, Mr. Miller telephoned the Administrative Law Judge to request another hearing to which the Administrative Law Judge notified Mr. Miller that he must make such request in writing and explain why he failed to appear. ALJ/Record on Appeal, p. 36.

(11) The Administrative Law Judge did not notify Mr. Miller of the necessity to file the request within 7 days of the hearing and shortly after speaking with the Administrative Law Judge concerning the hearing, Mr. Miller received a decision pursuant to the March 9, 1992 hearing which stated he had 30 days to file an appeal. Mr. Miller believed that was the controlling time limit. Record on Appeal, p. 21 (Exhibit B). Hearing Transcript, pp. 3-4; Record on Appeal, pp. 28-29.

(12) Pursuant to the Administrative Law Judge's directions, Mr. Miller sent the written request for rescheduling to the Administrative Law Judge on March 27, 1992. ALJ/Record on Appeal, p. 36.

(13) On May 13, 1992 a hearing was held at the Provo Job Service office before the Administrative Law Judge. ALJ/Record on Appeal, p. 36.

(14) In a decision rendered on or about May 22, 1992, the Administrative Law Judge held that Mr. Miller did not have good cause to request rescheduling, or, in the alternative, that the Appeals Tribunal did not have jurisdiction over the matter under Utah Code Ann. §35-4-10(b) (1953, as amended) as a result of Mr. Miller's failure to file a timely appeal and the fact that he did not have good cause to file a timely appeal. ALJ/Record on Appeal, p. 36-37.

(15) On June 22, 1992 the Board of Review acknowledged receipt of Mr. Miller's appeal on the issues of whether or not he had good cause for the late appeal to the Administrative Law Judge and whether Mr. Miller had good cause for failing to attend the March 9, 1992 hearing. Record on Appeal, p. 46.

(16) On September 1, 1992 the Board of Review mailed its decision to Mr. Miller affirming the decision of the Administrative Law Judge. Record on Appeal, p. 48.

SUMMARY OF THE ARGUMENT

Point I.: The Board of Review's affirmance of the ALJ's decision that Mr. Miller did not have good cause to file a late appeal is not reasonable since the Board's findings regarding the alleged 10-day extension time are not supported by substantial evidence given the contradictory nature of the note signed by the field auditor regarding the appeal, the failure of the Board to identify the dates on which Mr. Miller spoke with the auditor subsequent to November 11, 1991, and given Mr. Miller's testimony that he mailed the written appeal as soon as he was notified by the auditor that he needed to do so. In addition, the ALJ failed to elicit all relevant facts at the hearing.

Moreover, the Board's affirmance is also not reasonable nor supported by substantial evidence in light of the misleading statements of the field auditor in regard to the nature of the appeal and the amount of information Mr. Miller needed to gather in support of his appeal.

Point II.: The Board of Review's decision affirming the ALJ's decision that good cause did not exist to request rescheduling is not supported by substantial evidence and is clearly unreasonable in light of (1) the lack of any substantiating evidence indicating that notice of the March 9, 1992 hearing was mailed to Mr. Miller at least 7 days prior to the

hearing as required by R562-6c-10.1.a, (2) the ALJ's failure to warn Mr. Miller regarding his time constraints, and (3) Mr. Miller's subsequent receipt of the March 11, 1992 decision notifying him that he had 30 days within which to appeal the March 9, 1992 decision which resulted in confusion as to the time limit within which Mr. Miller had to reschedule the hearing.

ARGUMENT

I. THE BOARD OF REVIEW ERRED IN AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S DECISION THAT MR. MILLER DID NOT HAVE GOOD CAUSE TO FILE A LATE APPEAL.

A. Section 35-4-10 of the Utah Code and the Rules promulgated by the Industrial Commission govern Mr. Miller's appeal.

Pursuant to Section 35-4-10, Utah Code Ann. (1953, as amended), the review of a decision or determination in cases involving contribution liability, as in the case of Mr. Miller, shall first be made by the Industrial Commission (hereinafter referred to as the "Commission") or its authorized representative. After a decision is reached notice thereof is to be given to the employer. The decision made pursuant to the review is the final decision of the Commission unless, within ten (10) days after the date of notification or mailing, the employer files a notice of appeal to an administrative law judge (hereinafter referred to as the "ALJ"). Utah Code Ann. §35-4-10 (a); (b) (1953, as amended).

After affording the parties with reasonable opportunity for a fair hearing, the ALJ is required to make findings and conclusions, and on that basis, affirm, modify, or reverse the determination. Notice and a copy of the decision and findings is to be promptly provided the parties. The decision is the final decision of the Commission unless, within ten (10) days after the date of mailing the notice to the parties' last known addresses, the employer files an application for appeal to the Board of Review. Utah Code Ann. §35-4-10 (b); (d) (1953, as amended).

Upon reviewing the evidence previously submitted and any additional evidence it requires, the Board of Review may affirm, modify, or reverse the decision of the ALJ. The Board of Review is then required to promptly notify the parties of its decision, together with its findings and conclusions. The decision of the Board of Review is final unless, within ten (10) days after mailing notice to the parties' last known address, the employer files a Petition for Review. Utah Code Ann. §35-4-10 (d); (h) (1953, as amended).

In addition to the foregoing statutory provisions, appeals regarding determinations involving contribution liability are subject to the rules prescribed by the Commission for determining the rights of the parties. Utah Code Ann. §35-4-10 (e) (1953, as amended). Pursuant to R562-10b-1 of the Utah

Administrative Code (UAC), R562-6c shall apply to appeals of contribution decisions as well as appeals of benefit decisions. R562-6c-7 provides an appellant the opportunity to contest a finding that his appeal was not filed within the time allowed as follows:

> When it appears that an appeal may not have been filed within the time allowed by the Act or these Rules, the appellant will be notified and given an opportunity to show that the appeal was timely or was delayed for good cause. . . .

