IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph P. Dull, d/b/a Dull's Auto Wreckers, Petitioner	:	
v.	:	No. 1266 C.D. 2009
Department of Labor and Industry, Office of Unemployment Compensation Tax Services, Respondent	:	Submitted: December 31, 2009

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: March 5, 2010**

In this appeal, Joseph P. Dull, d/b/a Dull's Auto Wreckers (DAW) asks whether the Department of Labor and Industry (Department) erred in denying its request for a reassessment of unemployment compensation taxes. The dispute concerns whether individuals who perform services for DAW are employees and, therefore, subject to unemployment compensation taxes or, independent contractors and, therefore, not subject to such taxes. Determining the individuals at issue were employees rather than independent contractors, the Department assessed taxes against DAW. Upon review, we affirm.

In November 2006, the Department's Office of Unemployment Compensation Tax Services issued an assessment of unemployment compensation taxes due from DAW, based on an initial determination that individuals performing

services for remuneration for DAW were his "employees" under the Unemployment Compensation Law[1] (UC Law). The assessment included the tax periods for the first quarter of 2002 through the second quarter of 2006. DAW timely petitioned for reassessment on the ground the workers for whom contributions were assessed did not qualify as "employees." A hearing ensued before a hearing officer appointed by the Department.

Testifying at the hearing were Doris Rose, a UC Tax Office Manager who audited DAW's records, DAW's owner, Joseph Dull, his son Brad Dull, his daughter Jolene Dull and his nephew Shawn Dull.

The Department subsequently issued a decision in which it made numerous findings regarding the individuals covered by the audit. These findings may be summarized as follows.

Joseph Dull is the sole proprietor of DAW, a business engaged in auto wrecking, auto repair, auto parts salvage, towing and used car sales. DAW pays remuneration to a number of individuals who perform a variety of services in the operation of the business. After receiving an anonymous tip that DAW made payments for services that were not reported as payroll, the Office of UC Tax Services conducted an audit and investigation and subsequently issued its assessment of additional taxes owed.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §§751–914.

Based on her audit and investigation, the UC Tax Office Manager testified that she found DAW made payments to a number of individuals for various services performed.

In response, Joseph Dull acknowledged he never paid "wages" to any individuals who performed services for DAW, but rather these individuals were always paid "on a 1099 basis." Hearing of 5/16/07, Notes of Testimony (N.T.), at 33. Dull is not frequently present on the premises of the business; instead, he relies on the workers, primarily his son and daughter, to operate the business.

DAW pays individuals by the hour at rates determined by experience and services performed; individuals use time cards and are paid on a weekly basis. Individuals who perform services for DAW do not work fixed schedules as DAW has no standard business hours. According to Joseph Dull, individuals come and go and take time off at their own discretion.

DAW provides uniforms, although not all workers choose to wear a uniform. DAW does not provide health insurance. DAW provides liability insurance for the business as is required to maintain its state inspection license. Sales tax is charged on parts sales and mechanical work under DAW's sales tax license. Individuals who perform mechanical and repair work are required to use their own tools, but workers frequently share tools.

Brad Dull, Joseph Dull's son, operates the salvage yard and works between 35 and 45 hours a week. Both he and Joseph hold auto sales licenses and

attend auto salvage auctions. Brad occasionally performs work for other entities, including assisting contractors and locating vehicles for another auto business.

Shawn Dull, Joseph Dull's nephew, works for DAW as a mechanic, and also performs work for other entities, including working with a contractor and at a transmission shop. Shawn's duties include estimating the cost of repairs, performing repairs and collecting the charges billed to customers. Shawn estimates he performs work for DAW for 30 to 40 hours a week; on occasion he helps other relatives in their businesses. He does not carry his own liability insurance.

Although Joseph Dull is the only individual who sells used cars, his brother Robert purchases salvage cars for DAW and paints and repairs vehicles. Robert also buys wrecked campers which he repairs and fixes as B & S Camper Sales.

Dull's daughter Jolene Dull works in DAW's business office, keeping records, paying bills and performing automobile title work, including notary work, as well as cleaning and working on cars. She has her own title transfer business that is separate from the notary services she performs for DAW. Additionally, Dull's other daughter, Jessica, answers the phone in the office approximately 20 hours per week.

