

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2021-025

JUNE TERM, 2021

Anna Berger* v. Department of Labor (Crossmark Inc., Employer)	}	APPEALED FROM:
	}	
	}	Employment Security Board
	}	
	}	DOCKET NO. 08-20-204-01

In the above-entitled cause, the Clerk will enter:

Claimant appeals the Employment Security Board's decision adopting the ruling of an administrative law judge (ALJ) that claimant filed an untimely appeal of the claims adjudicator's denial of her claim for unemployment compensation benefits. We affirm.

On April 9, 2020, claimant filed a claim with the Department of Labor for unemployment compensation benefits. Claimant received benefits for several weeks. On June 10, 2020, a claims adjudicator determined that claimant had left her employment voluntarily without good cause attributable to the employer and was therefore disqualified for benefits. It ordered claimant to repay \$5976 to the Department of Labor. On August 25, 2020, claimant appealed to the ALJ. The Department sent a hearing notice to claimant's address of record on October 12. The notice stated that a hearing on the timeliness of claimant's appeal would be held on November 2 and that claimant had to provide a telephone number at which she could be reached for the hearing. Claimant did not provide a telephone number, and no hearing was held. The ALJ dismissed the appeal as untimely because it was filed more than thirty days after the date of the benefit determination.

Claimant appealed to the Employment Security Board. The Board sent notice to claimant that a hearing would be held on December 22 regarding the timeliness of her appeal. Claimant did not appear at the hearing. The Board adopted the ALJ's ruling. This appeal followed.

Claimant asserts that she timely appealed the claims adjudicator's decision by telephone and email. She then filed another appeal in August 2020, even though she thought she had already appealed it by telephone and email. She received notice in October that a hearing would be scheduled. A few days later, she was arrested and incarcerated in Massachusetts. As a result, she was not able to access her telephone or mail, and so could not participate in the ALJ hearing.

The unemployment compensation statute provides that a party seeking to appeal the determination of a claims adjudicator must do so "within 30 days after notice thereof." 21 V.S.A. § 1348(a). "Regardless of the manner of service, appeal periods shall commence to run from the date of the determination or decision rendered." *Id.* § 1357. We have held that the Board does not have discretion to extend this statutory appeal period, except for failure to receive notice as specified in § 1357. See Allen v. Vt. Emp't Sec. Bd., 133 Vt. 166, 169 (1975) (stating that "board

has no inherent power to extend the statutory appeal period” except for failure to receive notice as specified in 21 V.S.A. § 1357); see also Trask v. Dep’t of Emp’t & Training, 170 Vt. 589, 590 (2000) (mem.) (declining “to carve out a fairness-based public policy exception to Allen”).

Pursuant to § 1357, an appeal period may be extended when a party files a sworn affidavit indicating that notice of the decision was not received, or if the Commissioner is satisfied that the party did not receive the notice. In such cases, the Department mails a new notice and the appeal period begins to run from the date of that notice. 21 V.S.A. § 1357. Here, however, claimant does not dispute that she received timely notice of the claims adjudicator’s decision. This exception to the Allen rule therefore does not apply. The ALJ and Board properly dismissed claimant’s August 2020 appeal as untimely because it was filed more than thirty days after the claims adjudicator’s decision.

Claimant says that she appealed by telephone. However, the Board’s rules and the notice sent to claimant make clear that an appeal must be submitted in writing, whether by email, fax, U.S. mail, or on paper delivered in person to the Department of Labor. Rules of the Vt. Emp’t Bd., Rule 14(A)(1), https://labor.vermont.gov/sites/labor/files/doc_library/EmploymentSecurityBoardRules_Amended_Effective10.01.19_0.pdf.

Claimant also maintains that she emailed an appeal to the Department prior to August 2020. She failed to present evidence of this below. Claimant essentially argues that this was due to circumstances beyond her control because she was unexpectedly incarcerated prior to the date of the ALJ hearing. However, claimant acknowledges that she received notice prior to her incarceration that the Department planned to schedule a hearing on the timeliness of the appeal. Despite this, she did not inform the Department of her situation or seek to reschedule the ALJ or Board hearings. Her notice of appeal from the ALJ decision to the Board lists her Vermont address and she did not update her mailing address until January 2021. While she states that she does not have access to email and had difficulty updating her mailing address in the facility where she is housed, she somehow received the ALJ decision and timely appealed it. She does not explain why she was able to do this but could not otherwise contact the Department. Under these circumstances, we see no basis to reverse the decision below.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice