

## APPEALS POLICY AND PRECEDENT MANUAL

### PROCEDURE

<b>TABLE OF CONTENTS</b>
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- 5. General
- 10. Abatement
- 25. Appearances
- 100. Adjournment, continuance and postponement of hearing
- 145. Dismissal, withdrawal, or abandonment
- 190. Evidence
- 275. Jurisdiction and powers of tribunal
- 280. Readjudication
- 380. Rehearing or review:
  - 380.05 General
  - 380.10 Additional proof
  - 380.15 Credibility of witness
  - 380.25 Scope and extent
- 405. Right of review:
  - 405.15 Finality of determination
  - 405.20 Person entitled
- 430. Taking and perfecting proceedings for review:
  - 430.05 General
  - 430.10 Method
  - 430.15 Notice
  - 430.20 Timely filing of protest
  - 430.30 Timely filing of appeal
- 440. Procedure in special cases:
  - 440.10 Finality of findings of federal employing agency
- 450. Procedure in Subsection 214.003 cases:
  - 450.10 Failure or refusal to timely appeal or failure to appear in response to notice

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 5.00

<b>PR GENERAL</b>
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**PR 5.00 GENERAL.**

APPLIES TO CASES (1) GENERAL DISCUSSIONS OF COURT OR ADMINISTRATIVE TRIBUNAL PROCEDURAL QUESTIONS, AND (2) PROCEDURAL POINTS NOT COVERED BY ANY OTHER SPECIFIC LINE IN THE PROCEDURE DIVISION.

For an extensive description of the Commission's policies regarding timeliness, see Commission Rule 32, 40 TAC §815.32.

For cases addressing the issue of good cause to reopen under Commission Rule 16(5)(B), 40 TAC §815.16(5)(B), see MS 30.00.

Appeal No. 503040-2. Per Commissioner vote on November 1, 2005, Case No. 503040-2 is no longer a precedent and has been removed.

Appeal No. MR-90-03459-10-031691. At any benefits hearing conducted by the Texas Workforce Commission, no witness shall be denied an opportunity to testify. However, the hearing officer shall retain the right to limit testimony to matters which are relevant and material to contested fact issues.

Appeal No. 2761-CA-76. An employer who fails to file a timely protest of the initial claim, when named thereon and duly notified thereof, cannot be considered a party of interest to such claim and is not entitled to a ruling on the chargeback issue.

Appeal No. 1733-CA-76. To be valid, Benefits Department's redetermination of a non-monetary issue must be mailed within twelve calendar days from the date of the mailing of the original non-monetary determination which it redetermines. Otherwise, such redetermination is not valid because of the language in Section 212.054 of the Act providing that "within the same period of time (i.e., twelve calendar days) an examiner may reconsider and redetermine any such determination." (Note: As of September 1, 1987, 14 days.)

Appeal No. 1213-CA-67. The Benefits Department is without jurisdiction to issue a determination which overturns a prior decision by the Appeal Tribunal in the same case and on the same issue. (Cross-referenced under PR 275.00.)

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 10.00

<b>PR ABATEMENT</b>
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**PR 10.00 ABATEMENT.**

APPLIES TO CASES WHICH CONSIDER (1) SUSPENSION OF A PROCEEDING FOR WANT OF PROPER PARTIES CAPABLE OF PROCEEDING, OR (2) TERMINATION OF A PARTICULAR PROCEEDING SO THAT IT CANNOT BE REVIVED, WITHOUT DETERMINING OR DEFEATING CLAIMANT'S RIGHTS OR BARRING INSTITUTION OF A NEW PROCEEDING.

Appeal No. 92-007970-90-051493. Following the issuance of a Commission decision, the director of the Job Service Operations Department of the Texas Workforce Commission requested that the matter be reheard. **HELD:** A department within the Texas Workforce Commission is not a party to the appeal and cannot file a written motion for rehearing under Section 212.153 of the Texas Unemployment Compensation Act. Therefore, in accordance with Section 212.153 of the Texas Unemployment Compensation Act, the Commission is without jurisdiction to rule on the referenced motion for rehearing and the motion is dismissed for lack of jurisdiction.

Appeal No. 85128-AT-62 (Affirmed by 8353-CA-62). The Soldier's and Sailor's Civil Relief Act specifically refers to a stay of proceedings "before a court"; therefore, the Commission is not obligated to grant a stay in administrative proceedings.

Appeal No. 7842-CA-61. The claimant's wife filed an appeal to the Commission signed only by herself and there was nothing in the record to indicate that the appeal was authorized by the claimant. **HELD:** The jurisdiction of the appropriate appellate body, whether it be the Appeal Tribunal or the Commission, is not properly invoked and the appeal will be abated if a party other than an "interested party" files an appeal on behalf of an "interested party" and it is not shown that the "interested party" was aware of and authorized the appeal. The appeal may be reinstated if the "interested party" files a written statement to the effect that the appeal was authorized by him. (Cross-referenced under PR 405.20.)

**APPEALS POLICY AND PRECEDENT MANUAL**

**PROCEDURE**

**PR 25.00**

<b>PR APPEARANCES</b>
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**PR 25.00 APPEARANCES.**

INVOLVES CASES IN WHICH THE HOLDING DEPENDS UPON THE APPEARANCE OR NONAPPEARANCE OF THE PARTIES.

Appeal No. 3103-CA-76. The claimant declined to attend any hearing conducted by an employee of the Texas Workforce Commission. The Texas Unemployment Compensation Act contains no provision which would permit the Commission to authorize someone outside the agency to conduct such a hearing. The decisions of the Appeal Tribunal and the Commission were based on information contained in the claimant's file and information submitted in the claimant's behalf by mail.

**APPEALS POLICY AND PRECEDENT MANUAL**

**PROCEDURE**

**PR 100.00**

**PR ADJOURNMENT, CONTINUANCE AND POSTPONEMENT OF HEARING**

**PR 100.00 ADJOURNMENT, CONTINUANCE, AND POSTPONEMENT OF HEARING.**

APPLIES TO CASES IN WHICH A POSTPONEMENT OF THE HEARING IS REQUESTED OR GRANTED, USUALLY WHERE SUCH RELIEF IS ASKED ON SOME SPECIFIED GROUND OR CAUSE IS SHOWN WHY THE APPLICANT IS OR IS NOT ENTITLED TO THE POSTPONEMENT.

Appeal No. 88465-AT-62 (Affirmed by 8732-CA-62). A request for resetting of a hearing is denied when the party who makes the request has been afforded a reasonable opportunity for a fair hearing but refused to testify.

**APPEALS POLICY AND PRECEDENT MANUAL**

**PROCEDURE**

**PR 145.00**

**PR DISMISSAL, WITHDRAWAL, OR ABANDONMENT**

**PR 145.00 DISMISSAL, WITHDRAWAL, OR ABANDONMENT.**

APPLIES TO CASES WHICH DISCUSS THE FINAL DISPOSITION OF A CLAIM FOR BENEFITS BY DISMISSAL, WITHDRAWAL, OR ABANDONMENT WITHOUT A HEARING UPON ANY OF THE ISSUES INVOLVED IN IT.

Appeal No. 502-AT-72 (Affirmed by 198-CA-72). In the absence of a claimant being given erroneous information, he cannot void an initial claim during an established benefit year for the purpose of filing a new initial claim in order to obtain increased benefits based on a different base period.

Appeal No. 1536-CA-71. A claimant can withdraw his previously requested withdrawal of an appeal provided he does so within ten days after the Appeal Tribunal decision is mailed. In such case, the Appeal Tribunal will schedule a hearing and issue a decision on the merits of the case. (Note that the Act currently provides for a 14-day appeal period.)

Appeal No. 517-CA-41. A benefit year and a base period are automatically established when a valid initial claim is filed and there is no authority under the Act whereby a claimant may dismiss, withdraw, or annul such claim.

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 190.00

PR EVIDENCE
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**PR 190.00 EVIDENCE.**

APPLIES TO DISCUSSION OF (1) BURDEN OF PROOF AS A PROCEDURAL MATTER, (2) LEGAL ADEQUACY OF PARTICULAR EVIDENCE TO OVERCOME PRESUMPTIONS, (3) WEIGHT AND SUFFICIENCY OF PARTICULAR EVIDENCE, AND (4) OTHER POINTS OF EVIDENCE.