Another individual who performed work for DAW, Arthur Beaner, previously owned his own body shop, which he operated in a small building on

DAW's premises, but not as part of DAW's business. When Beaner had no work, he would sand and paint cars in DAW's facility for an hourly wage. Beaner also performed services for another car business.[2]

Ultimately, the Department denied DAW's petition for reassessment. It determined that DAW did not meet its burden of proving the services performed by the individuals covered by the assessment satisfied the exclusionary provisions of Section 4(*l*)(2)(B) of the UC Law (delineating what constitutes "employment" under the UC Law).[3] DAW appealed to this Court.

On appeal,[4] DAW contends the Department misapplied the case law and statutory authority to the facts presented. Specifically, it argues the Department erred in determining the individuals at issue are DAW's "employees." DAW further asserts the Department erred in determining the evidence presented was insufficient to support a conclusion that the services performed by the

[2] Several other individuals also performed services for DAW. Craig Smith performed work for DAW during periods of layoff from his regular employment. Remington Stufft performed undefined work for DAW. David Mock assisted Brad Dull in DAW's salvage yard. Mark Mock, a school teacher, performed work on cars during the winter months. Dennis Mock worked in both the body shop and performed some mechanical work. Shane Jarratt worked for Dull during his summer vacation, performing roof tarring and salvage yard cleanup.

[3] In addition to the individuals discussed above, the assessment originally included Justin Mock. The Department found payments to Justin Mock were not "wages" for unemployment compensation tax purposes. The status of this individual is not at issue in this appeal.

[4] Our review is limited to determining whether necessary findings were supported by substantial evidence, whether the Department committed an error of law, or whether the petitioner's constitutional rights were violated. Victor v. Dep't of Labor & Indus., 647 A.2d 289 (Pa. Cmwlth. 1994).

individuals satisfied the exclusionary provisions of Section 4(*l*)(2)(B) of the UC Law. DAW argues it presented sufficient evidence to justify such a conclusion and to establish all the individuals are independent contractors rather than employees. DAW thus argues the Department's decision is not supported by substantial evidence and is not in accordance with the UC Law.

Section 4(*l*)(2)(B) of the UC Law provides:

> Services performed by an individual for wages shall be deemed to be employment subject to this act, unless and until it is shown to the satisfaction of the department that – (a) such individual has been and will continue to be free from control or direction over the performance of such services both under his contract of service and in fact; and (b) as to such services such individual is customarily engaged in an independently established trade, occupation, profession or business.

43 P.S. §753(*l*)(2)(B). The burden to overcome the "strong presumption" that a worker is an employee rests with the employer. See Sharp Equip. Co. v. Unemployment Comp. Bd. of Review, 808 A.2d 1019, 1024 (Pa. Cmwlth. 2002). To prevail, an employer must prove: (i) the worker performed his job free from the employer's control and direction, and (ii) the worker, operating as an independent tradesman, professional or businessman, did or could perform the work for others, not just the employer. Venango Newspapers v. Unemployment Comp. Bd. of Review, 631 A.2d 1384 (Pa. Cmwlth. 1993). "[T]his two-pronged test is conjunctive and both prongs must be satisfied in order for persons rendering services for wages to be considered independent contractors." Electrolux Corp. v. Dep't of Labor & Indus., Bureau of Employer Tax Operations, 705 A.2d 1357, 1360 (Pa. Cmwlth. 1998). Thus, "unless the employer can show that the

employees are not subject to his control and direction and are engaged in an independent trade, occupation or profession, then he cannot come within the exemption …." C.A. Wright Plumbing Co. v. Unemployment Comp. Bd. of Review, 293 A.2d 126, 129 (Pa. Cmwlth. 1972).

As to the first element, findings regarding the actual working relationship between worker and employer determine whether this element is satisfied. To that end, our Supreme Court instructs:

> While no hard and fast rule exists to determine whether a particular relationship is that of employer-employee or owner-independent contractor, certain guidelines have been established and certain factors are required to be taken into consideration:
>
> 'Control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one employed is engaged in a distinct occupation or business; which party supplies the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer, and also the right to terminate the employment at any time.'

Hammermill Paper Co. v. Rust Eng'g Co., 430 Pa. 365, 370, 243 A.2d 389, 392 (1968). "Because each case is fact specific, all of these factors need not be present to determine the type of relationship which exists." York Newspaper Co. v. Unemployment Comp. Bd. of Review, 635 A.2d 251, 253 (Pa. Cmwlth. 1993).