Pursuant to R562-6c-8, "[a] late appeal may be considered on its merits if it is determined that the appeal was delayed for good cause." The rule further provides that good cause is limited to the following circumstances:

> 1. The appeal was filed within 10 days of actual receipt of the decision if such receipt was beyond the original appeal period and not the result of willful neglect; or
> 2. The delay in filing the appeal was due to circumstances beyond the control of the appellant; or
> 3. The appellant delayed filing the appeal for circumstances which were compelling and reasonable.

In the case before the Court, the Department of Employment Security (hereinafter referred to as the "Department") issued a Notice of Audit Determination dated October 23, 1991, together with Schedules of Unreported Wages for the years 1988 through 1990. Record of Petition for Review to the Utah Court of Appeals from the Industrial Commission of Utah, Department of

Employment Security (hereinafter referred to as "Record on Appeal"), pp. 1-10, 32. The Notice stated that Mr. Miller's business failed to report all employment of the company resulting in an assessment to Mr. Miller of contributions, interest, and penalties ($6,054.90). Record on Appeal, p. 7. Consistent with the provisions of Utah Code Ann. §35-4-10(a) (1953, as amended), the Notice informed Mr. Miller that the decision would become final unless, within 10 days from the date of mailing, Mr. Miller filed a written appeal setting forth the grounds upon which the appeal is made. Record on Appeal, p. 8. On November 1, 1991 the auditor received a telephone call from Mr. Miller who notified the auditor that he just received the Notice of Audit Determination from Mr. Miller's accountant. Reporter's Transcript of May 13, 1992 Hearing (hereinafter referred to as "Hearing Transcript"), p. 7; Record on Appeal, p. 32.

B. <u>The Board of Review's findings that Mr. Miller was granted only a 10-day extension within which he could file an appeal is not supported by substantial evidence</u>.

Pursuant to the findings of the Administrative Law Judge ("ALJ") dated May 22, 1992, which findings were adopted by the Board of Review in Case No. 92-BR-237-T, the auditor gave Mr. Miller an extension of only ten (10) additional days from the date of the call within which Mr. Miller could file a written appeal. These findings, however, are not supported by substantial

evidence, and therefore, appropriate relief should be granted to Mr. Miller.

Pursuant to the Utah Administrative Procedures Act, relief shall be granted if "the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. §63-46b-16(4) (1953, as amended). See also Stewart v. Board of Review, 831 P.2d 134, 137 (Utah App. 1992). Pursuant to the decision of this Court in Grace Drilling Co. v. Board of Review, "[s]ubstantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" 776 P.2d 63, 68 (quoting Idaho State Insurance Fund v. Hunicutt, 715 P.2d 927, 930 (Idaho 1985)).

In challenging the findings of fact, Mr. Miller must marshall all of the evidence supporting the findings and show that despite the supporting facts, the ALJ's findings are not supported by substantial evidence. First National Bank v. County Board of Equalization, 799 P.2d 1163 (Utah 1990). The evidence supporting the ALJ's findings regarding an extension of time came exclusively from the testimony of the Department's field auditor, James Alexander, taken at the hearing conducted by the ALJ on May 13, 1992 at the Provo Job Service Center. The testimony of the

auditor supporting the ALJ's findings in regard to the extension period was as follows:

AUDITOR: . . . [Mr. Miller] had called me on November 1st to indicate that he had just obtained the Determination letters and that he had some time constraints. I informed him that it was the requirement of, as stated in the letter and of the Department that a written appeal needed to be filed and that such written appeal needed to be sent to this Department. Because of his statement that the had not received the Notice until just that date, having gone to his accountant's office and picked up the, the materials that were there at his accountant's office, he had indicated to me at that point that he had not received his, the employer's copy. I gave him at that point in time 10 days from that November 1st date in which to file a written appeal verbally over the telephone.

ALJ: So you extended the appeal period by 10 days?

AUDITOR: Yes, sir.

ALJ: And would that have been extended to what date then?

AUDITOR: That would have then been extended to the 11th of November.

ALJ: And did you receive an appeal from him within that time frame?

AUDITOR: No, sir, I did not.

ALJ: And did you have communication with Mr. Miller after November 11th?

AUDITOR: He did call me on two occasions, the dates I do not have available at this time, but he did call me on two occasions wh-, and both cases I told him that he needed to file a written appeal immediately and that timeliness had become an issue in terms of filing the appeal.

ALJ: You indicated you told him that the timeliness had become an issue also?

AUDITOR: Yes, sir, I did.

ALJ: And when did you actually receive an appeal from Miller?

AUDITOR: The postmark that we dated on the 11th of December, we received it, that was after the Field Audit Distribution Desk had already sent the audit to be processed.

ALJ: Okay, anything further you'd like to state concerning the timeliness of the appellant's appeal?

AUDITOR: None, sir.

Hearing Transcript, pp. 7-8; Record on Appeal, pp. 32-33. No other evidence appears on the record in support of the ALJ's findings in this regard.

Mr. Miller's testimony at the May 13th hearing, on the other hand, does not support the findings that only a ten-day extension was granted. Mr. Miller's testimony proceeded as follows:

ALJ: . . . Would you explain why you waited beyond 10 days in which to file your appeal?

MILLER: Well, I, yea, I think it was Mr. Alexander I talked to, I called him up there two or three times in regards to this and then he told me later that I had to file in a written appeal and so when he told me that, that when I filed the written appeal.

ALJ: And when did you first have conversation with him?

MILLER: I don't have an exact record of it but it was within a few days after I got this [Notice of Audit Determination].

