

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paul Howells, :
 :
 Petitioner :
 :
 v. : No. 1283 C.D. 2009
 :
 Unemployment Compensation : Submitted: February 12, 2010
 Board of Review, :
 Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE JOHNNY J. BUTLER, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE KELLEY

FILED: May 20, 2010

Paul Howells (Claimant), *pro se*, petitions for review of an order of the Unemployment Compensation Board of Review (Board) which affirmed an order of a Referee pursuant to the Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §§ 751-914. The Referee’s order affirmed a denial of benefits under the Law made by an Unemployment Compensation Service Center, pursuant to Section 402(h) of the Law, 43 P.S. § 802(h), which provides that an employee “shall be ineligible for compensation for any week in which he is engaged in self-employment.” We affirm.

Claimant and Erik Evans (Evans) incorporated a cubicle design and installation business together in February, 2004, in which Claimant and Evans each invested \$1500.00. Although the business was incorporated by Claimant and Evans without the assistance of counsel, the business venture appears to have been operated as a partnership, with Claimant in the role of *de facto* general partner; the share certificates supplied with the self-incorporation kit were never distributed, and no board of directors meetings were held. Claimant was listed as the president of the company, CDI Cubicle & Design Installation (CDI), was responsible for the day-to-day operations and the supervision of crews, and had substantial control and/or the right thereto as a corporate officer. Evans assumed the roles of marketing and administration, and was more often responsible for bringing in business. Under the two partners' agreement, Claimant was to receive \$500 weekly as his salary.

By July, 2007, Evans had persuaded some of the business's clients to leave and take their business to a new company under Evans' sole control. Claimant thereafter made sporadic attempts to revive the original business venture. At the time of the proceedings at issue, the partners' original venture, CDI, had not been legally dissolved and had not filed for bankruptcy. Claimant had not earned any employment wages since the formation of CDI, up to the time of his application for benefits under the Law.

Claimant filed an unemployment claim with the UC Center on August 17, 2008, and was held ineligible pursuant to Section 402(h) of the Law by

determination dated December 22, 2008. Claimant timely appealed to a Referee, and a hearing ensued at which both Claimant and his attorney appeared.

By Decision and Order dated February 13, 2009, the Referee made Findings of Fact, and affirmed the UC Center determination, reasoning that Claimant was self-employed and had become an unemployed businessman. Thusly, the Referee concluded that Claimant was ineligible for benefits under Section 402(h). Claimant then appealed to the Board, which reviewed the record in the matter, adopted and incorporated the Referee's Findings and conclusion, and affirmed the Referee's order by Board order dated May 4, 2009. Claimant now petitions this Court for review of the Board's order.

This Court's scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or necessary findings of fact were not supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Kirkwood v. Unemployment Compensation Board of Review, 525 A.2d 841 (Pa. Cmwlth. 1987).

Claimant present two issues for review: 1.) whether the Board's Findings are supported by substantial evidence, and; 2.) whether Claimant should be granted another hearing due to the conditions at his hearing.

Claimant argues that three particular Findings made by the Referee, and adopted by the Board, are not supported by substantial evidence¹ of record. Those three Findings are:

¹ Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. Hercules v. Unemployment Compensation Board of Review,

(Continued....)

5. Claimant was primarily responsible for the day to day operations and supervision of crews.

...

11. No real board of director meetings were held, and it appears the business operated in fact as a partnership until Evans left.

12. Claimant had substantial control and/or the right to exercise substantial control of the company as a corporate officer and in fact, a general partner.

Referee Decision and Order, as adopted by the Board (hereinafter, Bd. Op.), at 1-2. Our review of the record reveals substantial evidence supporting these three Findings.²

Our review of Claimant's own testimony in this matter supports the Board's Findings. Claimant testified, *inter alia*, that: he participated in the payroll and hiring functions of CDI; he was given the title of President of the company; he assigned duties and arranged scheduling; he personally owned a significant portion of the company equipment prior to incorporation; as of the time of the hearing, CDI and Claimant still have "a couple of clients"; he contributed both the experience, know-how, and \$1500 (equally with Evans) to the formation of CDI;

604 A.2d 1159 (Pa. Cmwlth. 1992).

² In its brief to this Court, the Board argues that Claimant has waived any challenges to the evidence supporting the Board's Findings by failing to expressly or properly articulate those challenges within his Petition for Review to this Court. We disagree. Claimant's Petition for Review expressly challenges whether Claimant "was not in substantial control of any portion of the business[.]" and expressly challenges "the finding of the [R]eferee that [Claimant] was self-employed." Notwithstanding Claimant's failure to articulate these challenges in terms of their numbered Findings, Claimant clearly has preserved for review the language of the challenged Findings, and the evidentiary support thereof.