Further, "[w]hile all of these factors are important indicators, the key element is whether the alleged employer has the *right* to control the work to be

done and the manner in which it was performed. If the alleged employer has this right, an employer-employee relationship likely exists." Id. (emphasis in original). Thus, an employer-employee relationship likely exists not only where the employer actually exercises control, but also where it possesses the right to do so. Victor v. Dep't of Labor & Indus., 647 A.2d 289 (Pa. Cmwlth. 1994); Zotis Enters., Inc. v. Dep't of Labor & Indus., 635 A.2d 698 (Pa. Cmwlth. 1993). As such, the ability to control the business and not actual control, is determinative of whether one should be considered self-employed. Id. Indeed, in Biter v. Department of Labor & Industry, 395 A.2d 669, 670 (Pa. Cmwlth. 1978), this Court, speaking through Judge Mencer, stated (with emphasis added): "It is well established that one need not [a]ctually exercise control in order to be considered an employer; rather, the mere right or authority to exercise control or interfere with the work creates an employment relationship."

As to the second element, two important factors are considered. More particularly, we look to "whether the individual was capable of performing the activities in question for anyone who wished to avail themselves of the services and whether the nature of the business compelled the individual to look to only a single employer for the continuation of such services." Venango, 631 A2d at 1388.

A determination regarding the existence of an employer/employee relationship is a question of law that depends on the unique facts of each case. Resource Staffing, Inc. v. Unemployment Comp. Bd. of Review, 961 A.2d 261 (Pa. Cmwlth. 2008). Of further note, in American Diversified Corp. v. Bureau of

Employment Security, Department of Labor & Industry, 275 A.2d 423, 426 (Pa. Cmwlth. 1971), this Court explained:

> The [UC Law] goes very far, and properly so, and places a very heavy burden on the applicant when it makes payment to anyone who has performed … services to excuse or exempt that payment from the unemployment compensation tax. Few indeed are the instances where that burden can be met ….

Here, the Department made specific findings concerning each of the 23 individuals on whom the UC Office Tax Manager focused her audit inquiry, explaining, in a 24-page decision, the specific evidence supporting the ultimate determination that DAW did not prove the individuals who performed services for it were independent contractors. Upon review, we discern no error in the Department's determinations.

As to the first element, we agree with the Department that DAW did not satisfy its burden of proving that it did not retain the right to control the services of the individuals. To that end, although Joseph Dull testified that he is frequently not present at DAW's facilities and that he relies on other individuals, primarily his relatives, to operate the business, his testimony indicates he could control the individuals that perform services for DAW. Specifically, on cross-examination, Joseph Dull testified:

> Q. Does [the fact that no one is typically at the garage] cause a problem for you?
>
> A. It's very frustrating. But I say they are self-employed, what do I do? Do I fire them? You can't fire somebody you didn't hire. So you either – I could say to

my son, well, you're no longer needed and I'd say now, what do I do with this salvage yard.

* * * *

Q. Well, if you were a different kind of business person don't you think you could require them to have particular hours?

A. Yeah, definitely.

* * * *

A. … They might be on the clock and not there down the road doing something else that's not for me but ---.

Q. And you know this?

A. Yeah, and I pay them.

Q. Any you pay them anyway.

A. Yeah.

Q. But you don't have to take that; do you?

A. No I don't have to. They are my relatives. They're drones.

Q. I mean it is your business?

A. Yeah, I think.

Q. And you could say more about what goes on there?

A. Yes, I could.

Q. Okay. I mean you do feel you have that kind of power; right?

A. Oh, yeah, without a doubt.

N.T. at 52-53, 60-61, 62-63 (emphasis added). Thus, although Joseph Dull testified that he is frequently not present at the business and that he leaves the operation of the business to others, the above-excerpted testimony reveals Dull retained the right to exercise control over the individuals at issue. Moreover, even though Joseph Dull is frequently absent from the business premises, our review of the record reveals the services performed by the individuals at issue are fully integrated into, and are, in essence, the core of DAW's business. The services are conducted by individuals, primarily Joseph Dull's relatives, who require little day-to-day direction. Essentially, Joseph Dull's relatives operate the business. As such, we discern no error in the Department's determination that DAW did not meet its burden of proving that it lacked the ability to control the work performed.

In addition, our review of the record confirms the Department's determination that DAW did not satisfy the second element, that the individuals at issue were engaged in an independently established trade, occupation, profession or business.

Our Supreme Court analyzed this second element in Danielle Viktor, Ltd. v. Department of Labor & Industry, 586 Pa. 196, 892 A.2d 781 (2006), in which the Court considered whether limousine drivers were independent contractors or employees. Concluding the drivers were independent contractors, the Court explained:

> The relevant word that we must analyze . . . is "independent" . . . Webster's Third New International Dictionary defines 'independent' as, *inter alia*:

> not dependent: as . . . not subject to control by others: not subordinate: self-governing, autonomous, free . . . not affiliated with or integrated into a larger controlling unit (as a business unit) . . . not requiring or relying on something else (as for existence, operation, efficiency).

Webster's Third New International Dictionary 1148 (1986).

"Dependent" is defined as, *inter alia*, "unable to exist, sustain oneself, or act suitably or normally without the assistance or direction of another . . . .: connected in a subordinate relationship: subject to the jurisdiction of another." Id. at 604.

. . . .

The Commonwealth Court did not rest its determinations solely on the fact that [the] [d]rivers were free to work for more than one company. The court considered the facts that [the] [d]rivers were hired on a job-to-job basis, could refuse any assignment, and were not dependent on [the limousine companies] for ongoing employment . . . . Further, the court also specifically determined that [the] [d]rivers suffered a risk of loss if expenses exceeded income . . . .

. . . .

Neither the statute nor this Court requires an independent contractor to own all of the assets of his or her business or to bear on his or her own the full measure of financial risk of the enterprise. Rather, the unique facts of each case must be examined in order to resolve the question of employee versus independent contractor status . . . .

. . . .

The record supports the holdings of the Commonwealth Court that [the limousine companies] demonstrated that [the] [d]rivers met subsection (b), for

> several reasons, including: (1) the [d]rivers' ability to perform their services for more than one entity, including competitors, with no adverse consequences; (2) the operation of their businesses and their ability to perform work did not depend on the existence of any one of the [limousine companies]; and (3) the fact that [the] [d]rivers bring all necessary perquisites of providing driving services to limousine companies, even though they do not own the limousines or bear all of the financial risk. (citations omitted and emphasis added).

Id. at 218-23, 229-30, 892 A.2d at 794-97, 801-02.

Unlike the limousine drivers in Viktor, the individuals who perform services for DAW are not hired on a job-to-job basis. To the contrary, the record reveals several of the individuals work full-time for DAW. N.T. at 69, 79, 93-94, 102. Further, DAW did not present evidence that other individuals who worked less than full-time performed distinct assignments by the job. Also, DAW presented no evidence that any of the individuals could or did refuse any specific work assignment.

Moreover, the services performed for DAW are performed on premises owned by DAW, using equipment and facilities owned by DAW, even though most of the individuals provide their own hand tools. N.T. at 30-32, 120-122. The individuals who perform services for DAW receive weekly paychecks based on an hourly wage, and some of the individuals receive reimbursement for expenses related to the business. N.T. at 36, 96, 100. Additionally, Joseph Dull testified he provides vacation pay to the individuals who perform services for DAW. N.T. at 62. A review of the record in its entirety reveals that, rather than acting as self-employed, independent contractors, the individuals operate DAW's

business in Joseph Dull's absence. The record further indicates, as to the services performed, the individuals look to DAW for the continuation of those services, and several of those individuals rely on DAW for their livelihood. Indeed, the individuals who testified at the hearing indicated they performed work for DAW for approximately 20 years. N.T. at 68, 77, 88. For these reasons, we discern no error in the Department's determination that DAW failed to satisfy the second element of Section 402(*l*)(B)(2) of the UC Law.

In conclusion, we note, DAW does not dispute any of the Department's findings, and it cites no evidence in support of its general conclusion that the individuals at issue are, in fact, free from DAW's control or that the individuals are engaged in their own independent businesses. Based on our review of the record and the law in this area, we discern no error in the Department's determinations that DAW failed to overcome the presumption that the individuals who perform services for it are, in fact, DAW's employees.

Accordingly, we affirm.

ROBERT SIMPSON, Judge

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v.	:	No. 1266 C.D. 2009
Department of Labor and Industry, Office of Unemployment Compensation Tax Services, Respondent	:	

O R D E R

AND NOW, this 5th day of March, 2010, the order of the Pennsylvania Department of Labor and Industry is **AFFIRMED**.

ROBERT SIMPSON, Judge