ALJ: And he told, did he tell you at that time to file a written appeal?

MILLER: No.

ALJ: Okay, when did he first tell you to file a written appeal?

MILLER: Well, I don't know but I filed it after we'd had the conversation, I wrote this request the next day after I, or somewhere near that, it was right shortly after that that I wrote the request in, on the, on the appeal.

* * *

ALJ: Is there a reason why you waited until December 11th to file the appeal?

MILLER: Well, like I said, I'd been in contact with Mr. Alexander two or three times in regards to it and he's the one that instructed me to, to send him a written request for a, an appeal.

Hearing Transcript, pp. 5-6; Record on Appeal, pp. 30-31. As the testimony of Mr. Miller evidences, Mr. Miller was indeed given an extension of time within which to file an appeal. However, pursuant to Mr. Miller's testimony, a specific time frame was not given.

If the testimony of Mr. Miller and the auditor constituted the only evidence in regard to the appeal, it is clear the Court could not substitute its judgment for that of the Board of Review since deference will be afforded the Board of Review

where inconsistent inferences can be drawn from the same evidence. However, although the testimony of Mr. Miller is not sufficient in itself to upset the findings of the Board of Review, when taken in light of the "whole record before the court," it is clear that the ALJ's findings that Mr. Miller was only granted a 10-day extension are not supported by substantial evidence.

Exhibit 6a is a copy of the letter Mr. Miller mailed to the auditor "appealing" the Audit Determination. The copy of the letter reflects, however, a note attached thereto and signed by the field auditor, James Alexander, which indicated the following: "Norm Miller Used Cars - Hold til 11-~~18~~ 22 - Sending a letter." The information contained on this note clearly contradicts the testimony of the auditor and the findings of the Board regarding an extension of only 10 days. In light of the note by the field auditor, therefore, a reasonable mind could not accept the testimony of the auditor as adequate evidence to support the findings of the Board of Review regarding an extension of only ten days. See Grace Drilling v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989). Indeed, the note more readily corroborates Mr. Miller's testimony that he called the auditor on several occasions and kept him informed as to his progress in the appeal.

Moreover, although the ALJ examined the auditor quite thoroughly as to whether or not an extension had been granted and

as to the time period of that extension, he did not examine Mr. Miller with respect to that issue other than to inquire as to why he had failed to file within the 10-day time limit. It is well established under Utah law, that "where one party in an administrative hearing is not represented by counsel, this court has acknowledged that the officer conducting the hearing has 'an affirmative duty to elicit all relevant facts, including those favorable and unfavorable to the party that is not represented.'" Nelson v. Dep't of Employment Security, 801 P.2d 158, 163 (Utah App. 1990) (quoting Ellison, Inc. v. Board of Review, 749 P.2d 1280, 1285 (Utah App. 1988)). In this case, neither party was represented by an attorney. However, the case upon which the court relied in both Nelson and Ellision, Inc. did not limit this duty to those cases in which only one party was represented by counsel. See Vidal v. Harris, 637 F.2d 710, 713 (9th Cir. 1981). Indeed, the United States District Court for the District of Utah in a Social Security disability case, cited favorably Vidal v. Harris and concluded that an ALJ's failure to elicit all relevant facts may result in the record not being fully and fairly developed. Stevenson v. Heckler, 588 F.Supp. 980, 983 (Dist. Ut. 1984). Moreover, in light of R562-6c-10.2.a's requirement that "[a]ll issues relevant to the appeal will be considered and passed upon," the ALJ's duty to elicit all relevant facts should be

extended to all cases in which a party is not represented by counsel. The ALJ's failure, therefore, to elicit further facts from Mr. Miller further prejudiced him, the record not being fully and fairly developed in that regard.

C. Mr. Miller had good cause to file a late appeal of the Audit Determination.

In Pacheco v. Board of Review, 717 P.2d 712 (Utah 1986), the Supreme Court of Utah, operating under the more stringent "arbitrary and capricious" standard of review, held that the ALJ's findings that good cause did not exist were arbitrary and capricious where the petitioner, Connie Pacheco, had immediately notified the hearing officer of her intent to appeal and was not specifically told that her failure to file by a certain date would preclude her from being heard on the merits. Like Pacheco, Mr. Miller herein immediately notified the auditor of his intent to appeal the Audit Determination. Moreover, because the Board of Review's findings regarding an extension of time are not supported by substantial evidence, the Board of Review's findings that good cause did not exist for Mr. Miller's failure to file a timely appeal are neither supported by substantial evidence nor are they reasonable.

Furthermore, the record supports the fact that Mr. Miller was misled as to what the field auditor required of him.

Although the auditor testified that sometime after November 11, 1991 he notified Mr. Miller on two occasions "that he needed to file a written appeal immediately and that timeliness had become an issue in terms of filing the appeal," the auditor could not identify the dates on which this occurred. Hearing Transcript, p. 8; Record on Review, p. 33. The Board's finding that good cause did not exist for filing a late appeal is not, therefore, supported by substantial evidence nor is it reasonable when considered in light of the facts that (1) the Board's findings regarding the alleged 10-day extension time are not supported by substantial evidence, (2) the Board failed to identify the dates on which Mr. Miller spoke with the auditor subsequent to November 11, 1991, and (3) pursuant to Mr. Miller's testimony, he mailed the written appeal as soon as he was notified by the auditor that he needed to do so. Hearing Transcript, p. 5; Record on Review, p. 30.