Case No. 1051204. As a driver, the claimant was subject to U.S. Department of Transportation (US DOT) regulations, including drug testing regulations. The employer discharged the claimant for violating the employer's policy and US DOT regulations, both of which prohibited a positive drug test. The claimant consented to the drug test, but denied drug use. The employer presented documentation to establish that the drug test was performed in accordance with regulations prescribed by US DOT, including Medical Review Officer (MRO) certification. HELD: The submission of documentation that contains certification by a MRO of a positive result from drug testing conducted in compliance with US DOT agency regulations, currently under 49 CFR Part 40 and Part 382, is presumed to satisfy requirements number 3, 4, and 5 of Appeal No. 97-003744-10-040997 (MC 485.46) that the employer must present documentation to establish that the chain of custody of the claimant's sample was maintained, documentation from a drug testing laboratory to establish that an initial test was confirmed by the Gas Chromatography/Mass Spectrometry method, and documentation of the test expressed in terms of a positive result above a stated test threshold, as these elements must occur before a MRO can certify that the test results are in compliance with the regulations. Requirements number 1 and 2 under Appeal No. 97-003744-10-040997 (MC 485.46) remain applicable; thus, the employer must also present a policy prohibiting a positive drug test result, receipt of which has been acknowledged by the claimant, and evidence to establish that the claimant has consented to drug testing under the policy.

NOTE: See Appeal 97-003744-10-040997 in this section for drug tests not subject to US DOT regulation. (Cross referenced at MC 190.15 and MC 485.46)

APPEALS POLICY AND PRECEDENT MANUAL

PROCEDURE

PR 190.00 (2)

**PR EVIDENCE**

Appeal No. 97-003744-10-040997. To establish that a claimant's positive drug test result constitutes misconduct, an employer must present:

1. A policy prohibiting a positive drug test result, receipt of which has been acknowledged by the claimant;
2. Evidence to establish that the claimant has consented to drug testing under the policy;
3. Documentation to establish that the chain of custody of the claimant's sample was maintained;
4. Documentation from a drug testing laboratory to establish that an initial test was confirmed by the Gas Chromatography/Mass Spectrometry method; and
5. Documentation of the test expressed in terms of a positive result above a stated test threshold.

Evidence of these five elements is sufficient to overcome a claimant's sworn denial of drug use.

NOTE: See Case 1051204 in this section for drug tests not subject to regulation by US Department of Transportation (Cross referenced at MC 190.15 & MC 485.46).



## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 190.00 (3)

PR EVIDENCE
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Appeal No. 97-004379-10-042497. The company president discharged the claimant based solely upon her supervisor's hearsay report that claimant admitted removing a refrigerator from a company storage shed. Neither the supervisor nor the company president had accepted payment for this refrigerator or authorized its removal. Although the claimant's unsworn local office statement suggests she paid for the refrigerator before taking it, the claimant did not appear to offer any testimony at the Appeal Tribunal hearing. HELD: An employer's evidence of a specific act of misconduct -- albeit hearsay -- is sufficient to support a misconduct disqualification where, as here, the claimant does not offer any testimony to rebut that evidence.

Appeal No. 87-02450-10-021688. Suspecting the claimant had stolen some meat from the company freezer, the owner confronted him and threatened to call the police. The claimant told the owner he would return the meat and promptly removed a box of meat from his car trunk and returned it to the freezer. The claimant was then discharged. At the hearing, the employer representative testified as to the claimant's statement made to the owner and the subsequent return of the box of meat. HELD: The evidence of the claimant's misconduct in the form of mismanagement of his position of employment was sufficient because the claimant's statement to the owner was an admission and therefore excepted from the hearsay rule. The statement was evidence of the claimant's culpability in the theft and was corroborated by firsthand testimony of the claimant's subsequent actions.

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 190.00 (4)

<b>PR EVIDENCE</b>
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Appeal No. 87-18197-50-101687. The claimant was discharged after he informed the employer that he would be unable to come to work for approximately six weeks due to injuries incurred the previous evening. He further informed the employer that the injuries had occurred while he was in the process of stealing a vehicle after having committed a burglary. The Appeal Tribunal held, among other things, that as the employer had failed to provide any evidence that the claimant's reported statements were true, the claimant's discharge was not for misconduct connected with the work. **HELD:** In the absence of any evidence to the contrary, the employer's hearsay testimony as to the statements made by the claimant to him about the cause of the injury and impending absence are sufficient to establish that the claimant's actions constituted misconduct. (\*Editor's note: As this was a chargeback case, the claimant did not participate in the Appeal Tribunal hearing.)

Appeal No. 87-13034-10-072387. At the hearing, the employer presented only hearsay statements to support its allegation that claimant had falsified a report of an on-the-job injury of a co-worker. The claimant presented no evidence. **HELD:** The employer's secondhand hearsay testimony of claimant's specific act of misconduct is sufficient to establish such misconduct in the absence of any controverting evidence from the claimant. Disqualification under Section 207.044 of the Act. (Also digested under MC 190.15.)

Also see cases digested under MC 190.00 and VL 190.00

Appeal No. 87-07136-10-042887. When the initial claim was filed, the claimant signed a statement (Form B-114) prepared by a Commission representative in which the claimant agreed he had previously admitted in writing to the employer that he had used alcohol on company property. **HELD:** Finding less than credible the claimant's assertion that he had not clearly reviewed the Form B-114 before signing it, the Commission held that sufficient proof had been presented to establish misconduct connected with the work on the claimant's part. (Also digested under MC 190.15 and cross-referenced under VL 190.15.)

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 190.00 (5)

PR EVIDENCE
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Appeal No. 87-09130-10-051387. A claimant's sworn denial of illegal drug use did not overcome positive, confirmed drug test results, indicating the presence of cannabanoids. (For a more complete digest of the opinion in this case, see MC 485.46.)

Railroad Commission vs. Shell Oil Company, 161 S.W. 2d 1022, 1029 (Texas Sup. Ct., 1942). In reference to what constitutes "substantial evidence," the following statement was made:

"In such a case, the issue is not whether or not the agency came to the proper fact conclusions on the basis of conflicting evidence, but whether or not it acted arbitrarily and without regard to the facts. Hence, it is generally recognized that where the order of the agency under attack involves the exercise of the sound judgment and discretion of the agency in a matter committed to it by the Legislature, the court will sustain the order of the action of the agency in reaching such conclusion if reasonably supported by substantial evidence. This does not mean that a mere scintilla of evidence will suffice, nor does it mean that the court is bound to select the testimony of one side, with absolute blindness, over that introduced by the other. After all, the court is to render justice in the case. The record is to be considered as a whole, and it is for the court to determine what constitutes substantial evidence. The court is not to substitute its discretion for that committed to the agency by the Legislature, but is to sustain the agency if it is reasonably supported by substantial evidence before the courts. If the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action, then the order must be set aside."

Todd Shipyards Corp. vs. TEC and Ochoa, 245 S.W. 2d 371 (Tex. Civ. App. 1951, n.r.e.). The court held that the "substantial evidence rule" applies to appeals to the court from decisions of the Commission respecting benefits.

Appeal No. 608-CA-77. In a case where, although notice of the claimant's initial claim was duly mailed to the employer, neither the State Office files nor the local office files contained any protest of the initial claim by the employer and no direct evidence was presented at the Appeal Tribunal hearing to show when such protest was filed, the Commission held that the evidence established

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 190.00 (6)

PR EVIDENCE
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Appeal No. 608-CA-77 (con't)

that the employer had failed to file a timely protest of the initial claim.

Appeal No. 1424-CA-76. Prior to filing her initial claim, the claimant last worked on a variable part-time basis for over eighteen months for the employer. Her claim was disallowed because of insufficient base period wage credits and the claimant contended that she was entitled to additional wage credits from the employer. She could not testify with certainty as to the exact number of hours per week that she worked but did recall her hourly rate and testified that she earned at least \$50.00 per week. HELD: Under the authority of Section 207.004(c) of the Act, the Commission awarded the claimant additional base period wage credits from the employer in the amount of \$650 per relevant quarter, the equivalent of \$50.00 per week. Although the employer had reported some base period wages for the claimant, these figures were deemed not conclusive. Since the claimant testified to different wage amounts and the employer failed to appear at the hearing, the "best information" obtained by the Commission within the meaning of Section 207.004(c) consisted of the claimant's testimony.

Appeal No. 21386-AT-65 (Affirmed by 656-CA-65). Testimony under oath is more convincing than unsworn written statements or testimony based on hearsay.

Appeal No. 4269-CA-49. A party's objection that the decision of the Appeal Tribunal was based on hearsay evidence was cured when the decision made by the Commission was based on competent evidence which was obtained under oath at a further hearing directed by the Commission following the party's appeal to it and which was, at that further hearing, subject to questioning by opposing counsel.

Also see Appeal No. 92-012653-210-090393 digested in PR 430.30.