Moreover, unlike the case in Arevalo v. Department of Employment Security, 745 P.2d 847, 848 (Utah App. 1987), wherein the petitioner was unable to explain why he filed an appeal almost three weeks late, Mr. Miller, in addition to his communications with the field auditor, notified the auditor that he needed additional time in order to gather the necessary information to support his appeal. Record on Appeal, p. 42. Indeed, as

evidenced by the Schedules of Unreported Wages admitted into evidence at the May 13, 1992 hearing, Mr. Miller was required to examine business records over a period of three years covering more than one hundred (100) different individuals. While the Department conducted the audit of Mr. Miller's business over a period of months, Mr. Miller was allegedly expected to provide the grounds upon which he appealed the Department's determinations within a matter of days. If Mr. Miller was not required to provide such detailed information, the record does not reflect that he was ever notified of that fact. Certainly, the necessity of reviewing and obtaining business records and information covering a period of three years and over one hundred individuals, together with the conversations with the ALJ regarding the appeal, constitute circumstances which are compelling and reasonable under R562-6c-8 of the Utah Administrative Code.

For the foregoing reasons, therefore, the Board of Review's decision affirming the decision of the ALJ is not supported by substantial evidence and is not reasonable upon a review of the record. Moreover, little doubt can be had that Mr. Miller has been substantially prejudiced by the decision of the Board of Review in this regard.

II. THE BOARD OF REVIEW ERRED IN AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S DECISION THAT MR. MILLER DID NOT HAVE GOOD CAUSE TO REQUEST RESCHEDULING OF THE MARCH 9, 1992 HEARING.

Pursuant to R562-6c-11.4 of the Utah Administrative Code, a party who has failed to participate at a hearing before an administrative law judge may, within seven days after the date of a scheduled hearing, make a written request for reopening the hearing which will be granted if good cause is shown for failing to participate. The rule further provides that "[i]f the request for reopening is not filed within seven days, reopening will not be granted unless the party can show good cause for failing to make the request within the seven-day time limitation." Moreover, pursuant to R562-6c-11.4(b), good cause does not include such things as the following:

> (1) Failure to read and follow instructions on the notice of hearing,
> (2) Failure to arrange personal circumstances such as transportation or child care,
> (3) Failure to arrange for receipt or distribution of mail,
> (4) Failure to delegate responsibility for participation in the hearing,
> (5) Forgetfulness.

In the case before the Court, Mr. Miller testified at the May 13, 1992 hearing before the ALJ that he failed to appear at the March 9, 1992 hearing because he erroneously circled March 19, 1992 rather than March 9, 1992 as the hearing date. Hearing Transcript, p. 3; Record on Appeal, p. 28. He further testified

that in preparing for the hearing approximately three days after March 9, 1992, he discovered his error at which time he immediately called the ALJ who informed Mr. Miller to write another request for another hearing date. Hearing Transcript, pp. 3-4; Record on Appeal, pp. 28-29. Mr. Miller admits to having probably received the hearing notice which included instructions regarding the time period within which to make a written request to reschedule the hearing and a copy of such notice was admitted into evidence as Exhibits A-1 and A-2. Hearing Transcript, p. 3; Record on Appeal, pp. 19-20, 28. The evidence introduced at the May 13, 1992 hearing also included Mr. Miller's request for a new hearing date which was postmarked March 27, 1992. Record on Appeal, p. 22.

In response to the ALJ's inquiry as to why he failed to mail a request for rescheduling until March 27, 1992, Mr. Miller indicated that he believed he had 30 days based on the appeal information included with the decision made pursuant to the March 9, 1992 hearing which was dated and mailed on March 11, 1992. Hearing Transcript, p. 4; Record on Appeal, p. 29. The decision provided that it would become final "unless, within **thirty** days from the date of this decision, further **written** appeal is made to the Board of Review . . . setting forth the grounds upon which the appeal is made." Record on Appeal, p. 21 (emphasis in original).

Mr. Miller, therefore, first received the notice of hearing which included the hearing instructions, later spoke with the ALJ who informed him to file a written request for another hearing, and then received the decision of the ALJ pursuant to the March 9th hearing he failed to attend, which decision stated he had 30 days to appeal. Moreover, the record does not reflect that when Mr. Miller called the ALJ a few days after the hearing, that the ALJ notified Mr. Miller that he needed to send the written request within seven days of the hearing. Not unlike the case in Pacheco v. Board of Review, good cause for the delay existed where the ALJ failed to give Mr. Miller express warning that a delay would foreclose his opportunity for another hearing. 717 P.2d 712, 714-15 (Utah 1986).

Furthermore, the notice mailed to Mr. Miller indicating the date of the March 9, 1992 hearing does not indicate the date on which it was mailed to Mr. Miller, providing only that it was "Dated and Mailed by: ncg." Record on Appeal, p. 19. Moreover, neither the Board of Review nor the ALJ made any findings in that regard which raises serious concerns regarding compliance with the rules promulgated by the Commission as well as due process. While it cannot be disputed that Mr. Miller did in fact receive the notice, when he received it was not determined by the Board of Review. Pursuant to R562-6c-10.1.a of the Utah Administrative

Code, "[a]ll interested parties will be notified by mail at least seven days prior to the hearing . . . ." There is no evidence in the record whatsoever as to when notice was mailed to Mr. Miller. to The foregoing facts, therefore, clearly constitute much more than a mere failure to read and follow instructions or forgetfulness. The Board of Review's decision affirming the ALJ's findings that good cause does not exist for Mr. Miller's failure to appear at the March 9, 1992 hearing, is not, therefore, supported by substantial evidence and is clearly unreasonable in light of (1) lack of any substantiating evidence indicating when the notice of hearing was mailed to Mr. Miller, (2) the ALJ's failure to warn Mr. Miller regarding his time constraints, and (3) Mr. Miller's subsequent receipt of the March 11, 1992 decision notifying him that he had 30 days within which to appeal the March 9, 1992 decision.

Mr. Miller has indeed been substantially prejudiced by the Board's decision affirming the decision of the ALJ, which, as set forth above, is not supported by substantial evidence and is clearly unreasonable upon a review of the whole record, if not arbitrary and capricious.

CONCLUSION

NOW, THEREFORE, it is respectfully requested that the Board of Review's decision in Case No. 92-BR-237-T affirming the Administrative Law Judge's decision in Case No. 92-A-2565-T which held that Mr. Miller does not have good cause to request rescheduling of a hearing, and in the alternative, that Mr. Miller failed to file a timely appeal and did not have good cause for late filing, be reversed and that this case be remanded to the Industrial Commission for an appeal on the merits of the case.

RESPECTFULLY SUBMITTED this 11th day of February, 1993.

HARDING & ASSOCIATES, P.C.

Jeffrey S. Gray

Jeffrey S. Gray
Attorneys for Appellant-Mr. Miller

CERTIFICATE OF SERVICE

I, Jeffrey S. Gray, hereby certify that on the 11th day of February, 1993 I served two (2) copies of the attached Brief of Petitioner, mailing the same by first class mail with sufficient postage prepaid to Lorin R. Blauer, Attorney for Respondent, at the following address:

Lorin R. Blauer
Special Assistant Attorney General
The Industrial Commission of Utah
Department of Employment Security
140 East 300 South
P.O. Box 11600
Salt Lake City, Utah 84147

HARDING & ASSOCIATES, P.C.

Jeffrey S. Gray
Attorneys for Appellant-Petitioner

ADDENDUM A

DECISION OF BOARD OF REVIEW

THE INDUSTRIAL COMMISSION OF UTAH
DEPARTMENT OF EMPLOYMENT SECURITY

APPEALS TRIBUNAL

DECISION OF ADMINISTRATIVE LAW JUDGE

Norm Miller Used Cars : Emp. No. 8-129629-0
ATTN: Norman Miller :
PO Box 392 : Case No. 92-A-2565-T
Lehi, UT 84043

DATE OF DETERMINATION: March 11, 1992 DATE OF HEARING: March 13, 1992

DATE OF APPEAL: March 27, 1992 PLACE OF HEARING: Provo, UT

APPEARANCES: Appellant and Department Representative

ISSUE: Whether the appellant had good cause for failing to attend the original hearing and whether the employer's appeal was filed in a timely manner or had good cause to file a late appeal.

Timeliness of the appeal is an issue to be determined in accordance with Section 35-4-10(b) of the Utah Employment Security Act and the Rules pertaining thereto.

FINDINGS OF FACT:

The Appeals Tribunal sent notice to the appellant of a hearing to be held on March 9, 1992 at the Provo Job Service office. A statement of hearing instructions accompanied the notice. The instructions informed the appellant if he failed to attend, a decision on the matter would be issued on the information available to the Administrative Law Judge. The instructions further explained if the appellant failed to appear he must request in writing within seven days for the hearing to be rescheduled.

When the appellant received the hearing notice, he erroneously recorded the hearing date upon his calendar. The appellant did not appear at the hearing. Since the appellant failed to appear, the Tribunal issued a decision based upon the information available. The Tribunal issued the decision on March 11, 1992. A few days after the hearing, the appellant called the Administrative Law Judge to request the hearing to be rescheduled. The Administrative Law Judge explained the request must be in writing with an explanation as to why he did not appear as scheduled. The claimant sent written response on March 27, 1992.

On October 23, 1991, the Department issued a Notice of Audit Determination assessing the appellant contributions, interest and penalties. The decision informed the appellant that the decision becomes final within ten days unless a

written appeal is filed in writing. The auditor who performed the audit had expressed verbally to the appellant's accountant on several occasions the results of his audit and the procedure for appeal before he issued his decision in writing.

On November 1 the auditor received a telephone call from the appellant who indicated he just received the decision from his accountant. The auditor explained the need for the written appeal. The auditor gave the appellant an extension of ten days in which Mr. Miller could file an appeal. The Department did not receive any response or communication from the appellant during the extension period. Subsequently, Mr. Miller called the auditor. The auditor again reiterated the procedure for filing an appeal. No response was made by the appellant. The Department processed the audit determination during the beginning of December to initiate collection. The appellant finally sent a letter of appeal on December 11, 1991 setting forth the reasons for the appeal. The Department reviewed the appeal with its accompanying information. The Department found no reason to alter the audit decision and referred the matter to the Appeals Tribunal.

REASONING AND CONCLUSION OF LAW:

Section 35-4-10(b) of the Utah Employment Security Act states:

> **Appeal of Contributions Decisions.**
>
> (b) Within ten days after the mailing or personal delivery of a notice of a determination or decision rendered following a review under Subsection (a), an employing unit may appeal to an administrative law judge by filing a notice of appeal. The administrative law judge shall give notice of the pendency of the appeal to the commission which is then a party to the proceedings. After affording the parties reasonable opportunity for a fair hearing, he shall make findings and conclusions and on that basis affirm, modify or reverse the determination. The parties shall be promptly notified of the administrative law judge's decision and furnished a copy of the decision and findings. The decision is the final decision of the commission unless within ten days after the date of mailing of notice to the parties' last known addresses or in the absence of a mailing within ten days after the delivery of notice, further appeal is initiated under the provisions of this section.

The Unemployment Insurance Rules pertaining to this section provide in pertinent part:

> A. GENERAL DEFINITION
>
> This section of the Act provides the opportunity to appeal a contribution decision. Examples of decisions which may be appealed include: Whether an employing unit is an employer, whether services performed are employment and determinations involving contribution liability. The provisions of the Rule for Section 35-4-6(c) which relate to appeals of benefit decisions are hereby incorporated by

reference and, therefore, apply to appeals of contribution decisions.

The Unemployment Insurance Rules pertaining to Section 35-4-6(c) provide in pertinent part:

R562-6c-8. Good Cause for Not Filing Within Time Limitations.

A late appeal may be considered on its merits if it is determined that the appeal was delayed for good cause. Good cause is limited to circumstances where it is shown that:

1. The appeal was filed within 10 days of actual receipt of the decision if such receipt was beyond the original appeal period and not the result of willful neglect; or

2. The delay in filing the appeal was due to circumstances beyond the control of the appellant; or

3. The appellant delayed filing the appeal for circumstances which were compelling and reasonable.

R562-6c-11. Rescheduling and Adjournment of Hearings.

4. After the Hearing

Any party who fails to participate personally or by authorized representative at a hearing before an Administrative Law Judge may, within seven days after the scheduled date of the hearing, make a written request for reopening of the hearing. Such petition will be granted if good cause is shown for failing to participate. A request for reopening made after the scheduled hearing must be in writing; it must state the reason(s) believed to constitute good cause for failing to participate at the hearing; and it must be delivered or mailed within a seven-day period to the Appeals office or to an office of the Department of Employment Security or to a Job Service office in any state. If the request for reopening is not filed within seven days, reopening will not be granted unless the party can show good cause for failing to make the request within the seven day time limitation. . . If a request for reopening is made, a hearing will be scheduled and notice will be given or mailed to each party to the appeal, to determine if there is good cause for reopening the hearing.

a. Failure to report as instructed at the time and place of the scheduled hearing is the equivalent of failing to participate even if the party reports at another time or place. In such circumstances, the party must make a written request for rescheduling and show good cause in accordance with these Rules before the matter will be rescheduled.

b. Good cause for failing to participate in an appeal hearing may not include such things as:

(1) Failure to read and follow instructions on the notice of hearing,

(2) Failure to arrange personal circumstances such as transportation or child care,

(3) Failure to arrange for receipt or distribution of mail,

(4) Failure to delegate responsibility for participation in the hearing,

(5) Forgetfulness.

The appellant in this case failed to properly follow the notice of hearing and accompanying instructions. The appellant's failure to record the date properly upon his calendar does not constitute good cause to request rescheduling. Thus, rescheduling is denied.

Nevertheless, if the appellant possessed good cause to request rescheduling, the Tribunal would hold lack of jurisdiction because the appellant filed an untimely appeal without good cause. When the Department issued the audit determination, the appellant received an extension of ten days in which to file an appeal. The auditor, in addition to written information given to the appellant, explained verbally to the appellant the need to file a written appeal. The evidence shows the appellant took no action to establish an appeal until after the Department processed the audit for collection.

The appellant has not provided any evidence which would demonstrate he was unable to file a written appeal or was prevented from doing so during the extended appeal period. The evidence does not show the delay in filing the appeal was due to circumstances beyond the appellant's control or compelling. The appellant failed to file an appeal in accordance with Section 35-4-10(b) of the Utah Employment Security Act. Therefore, the Department's decision is considered final.

DECISION:

The appellant does not have good cause to request rescheduling. In the alternative, the Tribunal holds the appellant failed to file a timely appeal and did not have good cause for late filing. Thus, pursuant to Section 35-4-10(b) of the Utah Employment Security Act, the Tribunal has no jurisdiction over the matter, and the Department's decision remains undisturbed.

Kenneth A. Major
Administrative Law Judge
DEPARTMENT OF EMPLOYMENT SECURITY

92-A-2565-T

This decision will become final unless, within thirty days from May 22 92, further written appeal is made to the Board of Review (PO Box 11600, Salt Lake City, UT 84147) setting forth the grounds upon which the appeal is made.

KM/jsn

cc: Norm Miller Used Cars

(5) Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, are deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commission that the individual is an independent contractor. The commission shall analyze all of the facts in Subsections (A) through (T) under the common-law rules applicable to the employer-employee relationship to determine if an individual is an independent contractor. An individual is an independent contractor if the weight of the evidence supports that finding. The following factors are to be considered if applicable:

(A) whether the individual works his or her own schedule, or is required to comply with another person's instructions about when, where, and how work is to be performed;

(B) whether the individual uses his or her own methods and requires no specific training from the purchaser, or is trained by an experienced employee working with him or her, is required to take correspondence or other courses, attend meetings, and by other methods indicates that the employer wants the services performed;

(C) whether the individual's services are independent of the success or continuation of a business, or are merged into the business where success and continuation of the business depends upon those services and the employer coordinates work with the work of others;

(D) whether the individual's services may be assigned to others, or must be rendered personally;

(E) whether the individual has the right to hire, supervise, and pay other assistants pursuant to a contract under which the individual is responsible only for the attainment of a result, or the individual hires, supervises, and pays workers at the direction of the employer;

(F) whether the individual was hired to do one job and has no continuous business relationship with the person for whom the services are performed, or continues to work for the same person year after year;

(G) whether the individual establishes his or her own time schedule, or does the employer set the time schedule;

(H) whether the individual is free to work when and for whom he or she chooses, or is required to devote full-time to the business of the employer, and is restricted from doing other gainful work;

(I) whether the individual uses his or her own office, desk, telephone or other equipment, or is physically within the employer's direction and supervision;

(J) whether the individual is free to perform services at his or her own pace, or performs services in the order or sequence set by the employer;

(K) whether the individual submits no reports, or is required to submit regular oral or written reports to the employer;

(L) whether the individual is paid by the job or on a straight commission, or is paid by the employer in regular amounts at stated intervals;

(M) whether the individual accounts for his or her own expenses, or is paid by the employer for expenses;

(N) whether the individual furnishes his or her own tools, or is furnished tools and materials by the employer;

(O) whether the individual has a real, essential, and adequate investment in the business, or has a lack of investment and depends on the employer for such facilities;

(P) whether the individual may realize a profit or suffer a loss as a result of services performed, or cannot realize a profit or loss by making good or poor decisions;

(Q) whether the individual works for a number of persons or firms at the same time, or usually works for only one employer;

(R) whether the individual has his or her own office and assistants, holds a business license, is listed in business directories, maintains a business telephone, or advertises in newspapers, or does not make services available except through a business in which he or she has no interest;

(S) whether the individual may not be fired or discharged as long as he or she produces a result which meets contract specifications, or may be discharged at any time; and

(T) whether the individual agrees to complete a specific service, and is responsible for its satisfaction or is legally obligated to perform the service, or may terminate his or her relationship with the employer at any time.

For additional information concerning employment status under common law, please refer to:

1. Internal Revenue Service Circular E, Employer Tax Guide;
2. Internal Revenue Service Small Business Tax Workshop publication, "20 Common Law Factors Defined" and "Comparative Approach of 20 Common Law Factors";
3. Job Service Field Audit Department, 533-2243.

BOARD OF REVIEW SMH/KM/LRB/cd
The Industrial Commission of Utah
Unemployment Compensation Appeals

NORM MILLER USED CARS
Employer No. 8-129629-0 :

: Case No. 92-A-2565-T

: DECISION

: Case No. 92-BR-237-T

DEPARTMENT OF EMPLOYMENT SECURITY :

The appellant, Norm Miller Used Cars, appeals the decision of the Administrative Law Judge which held that the appellant had failed to appeal an earlier Department decision within the time permitted by Section 35-4-6(c) of the Utah Employment Security Act. The ALJ, therefore, concluded that he lacked jurisdiction to consider the appellant's appeal further. The Department decision which held that remuneration for services performed by individuals in behalf of the appellant was subject to liability for unemployment insurance contributions, pursuant to Sections 35-4-22(j)(1), 35-4-22(p) and 35-4-22(j)(5) of the Act, is still in effect.

After careful consideration of the record in this matter, the Board of Review finds the decision of the Administrative Law Judge to be a correct application of the provisions of the Utah Employment Security Act, supported by competent evidence and, therefore, affirms the decision. In so holding, the Board of Review adopts the findings of fact and conclusions of law of the Administrative Law Judge.

In this case, the appellant appeals the ALJ's denial of rescheduling for a hearing on the appellant's late appeal. The appellant argues that he should be granted rescheduling of the hearing because he recorded the hearing date wrong and thus missed the hearing. The Board of Review notes, however, that the appellant did not immediately request rescheduling upon discovering his error as instructed in the instructions that accompany the Notice of Hearing which state that the hearing should be requested within seven days. Rather, the appellant waited over two weeks after discovering the error before requesting rescheduling. The purpose for the hearing, which the employer missed, was to determine whether the appellant had good cause for filing his initial appeal over one month late. Thus, the appellant has established a pattern of late filing of appeals, of inattention to details regarding the date of appeal hearings, and late requests for requesting rescheduling of hearings. The Board of Review agrees with the ALJ that the employer has failed to establish good cause for failing to make a timely request for rescheduling of the hearing.

In its appeal, the appellant also complains about abuses of the unemployment insurance system. The Board of Review is aware that there are those who do abuse the unemployment insurance system. The Department has a Benefit Payment Control unit whose function is to investigate and prosecute abuses of the system. The Department needs cooperation, support and assistance of the citizens to avoid abuses and to cut off further abuse by those who are abusing the system. The appellant is invited to contact the Benefit Payment Control unit of the Department and report any evidence which he has of persons who are abusing the unemployment insurance system. When abuses are properly dealt with and controlled, all employers of the State benefit by a reduction in the costs of the unemployment insurance system. The appellant may reach the Benefit Payment Control until by calling 536-7616 or 536-7613.

This decision becomes final on the date it is mailed, and any further appeal must be made within 30 days from the date of mailing. Your appeal must be submitted in writing to the Utah Court of Appeals, Midtown Plaza, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to Section 63-46b-16 of the Utah Administrative Procedures Act and Rule 14 of the Utah Rules of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

BOARD OF REVIEW

Dated this 27th day of August, 1992.

Date Mailed: September 1, 1992.

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 1st day of September, 1992, by mailing the same, postage prepaid, United States mail to:

Norman Miller
Norm Miller Used Cars
P. O. Box 392
Lehi, UT 84043

Connie Dumas

ADDENDUM B

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. §35-4-10(a),(b),(d),(e),(h), and (i)

(a) A review of a decision or determination involving contribution liability or applications for refund shall be made by the commission or its authorized representative in accordance with the provisions of this chapter. The decision of the representative conducting the review is considered the decision of the commission. The commission or its authorized representative conducting the review may refer the matter to an appeal referee, may decide the application for review on the basis of any facts and information as may be obtained or may, in its discretion, hear argument or hold a hearing to secure further facts. After the review, notice of the decision shall be given to the employing unit. The decision made pursuant to the review is the final decision of the commission unless, within ten days after the date of notification or mailing of the decision, a further appeal is initiated under the provisions of this section.

(b) Within ten days after the mailing or personal delivery of a notice of a determination or decision rendered following a review under Subsection (a), an employing unit may appeal to an appeal referee by filing a notice of appeal. The appeal referee shall give notice of the pendency of the appeal to the commission, which is then a party to the proceedings. After affording the parties reasonable opportunity for a fair hearing, he shall make findings and conclusions and on that basis affirm, modify, or reverse the determination. The parties shall be promptly notified of the referee's decision and furnished a copy of the decision and findings. The decision is the final decision of the commission unless within ten days after the date of mailing of notice to the parties' last known addresses or in the absence of a mailing within ten days after the delivery of notice, further appeal is initiated under the provisions of this section.