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 275.00

**PR JURISDICTION AND POWERS OF TRIBUNAL****PR 275.00 JURISDICTION AND POWERS OF TRIBUNAL.**

APPLIES TO CASES WHICH DISCUSS THE RIGHT OF THE COURT OR ADMINISTRATIVE TRIBUNAL TO PASS UPON A GIVEN CASE OR PARTICULAR ASPECTS OF THE CASE.

Appeal No. 99-007805-10-082099. Determinations made under Sections 201.011(1), including requests to use an alternate base period, and 208.021 of the Act fit under the "wage credit/right to benefits" category which, pursuant to Commission Rule 32(i)(1), 40 TAC § 815.32(i)(1), present a one-time exception to the timeliness rules. A late appeal to the Appeal Tribunal on such issue, if made within the same benefit year as the determination on appeal, will be deemed timely. However, once an Appeal Tribunal decision on the issue has been made and mailed, the appeal time limits in Chapter 212 of the Act will apply.

Appeal No. 92-01264-60-011693. Determinations made under Sections 201.011(13) and 208.001(a) of the Act fit into the "wage credits/rights to benefits" category which, pursuant to Commission Rule 32(i)(1), 40 TAC §815.32(i)(1), present a one-time exception to the timeliness rules. A late appeal to the Appeal Tribunal on such issue, if made within the same benefit year as the determination on appeal, will be deemed timely. However, once an Appeal Tribunal decision on the issue has been made and mailed, the appeal time limits in Chapter 212 of the Act will apply. (Also digested under PR 405.15.)

Appeal No. 86-04849-50-032087. On different dates, the employer was mailed identical Notices of Decision of Potential Chargeback regarding the same claimant and wages. The employer timely appealed both, which appeals were separately processed by the Appeals Department. On January 19, an Appeal Tribunal decision protecting the employer's account from chargeback became final. After that date, another Appeal Tribunal decision (pursuant to the employer's other appeal) was issued, charging the employer's account. HELD: The Appeal Tribunal was without jurisdiction to issue the decision contradicting the decision which had become final on January 19.

**APPEALS POLICY AND PRECEDENT MANUAL****PROCEDURE****PR 275.00 (2)****PR JURISDICTION AND POWERS OF TRIBUNAL**

Appeal No. 85-08452-10-080585. When the last day for filing a timely petition or request for reopening under Commission Rule 16 falls on a Sunday, the time limit for filing such petition or request will be extended through the next regular business day.

Appeal No. 1192-CA-77. Where a party's motion to reopen was not timely filed, an Appeal Tribunal decision, purporting to rule on the merits, must be set aside and the petition to reopen must be dismissed for want of jurisdiction.

For cases addressing the substantive issue of good cause to reopen under Commission Rule 16(5)(B), 40 TAC §815.16(5)(B), see MS 30.00.

Appeal No. 530-CA-78. The Appeal Tribunal has no jurisdiction over a determination which is issued subsequent to the filing of a timely appeal (regarding an earlier determination) and prior to the date of the appeal hearing, unless the later determination is itself appealed in a timely manner. (Cross-referenced under PR 430.30.)

Appeal No. 3267-CA-77. An order of ineligibility under Section 207.021(a)(3) or Section 207.021(a)(4) of the Act is a continuing matter, so that a late appeal from such a determination serves to vest the Appeal Tribunal with jurisdiction over the ability to work or availability for work issue, effective twelve (14, as of September 1, 1987) calendar days prior to the date the appeal was actually filed.

Appeal No. 780-CA-77. By not filing a protest to the claimant's initial claim, the employer waived his rights in connection therewith. Nevertheless, the employer appealed the initial determination awarding the claimant benefits without disqualification and the Appeal Tribunal disqualified the claimant under Section 207.045 of the Act. **HELD:** Since the employer waived all his rights in connection with the claimant's claim, the employer did not have appeal rights from the initial determination and the Appeal Tribunal did not have jurisdiction to hear the employer's appeal. Accordingly, the Appeal Tribunal decision was set aside for lack of jurisdiction, leaving in full force and effect the determination awarding the claimant benefits without disqualification.

**APPEALS POLICY AND PRECEDENT MANUAL****PROCEDURE****PR 275.00 (3)****PR JURISDICTION AND POWERS OF TRIBUNAL**

Appeal No. 3585-CSUA-76. An order of ineligibility under Section 207.041 of the Act is a continuing matter. Therefore, a late appeal from such an order of ineligibility vests the Appeals Tribunal with jurisdiction over that issue effective twelve (14, as of September 1, 1987) calendar days prior to the date the appeal was actually mailed.

Appeal No. 1753-CA-76. Where a determination has become final, a timely appeal not having been filed therefrom, the Appeal Tribunal is without jurisdiction to issue a decision on the merits.

Appeal No. 3341-CA-75. Since a disqualification under Section 5(d) of the Act is a continuing matter, a late appeal from a determination of disqualification under that Section will vest the Appeal Tribunal with jurisdiction over the labor dispute issue effective twelve (14, as of September 1, 1987) calendar days prior to the date such late appeal was actually filed.

Appeal No. 554-CA-71. Regardless of whether an employer files a timely protest of an initial claim, Section 214.003 of the Act can be applied at any time fraud is discovered.

Appeal No. 343-CA-71. Where a claimant is initially determined to be eligible for benefits and no appeal is filed, an appeal from a subsequent determination on eligibility gives the Appeal Tribunal jurisdiction to consider eligibility only from the earliest date to which the subsequent determination on appeal relates.

Appeal No. 267-CA-70. Prior to the time a withdrawal decision becomes final, the Appeal Tribunal can reopen a case and rule on the merits.

Appeal No. 17-CF-68. A disqualification under Section 207.052 of the Act is a continuing condition and the Appeal Tribunal has jurisdiction over that issue twelve (14, as of September 1, 1987) calendar days prior to the date an appeal is actually filed even though the appeal is late to the determination imposing the disqualification.

**APPEALS POLICY AND PRECEDENT MANUAL**

**PROCEDURE**

**PR 275.00 (4)**

**PR JURISDICTION AND POWERS OF TRIBUNAL**

Appeal No. 384-CA-64. The Act provides for imposition of disqualification under the provisions of Section 207.045 or 207.044 following the filing of a valid claim. No disqualification is authorized under these sections of the Act unless the claimant has filed a valid claim subsequent to the separation in question. (Cross-referenced under MS 60.20.)

Appeal No. 4644-CA-50. The Commission has no jurisdiction to impose a disqualification for refusal of suitable work under Section 207.047 of the Act if the refusal of work was prior to the beginning date of the claimant's benefit year.

Also see Appeal No. 1213-CA-67 under PR 5.00.



**APPEALS POLICY AND PRECEDENT MANUAL**

**PROCEDURE**

**PR 280.00**

<b>PR READJUDICATION</b>
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**PR 280.00 READJUDICATION.**

INCLUDES CASES WHICH INVOLVE THE QUESTION OF WHETHER THE SAME WORK SEPARATION MAY BE ADJUDICATED MORE THAN ONCE.

No precedent cases.

NOTE: See Commission Rule 20(7)(F), 40 TAC §815.20(7)(F), which provides that the fact that a disqualification was imposed on the basis of a given separation under Section 207.044 or Section 207.045 of the Texas Unemployment Compensation Act in a previous benefit year shall not prevent a disqualification on the basis of that separation if it is the last separation from work prior to the filing of an initial claim establishing a new benefit year.

## APPEALS POLICY AND PRECEDENT MANUAL

### PROCEDURE

PR 380.00 - 380.10

<b>PR REHEARING OR REVIEW</b>
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#### PR 380.00 REHEARING OR REVIEW.

##### 380.05 REHEARING OR REVIEW: GENERAL.

INCLUDES CASES CONTAINING (1) A GENERAL DISCUSSION OF A REHEARING OR REVIEW, (2) POINTS COVERED BY THREE OR MORE SUBLINES OR LINE 380, AND (3) POINTS NOT COVERED BY ANY OTHER SUBLINE.

Appeal No. 87-00811-10-011588. The Commission applied the holding in Appeal No. 84-14973-60-121284 (PR 430.30) to a notice of change of address filed during the period in which a party could file a timely petition to reopen under Commission Rule 16(5)(B), 40 TAC §815.16(5)(B). (Cross-referenced under PR 430.30.)

Appeal No. 4183-CA-76. Where the postmark on the envelope containing a motion for rehearing is illegible and there is evidence that it was actually deposited in the mail a few minutes before midnight on the last day for filing a timely motion for rehearing, the motion for rehearing will be deemed to have been timely filed.

Appeal No. 1917-CA-76. Where a party is erroneously advised by a Commission representative that he has exhausted his administrative remedies when, in fact, at that time he could have filed a timely motion for rehearing before the Commission, the claimant's motion for rehearing filed outside the statutory time limit for appeal or rehearing must be deemed timely filed.

##### 380.10 REHEARING OR REVIEW: ADDITIONAL PROOF.

DISCUSSES THE NECESSITY OR EFFECT OF PRESENTING ADDITIONAL PROOF AT REHEARING OR REVIEW, OR WHETHER ADDITIONAL EVIDENCE IS ADMISSIBLE OR CONSTITUTES SUCH ADDITIONAL PROOF AS IS REQUIRED.

Appeal No. 4269-CA-49. Additional evidence obtained by a rehearing is admissible and may be used as the basis for a Commission decision on review even though such competent evidence was not obtained at the Appeal Tribunal hearing.

## APPEALS POLICY AND PRECEDENT MANUAL

### PROCEDURE

PR 380.15 - 380.25

<b>PR REHEARING OR REVIEW</b>
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**PR 380.15 REHEARING OR REVIEW: CREDIBILITY OF WITNESS.**

DISCUSSION OF THE EFFECT OF THE Demeanor, BEHAVIOR, ATTITUDE, OR RENDITION OF TESTIMONY OF WITNESS AS AFFECTING HIS CREDIBILITY.

Appeal No. 7625-CA-61. Based on the fact that claimant gave one reason for quitting to his employer, another reason on the initial claim, and a third reason to the hearing officer, the Commission gave little credence to the claimant's testimony and disqualified claimant.

**380.25 REHEARING OR REVIEW: SCOPE AND EXTENT.**

DISCUSSION OF THE POWERS OF THE TRIBUNAL TO GO INTO CERTAIN ASPECTS OF A CASE OR TO APPLY A PARTICULAR REMEDY.

Appeal No. 2633-CA-77. The Commission may inquire into and rule on the question of whether a person has standing to file an appeal; that is, whether he became a party of interest or not, even though such question had not been raised at any prior stage of the proceeding. (Cross-referenced under PR 405.20.)

Appeal No. 608-CA-77. Where the employer fails to file a timely protest of the initial claim, the employer, having thereby waived its rights in connection with the claim, had no right to file an appeal to the Commission from the Appeal Tribunal decision in the case. Such appeal must be dismissed for want of jurisdiction, leaving the Appeal Tribunal decision in full force and effect.

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 380.25 (2)

<b>PR REHEARING OR REVIEW</b>
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Appeal No. 3087-CA-76. A base period employer which fails to file a timely protest of an initial claim upon having been duly notified of such claim, has thereby waived its right to a ruling on chargeback. A chargeback ruling made in such a case will be set aside.

Appeal No. 845-CA-76. The employer did not file a timely protest to the claimant's initial claim nor did it appeal from the determination that, in light of its failure to file a timely protest, it had thereby waived all its rights in connection with the claim. Nonetheless, the employer was erroneously mailed a copy of the determination on the merits of the claimant's separation and the charging of its account and filed an appeal therefrom. The Appeal Tribunal assumed jurisdiction without comment and reversed the determination, thereby disqualifying the claimant and protecting the employer's account. HELD: The Appeal Tribunal decision was set aside and the employer's appeal dismissed for lack of jurisdiction. By failing to file a timely protest to the initial claim, the employer waived all its rights in connection with such claim, including any right it might otherwise have had to appeal from the determination thereon, even though the employer was erroneously mailed a copy of such determination.

Appeal No. 96-012769-10-110796. A party appealed an Appeal Tribunal decision in which the separation and chargeback were adverse to the appellant and the eligibility issue was favorable. The Commission assumed jurisdiction and ruled on only the issues of separation and chargeback since these were the only issues adverse to the appellant and such issues were easily severable.

**APPEALS POLICY AND PRECEDENT MANUAL****PROCEDURE****PR 405.00 - 405.15****PR RIGHT OF REVIEW****PR 405.00 RIGHT OF REVIEW.****405.15 RIGHT OF REVIEW: FINALITY OF DETERMINATION.**

DISCUSSION AS TO WHETHER A PARTICULAR DETERMINATION IS SUBJECT TO REVIEW, OR IS A FINAL DISPOSITION OF THE CASE OR OF THE POINT INVOLVED.

Appeal No. 92-01264-60-011693. Determinations made under Sections 201.011(13) and 208.001(a) of the Act fit into the "wage credits/rights to benefits" category which, pursuant to Commission Rule 32(i)(1), 40 TAC §815.32(i)(1), present a one-time exception to the timeliness rules. A late appeal to the Appeal Tribunal on such issue, if made within the same benefit year as the determination on appeal, will be deemed timely. However, once an Appeal Tribunal decision on the issue has been made and mailed, the appeal time limits in Chapter 212 of the Act will apply. (Also digested under PR 275.00.)

Appeal No. 86-09401-10-060187. Once a Notice of Claim Determination has become final, any subsequent corrected Notice of Claim Determination ruling on the same claim and work separation is void.

TEC & Wilson v. Cady, 563 S.W. 2d 387 (Civ. App. Dallas 1978). Although duly notified, the employer failed to file a protest of the initial claim within the period provided by statute, there being no evidence of when the notice of claim was actually received by the employer. HELD: (1) The protest period is not so short as to be, as a matter of law, insufficient to give the employer a fair opportunity to respond to the claim; hence, the protest period was not a denial of due process to the employer. (2) Even under current conditions, the United States Postal Service is not so unreliable as to render the protest period insufficient, where there is no evidence that the receipt of the Commission's notice of initial claim was excessively delayed.

**APPEALS POLICY AND PRECEDENT MANUAL****PROCEDURE****PR 405.15 (2)****PR RIGHT OF REVIEW**

The court upheld the application of the provisions of Section 208.004 of the Act which declares that failure to protest a notice of initial claim within the specified time period from the date the notice was mailed by the Commission operates as a waiver of the employer's rights respecting the claim. (Note: The statutory protest period under review in the Cady case was ten days. Effective January 1, 1978, that period was extended to twelve days and remains 12 days despite legislative changes of September 1, 1987.) (Cross-referenced under PR 430.20.)

Appeal No. 702-CAC-78. The Commission in this case applied the proposition previously established in Appeal No. 1843-CA-74 (below) to a chargeback situation.

The employer in this case filed a late protest to a Notice of Maximum Potential Chargeback and it was learned that the base period wages reported for the claimant by the employer were actually earned by the claimant's daughter, using the claimant's Social Security number. The Commission assumed jurisdiction, deleting the wage credits in question and reciting the dictum from Appeal No. 1843-CA-74 to the effect that, at any time during a claimant's benefit year, a monetary redetermination adding or deleting wage credits would be made if an error in wage credits is brought to the Commission's attention. (Cross-referenced under PR 430.30.)

Appeal No. 2653-CA-77. Where an employer is the last employer and a base period employer and filed a timely protest of the initial claim, it becomes a party of interest to the claim and is entitled to a ruling on the chargeback issue. Therefore, a determination mailed to such an employer which failed to rule on the chargeback issue does not become final, and the employer's appeal, filed more than twelve calendar days from the date of such determination, must be deemed timely and jurisdiction must be taken of the merits of the case.

Appeal No. 941-CUCX-77. The appeal time limits of Section 212.053 of the Act do not apply to a determination which is found to have been void from its inception. (For text, see MS 260.00.)

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 405.15 - 405.20

<b>PR RIGHT OF REVIEW</b>
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Appeal No. 1843-CA-74. With respect to monetary determinations, Section 208.023 of the Act provides that the claimant may, within twelve (14, as of September 1, 1987) calendar days from the date such determination is mailed, request a redetermination or appeal. The Commission held that the statutory language was intended to encourage a claimant to file a request for monetary redetermination as soon as possible and was not intended as a bar to his obtaining credits for wages. Any time during a claimant's benefit year, a monetary redetermination adding or deleting wage credits will be made if error in wage credits is brought to the Commission's attention. (Cross-referenced under PR 430.30.)

Appeal No. 339-CA-73. If the claimant named his correct last work and it was notified of the filing of an initial claim in accordance with Section 208.002 of the Act, the Benefits Department does not have jurisdiction or authority to disallow the initial claim. A determination which was issued without jurisdiction cannot be held to have become final and binding upon the parties and the Commission because of a late appeal.

Appeal No. 1101-CA-71. There can be no finality to a determination which does not show the employer's correct account number.

**405.20 RIGHT OF REVIEW: PERSON ENTITLED.**

WHERE DETERMINATION IS MADE OF WHETHER A PARTICULAR PARTY IS AN INTERESTED PARTY FOR THE PURPOSE OF APPEALING A DECISION.