* * *

(d) (1) * * *

(2) The board of review within the time specified for the filing of appeals may allow an appeal from a decision of an appeals referee on application filed within the designated time by any party entitled to notice of the decision. An appeal filed by the party shall be allowed as of right if the decision did not affirm a prior decision. Upon appeal the board of review may on the basis of the evidence previously submitted in the case, or upon the basis of any additional evidence it requires, affirm, modify, or reverse the findings, conclusions, and decision of the appeal

referee. The board of review shall promptly notify the parties to any proceedings before it of its decision, including its findings and conclusions, and the decision is final unless within ten days after mailing of notice to the parties' last known addresses or in the absence of mailing within ten days after the delivery of the notification further appeal is initiated under the provisions of this section. However, upon denial by the board of review of an application for appeal from the decision of an appeal referee the decision of the appeal referee is considered to be a decision of the board of review within the meaning of this paragraph for purposes of judicial review and is subject to judicial review within the time and in the manner provided.

(e) The manner in which disputed matters are presented, the reports required from the claimant and employing units and the conduct of hearings and appeals shall be in accordance with rules prescribed by the commission for determining the rights of the parties, whether or not the rules conform to common-law or statutory rules of evidence and other technical rules of procedure. When the same or substantially similar evidence is relevant and material to the matters in issue in more than one proceeding, the same time and place for considering each matter may be fixed, hearings jointly conducted, a single record of the proceedings made, and evidence introduced with respect to one proceeding considered as introduced in the others, if in the judgment of the appeal referee having jurisdiction of the proceedings, the consolidation would not be prejudicial to any party. A full and complete record shall be kept of all proceedings in connection with a disputed matter. All testimony at any hearing upon a disputed matter shall be reported but need not be transcribed unless the disputed matter is appealed.

* * *

(h) Any decision in the absence of an appeal as provided becomes final ten days after the date of notification or mailing and judicial review may be permitted only after any party claiming to be aggrieved has exhausted his remedies before the commission and board of review as provided by this chapter. The commission is a party to any judicial action involving any decisions and shall be represented in the judicial action by any qualified attorney employed by the commission and designated by it for that purpose or at the commission's request by the attorney general.

(i) Within ten days after the decision of the board of review has become final, any aggrieved party may secure judicial review by commencing an action in the Court of Appeals against the board of review for the review of its decision, in which action any other party to the proceeding before the board of review shall be made a defendant. In that action a petition, which shall state the grounds upon which

a review is sought, shall be served upon a member of the board of review or upon that person the board of review designates. This service is considered completed service on all parties but there shall be left with the party served as many copies of the petition as there are defendants and the board of review shall mail one copy to each defendant. . .

Utah Code Ann. §63-46b-16(4)

The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

* * *

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

* * *

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

* * *

(iv) otherwise arbitrary or capricious.

UAC R562-6c-7

When it appears that an appeal may not have been filed within the time allowed by the Act or these Rules, the appellant will be notified and given an opportunity to show that the appeal was timely or was delayed for good cause. If it is found that the appeal was not filed within the applicable time limit and the delay was without good cause, the Administrative Law Judge will not have jurisdiction to consider the merits unless jurisdiction is established in accordance with provisions of Section 35-4-6(b) of the Act. Any decision with regard to jurisdictional issues will be issued in writing and mailed to all interested parties with a clear statement of the right of further appeal or judicial review.

UAC R562-6c-8

A late appeal may be considered on its merits if it is determined that the appeal was delayed for good cause. Good cause is limited to circumstances where it is show that:

1. The appeal was filed within 10 days of actual receipt of the decision if such receipt was beyond the original appeal period and not the result of willful neglect; or

2. The delay in filing the appeal was due to circumstances beyond the control of the appellant; or

3. The appellant delayed filing the appeal for circumstances which were compelling and reasonable.

UAC R562-6c-10.1.a

1. Notice.

a. All interested parties will be notified by mail at least seven days prior to the hearing . . . .

UAC R562-6c-10.2.a

2. Hearing of Appeal.

a. All hearings are to be conducted informally and in such manner as to protect the rights of the parties. All issues relevant to the appeal will be considered and passed upon. . . .

UAC R562-6c-11.4

4. After the Hearing.

Any party who fails to participate personally or by authorized representative at a hearing before an Administrative Law Judge may, within seven days after the scheduled date of the hearing, make a written request for reopening of the hearing. Such petition will be granted if good cause is shown for failing to participate. A request for reopening made after the scheduled hearing must in writing; it must state the reason(s) believed to constitute good cause for failing to participate at the hearing; and it must be delivered or mailed within a seven-day period to the Appeals office or to an office of the Department of Employment Security or a Job Service office in any state. If the request for reopening is not filed within seven days, reopening will not be granted unless the party can show good cause for failing to make the request within the seven-day time limitation. If a request for reopening is not allowed, a copy of the decision will be given or mailed to each party, with a clear statement of the right of appeal or judicial review. If a request for reopening is made, a hearing will be scheduled and notice will be given or mailed to each party to the appeal, to determine if there is good cause for reopening the hearing.

* * *

b. Good cause for failing to participate in an appeal hearing may not include such things as:

(1) Failure to read and follow instructions on the notice of hearing,

(2) Failure to arrange personal circumstances such as transportation or child care,

(3) Failure to arrange for receipt or distribution of mail,

(4) Failure to delegate responsibility for participation in the hearing,

(5) Forgetfulness.

UAC R562-10b-1

This section of the Act provides the opportunity to appeal a contribution decision. . . . The Department will also require compliance with rule R562-6c which relates to appeals of benefit decisions and therefore applies to appeals of contribution decisions.