Appeal No. 308-CA-69. A person may initiate an appeal on behalf of a claimant only if he is duly authorized to do so and if the authorization appears affirmatively in the record. It takes personal action by a party to the claim or a person duly authorized by a party to act on his behalf in order to invoke the jurisdiction of the Commission under the Act.

Also see Appeal No. 7842-CA-61 under PR 10.00 and Appeal No. 2633-CA-77 under PR 380.25.

**APPEALS POLICY AND PRECEDENT MANUAL**

**PROCEDURE**

**PR 430.00 - 430.10**

**PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW**

**PR 430.00 TAKING AND PERFECTING PROCEEDINGS FOR REVIEW.**

**430.05 TAKING AND PERFECTING PROCEEDINGS FOR REVIEW:  
GENERAL.**

INCLUDES CASES CONTAINING (1) A GENERAL DISCUSSION OF TAKING AND PERFECTING PROCEEDINGS FOR REVIEW, (2) POINTS COVERED BY ALL OF THE SUBLINES OF LINE 430, AND (3) POINTS NOT COVERED BY ANY OTHER SUBLINE.

Appeal No. 86-05110-10-032787. The employer's copy of the initial claim was mailed to the correct street address but the wrong zip code. The first actual notice of the initial claim was the notice of the hearing on the appeal filed by the claimant. The employer's first written "protest" was its appeal to the Commission. HELD: The mistake in the employer's zip code rendered the address incorrect. Accordingly, the employer was a party of interest entitled to file an appeal.

**430.10 TAKING AND PERFECTING PROCEEDINGS FOR REVIEW:  
METHOD.**

DISCUSSES THE ADEQUACY OF METHOD OF APPEAL OR WHETHER CERTAIN ACTION OF AN INTERESTED PARTY CONSTITUTES AN APPEAL.

Appeal No. 9594-F-78. (Commission decision; case taken up by the Commission on its own motion under Section 212.105 of the Act.) On its timely protest to the initial claim, the employer recited no facts adversely affecting the claimant's right to benefits; it merely requested a ruling on the claimant's eligibility under Chapter 207 B of the Act. HELD: Although the employer's protest did not set out or allege any facts, the Texas Unemployment Compensation Act is a remedial statute and thus should be construed liberally. In keeping with this general principle, the Commission endorses an expansive reading of Section 208.004 of the Act. This comports with the Commission's past advice to employers that, if they wish to preserve appeal rights with regard to later determinations, they should protest the initial claim even if they do not have any information at that time which would prevent payment of



## APPEALS POLICY AND PRECEDENT MANUAL

### PROCEDURE

PR 430.10 - 430.15

**PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW**

Appeal No. 9594-F-78

(Cont'd)

benefits. Claimants and employers have traditionally been held to have preserved their appeal rights upon receipt by the Commission, within the statutory period, of any written information indicating a disagreement with the current status of a case. Accordingly, the employer's protest was held to have been timely and sufficient to preserve the employer's appeal rights.

Appeal No. 1574-CUCX-77. The claimant specifically informed the Commission on his interstate continued claim of January 8, 1977, that he desired to appeal from a determination of disqualification mailed January 6, 1977. He did not file a formal notice of appeal until January 28, 1977, when informed by the local office that he needed to do so. HELD: Although the claimant's intended appeal of January 8 was not submitted on a formal appeal document, it certainly amounted to a notification to the Commission that he desired to appeal. The Commission, therefore, held that the claimant's appeal was timely and that it had jurisdiction of the merits of the case.

**430.15 TAKING AND PERFECTING PROCEEDINGS FOR REVIEW:  
NOTICE.**

DISCUSSION AS TO ADEQUACY OF NOTICE OF A DECISION TO AN INTERESTED PARTY, OR AS TO ADEQUACY OF NOTICE BY INTERESTED PARTY OF A DESIRE FOR REVIEW OF DECISION.

Appeal No. 87-17430-10-093087. A Notice of Claim Determination was mailed to the address provided by the claimant when he filed his initial claim, an address which was subsequently determined not to be the claimant's correct address. The claimant did not receive the notice and, thus, did not file an appeal until after the notice had become final. HELD: The claimant's appeal was determined to be late. The validity of the Notice of Claim Determination was proper. The address as given by the claimant was, at the time of the mailing of the notice, the claimant's correct last address as reflected by Commission records.

## APPEALS POLICY AND PRECEDENT MANUAL

### PROCEDURE

PR 430.15 - 430.20

#### PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW

Appeal No. 909-CA-76. Where the attorney for a party specifically requested that a copy of the Appeal Tribunal decision be sent to him but this was not done causing the attorney's appeal to the Commission on the party's behalf to be filed four days late, such appeal to the Commission was held timely as the party, under the circumstances, was not "duly notified" of the Appeal Tribunal decision as required by Section 212.103 of the Act.

NOTE: Commission Rule 32, 40 TAC §815.32, specifically extends this principle to non-attorney party representatives.

#### **430.20 TAKING AND PERFECTING PROCEEDINGS FOR REVIEW: TIMELY FILING OF PROTEST.**

INCLUDES CASES WHICH INVOLVED THE QUESTION OF WHETHER EMPLOYER'S PROTEST WAS TIMELY FILED.

NOTE: See Commission Rule 2, 40 TAC §815.2, for description of the Commission's general policy regarding controlling dates of mailed communications. Also see Commission Rule 32, 40 TAC §815.32, for an extensive description of the Commission's policies regarding timeliness.

Appeal No. 98-005480-10-052098. The employer alleged that they attempted to submit the employer's protest to the initial claim by faxing it to the Commission in a timely fashion. The Commission did not receive the fax. HELD: A situation involving a fax is analogous to nonreceipt of mailed documents set out in Commission Rule 815.32(f). When a party alleges filing a protest by the faxing of a document which the TWC has never received, the party must present credible and persuasive testimony of timely filing corroborated by testimony of a disinterested party and/or physical evidence specifically linked to the appeal in question. For faxed documents, physical evidence specifically linked to the appeal in question shall be a copy of the protest, in addition to physical evidence of the transmission, such as a copy of a confirmation message, copy of a transmission log indicating the fax date, or other credible and persuasive documentary evidence. The employer failed to present the above evidence and therefore the employer's protest cannot be deemed timely.

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 430.20 (2)

**PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW**

Appeal No. 97-007426-10\*-061197. An employer's failure to timely protest the Notice of Application for Unemployment Benefits does not preclude it from filing a subsequent appeal as a party of interest during the same benefit year where the only issue to be decided is the claimant's entitlement to additional wage credits.

Appeal No. 95-014321-50-102495. On April 11, 1995 the employer was mailed a Notice of Maximum Potential Chargeback, advising the employer of the 14 day period for filing a timely protest. The Texas Workforce Commission's Chargeback Unit had no record of any protest having been filed by the employer. At the Appeal Tribunal hearing, the employer presented a copy of its protest letter dated April 24, 1995 and, further, presented the firsthand testimony of its claim specialist who prepared the employer's protest and mailed it to the Texas Workforce Commission on April 24, 1995. HELD: Citing Commission Rule 32(f), 40 TAC §815.32(f), the Commission held that while the testimony presented by the employer was credible and persuasive, it was not the testimony of a disinterested party. However, the protest copy introduced into evidence by the employer constituted physical evidence specifically linked to the appeal, within the meaning of Commission Rule 32(f). Accordingly, the employer's protest was deemed timely.

Appeal No. 93-003426-10-022594. If there is credible and persuasive evidence of nonreceipt of a document from TWC, and it is established that a party's name was misspelled in the addressing of that document, regardless of the extent of the error and even if the document was otherwise correctly addressed, the appeal to that document will be deemed timely under Commission Rule 32(b)(2) (also see Appeal No. 7807-CA-61 in this subsection).

Appeal No. 87-18325-10-101987. The employer's protest to the initial claim bore a postal meter imprint dated the last day on which it would have been timely, but also a U.S. Postal Service postmark dated the following day. The employer representative, who had no firsthand knowledge of the mailing of the employer's protest, presented an affidavit from the individual who assertedly mailed the protest on the last day on which it would have been timely. HELD: Specifically citing provisions of its timeliness policy (PR 5.00) (Now

## APPEALS POLICY AND PRECEDENT MANUAL

### PROCEDURE

PR 430.20 (3)

#### PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW

Appeal No. 87-18325-10-101987 (con't)

codified as Commission Rule 32, 40 TAC §815.32), the Commission held that where a postal meter date and a postmark date are in conflict, the latter will control, and that affidavits alone cannot establish earlier mailing. Such an affidavit or an allegation of earlier mailing entitles a party to a hearing where testimony of such earlier mailing, subject to cross-examination, can be offered.

Section 70. Texas Law of Evidence, (McCormick & Ray) Mailing and Delivery of Letters

A letter, notice or other communication properly addressed, stamped and mailed is presumed to have been received by the addressee in due time. However, this presumption arises only after proof that the letter was properly addressed to the post office of the addressee, stamped with the proper postage, and that the same was mailed; and that the usual time for transmission of mail between the points of mailing and address has expired. These matters may be proved by circumstantial evidence. For example, the mailing routine of the sender's business may be sufficient evidence to raise the presumption.

Smith v. F.W. Heitman Co., 98 S.W. 1074 (Tex. Civ. App. 1906). The fact of proper mailing may be shown by circumstances, and the regular and settled custom of a business house with regard to the disposition of letters sent out by it through the mail would be admissible as such a circumstance, and sufficient to uphold an inference that such letter was regularly mailed; that is, deposited in the post office, properly addressed and stamped and received by the addressee.

Also see TEC & Wilson v. Cady under PR 405.15.

Appeal No. 986-CAC-79. The employer filed a late protest to a Notice of Maximum Potential Chargeback and, on appeal from a Decision of Potential Chargeback charging the employer's account, an Appeal Tribunal decision was issued which affirmed the charging of the employer's account. Meanwhile, the claimant had filed a disagreement to a monetary determination, alleging additional base

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 430.20 (4)

**PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW**Appeal No. 986-CAC-79

(Cont'd)

period wages from the same employer. An investigation disclosed that the claimant was entitled to additional base period wage credits as some of his base period wages had been reported by the employer under an erroneous social security number. Accordingly, a further Notice of Maximum Potential Chargeback was issued to the employer, reflecting the correct amount of the claimant's base period wages from the employer and the correct amount of benefits chargeable. The employer filed a timely protest thereto. A Notice of Decision of Potential Chargeback, indicating that benefits were not chargeable, was issued to the employer on the same day that the Appeal Tribunal decision, affirming the charging of the employer's account, was issued. The employer then filed a late appeal to the Commission from that Appeal Tribunal decision. HELD: The Appeal Tribunal decision and the earlier Decision of Potential Chargeback, upon which it was based, were set aside and the more recent Decision of Potential Chargeback, ruling that benefits were not chargeable, was permitted to remain in full force and effect. A ruling of maximum potential chargeback which is based on an erroneous indication of maximum benefits chargeable and which is not timely protested does not become final if a subsequent, corrected Notice of Maximum Potential Chargeback is timely protested. A Notice of Maximum Potential Chargeback which incorrectly recites the maximum benefits potentially chargeable does not satisfy the notice requirement of Section 204.023 of the Act. (Also digested under CH 50.00.)

Appeal No. 2827-CA-77. Where an initial claim has been backdated, the statutory time limit for protest, prescribed by Section 208.004 of the Act, begins to run from the day after the date on which notice of the initial claim was actually mailed to the employer named on the claim and not from the date to which the claim was backdated.

Appeal No. 1902-CA-77. The mailing of notice of an initial claim to the correct address of the premises at which the claimant actually last worked for the employer constitutes due notice under Section 208.002 of the Act and Commission Rule 3, notwithstanding the fact that the employer does not customarily receive mail at its branch locations but, rather, at its central office, through a post office box.

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 430.20 (5)

**PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW**

Appeal No. 973-CA-76. The notice of the claimant's initial claim was not mailed to the firm for which the claimant had last worked but, rather, to a related company, with a separate employer account number and a separate address from the company for which the claimant last worked. The last employer, consequently, did not protest the initial claim but did timely protest the chargeback notice which was the first notice the employer actually received concerning the claim. HELD: Since the Commission did not comply with the notice provisions of Section 208.002 of the Act, and the employer timely protested the first notice it actually received concerning the claimant's initial claim, the employer was deemed to have filed a timely protest of the initial claim.

Appeal No. 497-CA-76. Where the claimant last worked for the employer named on the initial claim at its location in El Paso, Texas, notice of the filing of such claim mailed to the employer's office in California was not due and proper notice to the employer, because Section 208.002 of the Act provides, in material part, that if the employer has more than one branch or division operating at different locations, notice of the filing of an initial claim shall be mailed to the branch or division where the claimant last worked. Further, since the employer was not notified in accordance with the terms of Section 208.002 of the Act, his failure to protest the claim within the statutory time limit did not constitute a waiver of his rights with respect to the claim.

Appeal No. 38-CA-76 and Appeals Nos. 57-CA-76 through 63-CA-76 (Affirmed by Maintenance Management, Inc. v. TEC, 557 S.W. 2d 561, San Antonio Ct. Civ. Appeals 1977). Shortly after losing a maintenance contract and laying off some of his employees, the employer visited a Commission local office and advised an individual there that he anticipated a number of initial claims by the separated employees and inquired of the individual how he should handle the matter. The individual to whom the employer spoke, who was not a Commission employee and did not represent himself as such, advised the employer that he should wait and handle all such claims at the same time. Acting on this advice, the employer delayed protesting a number of initial claims until after the statutory protest period had expired. Subsequently, the employer was sent a determination advising him that his protests had not been timely filed and that he had thereby waived his rights in connection with the claims. The employer did not appeal that determination nor did he file protest to subsequent notices of maximum potential chargeback regarding the claimants. HELD: The employer did not file timely protests to the initial claims and, thus, waived his rights in connection with the claims. Furthermore, even if the employer's untimeliness in protesting the initial claims had been due to misinformation provided by bona fide Commission representatives, this would not excuse the employer's failure to protest or appeal other documents in a timely manner throughout the claimants' benefit years.

## APPEALS POLICY AND PRECEDENT MANUAL

### PROCEDURE

PR 430.20 (6)

#### PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW

Appeal No. 3476-CA-75. An employer has not waived its rights in connection with a claim where notice of the initial claim was not mailed to the employer's correct address and was returned undelivered by the Postal Service and where the employer duly protested the first notice of the claim that it actually received.

Appeal No. 93-CA-73. Testimony as to an employer's mailing routine may be sufficient to raise a presumption that its protest was stamped, properly addressed and placed in the U.S. Mail on the date shown by the employer's postage meter, even though it was postmarked four days later by the Postal Service.

Appeal No. 5763-AT-69 (Affirmed by 618-CA-69). When a copy of the initial claim is mailed, pursuant to Section 208.002 of the Act and Commission Rule 3, to the correct address and location of the employer's branch where the claimant last worked and the employer does not file a protest within the statutory time period, the Appeal Tribunal is without jurisdiction to consider the merits of the case.

Appeal No. 641-CBW-67. An employer who is notified that his account is protected in a prior benefit year will be protected in a subsequent benefit year on the same separation even though he does not file a timely protest to chargeback in the second benefit year.

Appeal No. 7807-CA-61. An employer is not given notice of an initial claim if notice is mailed without complete address and is not received by the employer. Therefore, the employer can file a timely protest of the initial claim when he does receive some notice that an initial claim was filed (also see Appeal No. 93-003426-10-022594 in this subsection).

Appeal No. 72802-AT-60 (Affirmed by 7150-CA-60). Mailing of notice of an initial claim to one of the partners for whom the claimant last worked meets the notice requirements of the Act even though the business named on the notice was not the business for which the claimant last worked.

Also see Appeal Nos. 85-099352-10-082885 and 941-CUCX-77 under PR 430.30

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 430.30

**PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW****PR 430.30 TAKING AND PERFECTING PROCEEDINGS FOR REVIEW:  
TIMELY FILING OF APPEAL.**

INCLUDES CASES WHICH INVOLVE THE QUESTION OF WHETHER ONE OR BOTH PARTIES HAS FILED A TIMELY APPEAL.

NOTE: See Commission Rule 2 for a description of the Commission's general policy regarding controlling dates of mailed communications. Also see Commission Rule 32, 40 TAC §815.32, for an extensive description of the Commission's policies regarding timeliness.

Appeal No. 2091905-2. When the claimant filed the initial claim, he provided an incorrect mailing address to the Commission. Consequently, the claimant did not receive the initial determination that disqualified him for benefits. He filed an appeal more than 14 days after the determination was mailed. The claimant's election to receive electronic correspondence from the Commission became active within the appeal deadline. HELD: A party's election to receive electronic correspondence is equivalent to a change in his mailing address for appeal purposes. The activation date of such election during the appeal period will be deemed to be a timely appeal for any pending determination or decision that is adverse to the party. Any such "appeal" must be filed within the applicable statutory appeal time period.

Appeal No. 95-009715-10-071895. The appellant's last day for filing a timely appeal fell on an official Texas state holiday of the sort on which agency offices remain open for public business with minimal staffing. The appellant filed the appeal in a TWC local office the next morning. HELD: The appellant's appeal was deemed timely. The provision in Commission Rule 32(a)(2), 40 TAC §815.32(a)(2), that appeal time frames established in the Texas Unemployment Compensation Act are to be extended one working day following a deadline which falls on a weekend or official state holiday should be applied to all Texas state holidays including those on which TWC offices are open for public business with minimal staffing ("skeleton crew" holidays).



## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 430.30 (2)

**PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW**

Appeal No. 94-010532-10\*-071294. The claimant-appellant did not appear at the first Appeal Tribunal hearing and received a decision affirming her disqualification. She filed a timely petition to reopen under Commission Rule 16(5)(B), alleging that she did not receive the written notice for the first Appeal Tribunal hearing. **HELD:** The claimant's uncontradicted testimony that she did not receive the hearing notice, taken in conjunction with her status as appellant and timely filing of her request to reopen wherein she alleged nonreceipt of the hearing notice, elevates her testimony to the level of "credible and persuasive" required by Commission Rule 32(b), 40 TAC §815.32(b), and is sufficient to rebut the presumption of receipt. Accordingly, the claimant had good cause for her nonappearance within the meaning of Commission Rule 16(5)(B), 40 TAC §815.16(5)(B). (Also digested under MS 30.00.)

Appeal No. 92-012653-210-090393. Testimony of an interested party meets the "credible and persuasive evidence of nondelivery" standard in Commission Rule 32(b)(2) only if it is not contradicted by the testimony of another witness or attendant circumstances and it is clear, direct and free from inaccuracies and circumstances tending to cast suspicion thereon. Here, there was no record of any inconsistent statements by the claimant or any other internal documentation that would challenge the claimant's contention of nonreceipt. As the claimant did not sit idly by for an extended period without making any effort to determine the status of his claim, his uncontradicted testimony that he did not receive the determination elevates his testimony to the level of "credible and persuasive" and is sufficient to rebut the presumption of receipt. (Cross-referenced under PR 190.00.)

Appeal No. 87-022645-1-0488 (Affirmed by 87-05530-10-050288). On January 21, the claimant wrote a letter to the Commission attempting to appeal a determination which was mailed the following day, because he had been informed by a local office representative that he had been disqualified under Section 207.044 of the Act. On March 9, the claimant filed an appeal in person in the local office. **HELD:** The claimant's letter of appeal dated January 21 could not be accepted as an appeal from the determination mailed January 22 because a document cannot be appealed prior to its mailing date. As the claimant's appeal dated March 9 was not filed within the appeal time limit prescribed by Section 212.053 of the Act, the claimant's appeal was dismissed for lack of jurisdiction.

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 430.30 (3)

**PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW**

Appeal No. 87-02148-10-021088. In its timely protest to the initial claim, the employer had requested that any claim determination be mailed to its corporate headquarters. Nonetheless, the notice of claim determination was mailed to the address given on the initial claim which was the actual physical location where claimant last worked. The employer filed a seemingly late appeal. HELD: By failing to mail the notice of claim determination to the address specifically requested by the employer, the Commission failed to comply with the requirement in Section 212.053 of the Act that copies of claim determinations be mailed to parties' last known address as reflected by Commission records. Therefore, the employer's appeal was deemed timely.

Appeal No. 85-02278-10-021886. When a written appeal is delivered by the U.S. Postal Service to the Texas Workforce Commission but in an envelope which has either no postmark or an illegible postmark, the appeal will be deemed to have been perfected on the date shown on the document itself or as of three business days prior to the date of receipt by the Commission, whichever date is later. In calculating "business days" for the purpose of implementing this holding, Saturdays, Sundays and Texas state holidays are not to be included.

Appeal No. 85-00190-10-122785. The Appeal Tribunal decision imposed a disqualification for the first time but did not specifically advise the claimant that he might be subject to the imposition of an overpayment which he would be obligated to repay. The claimant did not file an appeal within ten days of the date the Appeal Tribunal decision was mailed; however, he did file an appeal within the required twelve (14, as of September 1, 1987) days after the mailing of the subsequent overpayment determination which resulted from the Appeal Tribunal decision. HELD: The Appeal Tribunal decision was misleading in that it did not specifically advise the claimant that he might be subject to the imposition of an overpayment which he would be obligated to repay. As the claimant did file a timely appeal from the overpayment determination, his appeal to the Commission was treated as timely and the Commission assumed jurisdiction over the merits of the claimant's work separation.

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 430.30 (4)

**PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW**

Appeal No. 85-09352-10-082885. The employer mailed its letter of appeal on a date on which it would have been timely. However, the letter was subsequently returned to the employer due to insufficient postage, with no delivery having been made to the Texas Workforce Commission. HELD: The employer's appeal was properly dismissed for lack of jurisdiction. It is the appellant's responsibility to use sufficient postage when filing an appeal by mail. (Cross-referenced under PR 430.20.)

Appeal No. 85-08055-10-071285. The last day on which the employer could have filed a timely appeal to the Appeal Tribunal was June 16, 1985, a Sunday. The employer's appeal, although dated June 13, 1985, was received in an envelope bearing a postage meter date of June 17, 1985. The Appeal Tribunal dismissed the employer's appeal for lack of jurisdiction. HELD: The Commission held that the employer's appeal had been timely filed. As the last day for filing a timely appeal had been a Sunday, the employer had through the end of the next regular business day, Monday, June 17, 1985, to file its appeal.

Appeal No. 84-08253-60-073085. The last day on which the claimant could have filed a timely appeal to the Appeal Tribunal was June 30, 1985, a Sunday. The claimant filed his appeal in person at a Commission local office on Monday, July 1, 1985. The Appeal Tribunal dismissed the claimant's appeal for lack of jurisdiction. HELD: The Commission held that the claimant's appeal had been timely filed. As the last day for filing a timely appeal had been a Sunday, the claimant had through the end of the next regular business day to file an appeal.

Appeal No. 84-14973-60-121284. Written notice of a change of address given by a party to the Texas Workforce Commission or to its agent, whether given in person or by mail, will be deemed to also be a timely appeal from any pending determination or decision which is adverse to that party. Any such "appeal" must be filed within the applicable statutory appeal time period if filed in person at an office of the Texas Workforce Commission or an office of another State's employment security agency acting as agent for the Commission. Any such "appeal" filed by mail must be postmarked within the applicable statutory appeal time period.

Also see Appeal No. 87-00811-10-011588 under PR 380.05.

**APPEALS POLICY AND PRECEDENT MANUAL****PROCEDURE****PR 430.30 (5)****PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW**

Appeal No. 1533-CA-78. On the same day that a Notice of Claim Determination was mailed to the employer, awarding the claimant benefits without disqualification and charging the employer's account, a Notice of Maximum Potential Chargeback was also mailed to the employer. The employer submitted a timely written protest on Form B-115 (employer protest to chargeback notice) which was intended also as an appeal to the Notice of Claim Determination. Although the employer's protest was written by an individual in the employer's payroll department who was authorized to respond on the employer's behalf, the protest was simply signed with the employer's corporate name and bore no signature of any particular individual. HELD: The Texas Unemployment Compensation Act, including Chapter 212 thereof, is a remedial statute which should be construed liberally. Corporate appeals must necessarily be filed by an authorized person on behalf of the nonperson legal entity. The employer's protest to the initial claim had been signed in precisely the same manner as its subsequent protest to chargeback/appeal and had been accepted as valid. Commission procedures should not require the protest and appeal format to be so legalistic that it frustrates genuine interest to protest or appeal. Accordingly, the employer was regarded as having filed a timely appeal and jurisdiction was assumed over the merits of the claimant's separation and the charging of the employer's account.

Appeal No. 941-CUCX-77. The appeal time limits in Section 212.053 of the Act do not apply to a determination which is found to have been void from its inception. (For text, see MS 260.00.)

Appeal No. 315-CA-77. On the last day for filing a timely appeal to the Commission, the employer's letter of appeal was prepared and placed in the central collection box in the employer's front office. Each day, the employer's secretary takes all correspondence from the collection box at or about 5:00 p.m. and takes it to the post office. The mail was so taken to the post office on the last day for filing an appeal to the Commission. HELD: The testimony established that the employer's appeal to the Commission was properly mailed within the statutory time limit allowed by law.

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 430.30 (6)

**PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW**

Appeal No. 3687-CA-76. Where the employer filed a late protest of the initial claim but filed a timely appeal from the determination that the protest was not timely filed, the appeal may not be dismissed for want of jurisdiction. The appeal from the determination having been timely filed, the Appeal Tribunal must proceed to rule on the issue of whether the protest of the initial claim had been timely filed or not. (Note: If, in such case, the Appeal Tribunal finds that the protest of the initial claim has been timely filed, the Appeal Tribunal should proceed to rule on the substantive issues presented by the case.)

Appeal No. 3230-CA-76. On June 29, the claimant notified Commission representatives of his change of address. On June 30, a determination of disqualification was mailed to the claimant's previously correct address, from which the claimant appealed on August 3. HELD: Since the determination of June 30 was not mailed to the claimant's correct last known address as reflected by Commission records, the requirements of Section 212.053 of the Act were not met. Accordingly, the claimant's appeal was deemed timely and jurisdiction was assumed over the merits of the June 30 determination.

Appeal No. 1733-CA-76. The employer filed a timely appeal from a determination which allowed the claimant benefits without disqualification. Thereafter, but more than twelve (14, as of September 1, 1987) days from the date of the original determination, a redetermination was issued which disqualified the claimant and protected the employer's account. Upon receiving the redetermination, the employer withdrew its appeal from the original determination. HELD: The redetermination was void under Section 212.054 of the Act since it was issued more than twelve calendar days after the original determination. Since the employer was misled by the invalid redetermination into withdrawing his timely appeal from the original determination, the employer's withdrawal of his appeal was set aside. The employer's timely appeal from the original determination was reinstated and the case remanded to the Appeal Tribunal for a hearing and decision on the merits.

## APPEALS POLICY AND PRECEDENT MANUAL

## PROCEDURE

PR 430.30 (7)

**PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW**

Appeal No. 1475-CA-76. A protest of a Notice of Maximum Potential Chargeback, postmarked within twelve (14, as of September 1, 1987) calendar days after the mailing of a B-33 (Notice of Claim Determination) which is adverse to the employer and which involves the same claimant and the same separation will be treated as a timely appeal from the B-33.

Appeal No. 436-CA-76. A late appeal will be deemed timely, and jurisdiction taken on the merits, if the untimeliness of the appeal is the direct result of the instructions, erroneous or otherwise, of a Commission representative.

Appeal No. 3501-CSUA-75. Where a claimant does not file a timely appeal from a determination of disqualification or ineligibility which effectively determines that the claimant was not entitled to benefits already received, the subsequent overpayment determination resulting therefrom must be affirmed.

Appeal No. 1489-CA-72. On August 9, a determination was mailed to the claimant, holding him ineligible as not available for work within the meaning of Section 207.021(a)(4) of the Act. On that same day, unaware of the adverse determination which had been mailed to him that day, the claimant visited the TWC local office to file a claim and stated he was available for work. The claimant did not file a separate written appeal until after the expiration of the statutory appeal period. HELD: The fact that the claimant came into the local office on the same day the adverse determination was mailed to him and made a statement in connection with the filing of a weekly claim, which contradicted the holding in the adverse determination, would not suffice to give the claimant a timely appeal.

Appeal No. 1583-CA-71. An employer has twelve (14, as of September 1, 1987) days to file an appeal from a determination charging his account. If the determination does not show the employer's correct account number, the employer is not limited by the twelve (14, as of September 1, 1987) day appeal period.

## APPEALS POLICY AND PRECEDENT MANUAL

### PROCEDURE

PR 430.30 (8)

#### PR TAKING AND PERFECTING PROCEEDINGS FOR REVIEW

Appeal No. 531-CA-71. An appeal must be considered timely filed when it is dated within the statutory time limit and the party testifies he placed it in a post office box on the last day for filing a timely appeal.

Appeal No. 3617-AT-69 (Affirmed by 454-CA-69). Filing an appeal with an attorney engaged by a party does not constitute filing an appeal with the Commission. The Appeal Tribunal has no jurisdiction over the merits of the case when the appeal is not made to the Commission or its representative within the statutory time limit.

Appeal No. 397-CA-68. In cases involving forfeiture of benefits, an appeal is considered timely when the file clearly reflects the party did not receive notice of such forfeiture and filed an appeal promptly upon learning of the forfeiture. Frequently, the individual is no longer in claim status and has no reason to be expecting to receive information from the Commission.

Appeal No. 987-CA-67. If a claimant does not request a hearing within the statutorily specified number of days from the date a Section 214.003 determination was mailed, even though it was received in time to do so, the forfeiture determination becomes final and the Appeal Tribunal has no jurisdiction over the merits of the case.

Also see Appeal Nos. 702-CAC-78 and 1843-CA-74 under PR 405.15 and Appeal No. 530-CA-78 under PR 275.00.

## APPEALS POLICY AND PRECEDENT MANUAL

### PROCEDURE

PR 440.00 - 440.10

<b>PR PROCEDURE IN SPECIAL CASES</b>
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**PR 440.00 PROCEDURE IN SPECIAL CASES.**

**440.10 PROCEDURE IN SPECIAL CASES: FINALITY OF FINDINGS OF FEDERAL EMPLOYING AGENCY.**

INCLUDES CASES WHICH DISCUSS THE FINALITY OF FINDINGS OF THE FEDERAL EMPLOYING AGENCY.

Section 313 of the Unemployment Compensation Amendments of 1976, P.L. 94-566 enacted October 20, 1976, provides that Section 8506(a) of Title 5 of the United States Code is amended by striking out the fifth sentence. The deleted sentence reads as follows:

"Findings made in accordance with the regulations are final and conclusive for the purpose of Sections 8502(d) and 8503(c) of this title."

Based on the 1976 Amendments, federal findings as to period of federal service, amount of federal wages and reasons for termination of federal service that are made by federal agencies after October 20, 1976, are no longer final and conclusive for purposes of determining entitlement of UCFE claims. UCFE claims will now be subject to the same administrative procedure applicable to regular UI claims.

However, any determination or decision as to what constitutes "federal service" and "federal wages" and the state to which federal service and wages are assigned, shall continue to be based upon federal law and regulations and as the Secretary of Labor may direct.



**APPEALS POLICY AND PRECEDENT MANUAL****PROCEDURE**

PR 450.00 - 450.10

**PR PROCEDURE IN SUBSECTION 214.003 CASES****PR 450.00 PROCEDURE IN SUBSECTION 214.003 CASES.****450.10 PROCEDURE IN SUBSECTION 214.003 CASES: FAILURE OR REFUSAL TO TIMELY APPEAL OR FAILURE TO APPEAR IN RESPONSE TO NOTICE.**

INCLUDES CASES WHICH DISCUSS EFFECT OF FAILURE OR REFUSAL TO APPEAL OR FAILURE TO APPEAR IN 214.003 CASES.

Appeal No. 1551-CA-77. The claimant (a non-English speaker) received a notice of forfeiture of benefits. He sought assistance from a Notary Public who informed him he need not take any action. His late appeal was dismissed by the Appeal Tribunal. HELD: Section 214.003 provides for the forfeiture of benefits to become effective only after a claimant has been afforded the opportunity for a fair hearing. Since the claimant acted prudently in seeking assistance in reading the determination and relied to his detriment on that assistance, he was denied his opportunity for a fair hearing. The Commission, therefore, considered the case on its merits. (Also digested under MS 340.05).

Appeal No. 1791-CA-77. A notice of cancellation of benefit rights under Section 214.003 of the Act was mailed to the claimant's correct last address. The claimant filed a late appeal, the Appeal Tribunal dismissed for lack of jurisdiction and the Commission affirmed. The claimant then filed a late motion for rehearing which the Commission granted. The evidence in the record revealed that the application of the forfeiture provisions of Section 214.003 had been based on erroneous information furnished by an employer (seemingly indicating that the claimant had failed to report earnings on certain claims when, in fact, the claimant had not been employed or receiving wages.) HELD: Clearly, the claimant did not comply with the provisions of Sections 212.053 and 212.153 of the Act regarding time limitations on appeals and motions for rehearing. However, the Legislature recognized the severity of Section 214.003's penalties when it made the specific provision therein that forfeiture or cancellation may be effective only after opportunity for a fair hearing has been afforded the claimant. Since the application of Section 214.003 was based on erroneous information, the claimant's failure to file a timely appeal or a timely motion for re-

**APPEALS POLICY AND PRECEDENT MANUAL**

**PROCEDURE**

**PR 450.00 - 450.10**

**PR PROCEDURE IN SUBSECTION 214.003 CASES**

Appeal No. 1791-CA-77.

(con't)

hearing should not preclude reversing the application of Section 214.003 in order to correct the error.

Appeal No. 7404-CA-60. Claimant was given an opportunity for a fair hearing and provisions of Section 214.003 were applied without a hearing when claimant refused to appear for hearing because he objected to statements on the notice of hearing.