no one else besides he and Evans were involved in the corporation; he filed his taxes as the president of CDI; Evans was listed as an employee of CDI; Evans did not correct Claimant's work, or tell him that work needed to be done differently; he and Evans both determined payroll amounts, and both were listed on the corporate bank account; he signed the insurance premium checks, and; he unilaterally had Evans' name removed from the bank account. Original Record, Transcript of Proceedings at 3-5, 13, 15-18. Of noteworthy import is the following exchange between the Referee and Claimant:

Referee: Any showing that [C]laimant didn't have the right to exercise the degree of control that he was entitled to? Whether or not he chose to do so?

Claimant: I chose to do so.

Id. at 21 (emphasis added). The above cited testimony, as well as our review of the record as a whole including Claimant's testimony as to Evans' roles and duties in CDI, constitute substantial evidence supporting the Board's Findings Nos. 5, 11 and 12. Hercules.

We note that a substantial portion of Claimant's challenges to the noted Findings consists of his citation to selected portions of his testimony that support contrary findings, in Claimant's favor, that were not made in this matter, including Claimant's preferred findings that he was not in substantial control of the business, and that he had a subordinate role in the business and to Evans. However, it is irrelevant whether the record contains evidence to support findings other than those made by the Board in its role as fact-finder; the critical inquiry is

whether evidence of record exists supporting the findings that were actually made. Ductmate Industries, Inc. v. Unemployment Compensation Board of Review, 949 A.2d 338 (Pa. Cmwlth. 2008). Where substantial evidence supports the Board's findings, they are conclusive on appeal. Id. As such, Claimant's arguments on this issue are without merit.

Claimant next argues that the Board erred as a matter of law in failing to apply the doctrine articulated in Starinieri v. Unemployment Compensation Board of Review, 447 Pa. 256, 289 A.2d 726 (1972). In Starinieri, our Supreme Court held that a self-employed person who becomes an "unemployed businessman" is ineligible to receive unemployment compensation under Section 402(h) of the Law. Starinieri advanced a test for determining whether an unemployed corporate employee is a businessman, and therefore not entitled to compensation benefits: whether the employee exercises a substantial degree of control over the corporation. Starinieri, 447 Pa. at 260, 289 A.2d at 728.

Claimant's argument on this point is without merit, given the Board Finding, supported by substantial evidence of record as noted above, that Claimant had substantial control, or the right thereto, over CDI as a corporate officer and/or *de facto* general partner thereof. Bd. Op., at 1. Given that Finding on Claimant's substantial control, Claimant's requested application of the Starinieri doctrine yields the same result; Claimant is not entitled to benefits under Section 402(h) of the Law. As such, to the extent that the Board's failure to expressly apply the Starinieri doctrine can, *arguendo*, be seen as an error, the result is the same, and any such error is harmless and without prejudice to Claimant. Generally stated,

where the Board has based its decision on a differing theory, but with the proper result, no reversal is required where the critical facts underlying the claimant's eligibility remained the same at all times, there was no shifting of any burden of proof, and there was no surprise and/or prejudice to the claimant. See generally, Hine v. Unemployment Compensation Board of Review, 520 A.2d 102 (Pa. Cmwlth. 1987).

Next, Claimant argues that he should be granted another hearing due to “unfavorable conditions” at the hearing before the Referee. Claimant asserts that when arriving for his scheduled hearing, he was informed that a different Referee than the one originally scheduled would preside over the hearing. The replacement Referee suffered from a respiratory condition requiring certain environmental conditions that normally are accompanied by specific advance instructions from the Referee to accommodate those conditions, which advance instructions Claimant did not receive in this case. Claimant presents two related issues hereunder.

First, Claimant notes that his girlfriend was excluded from the hearing room due to her recent use of cigarettes. Claimant argues that his girlfriend's presence during the hearing could have resulted in her participation as a witness, in furtherance of his case. Claimant, however, has waived this argument. Claimant has failed to cite to any place in the record – and our review thereof reveals no place therein – where Claimant objected to the exclusion of his girlfriend's participation in the hearing, or where Claimant attempted to offer her as a witness in the proceeding. As such, Claimant has waived this argument on appeal. Where

a claimant fails to raise an issue before a referee when he has an opportunity to do so, that issue is waived for purposes of subsequent appellate review. Dehus v. Unemployment Compensation Board of Review, 545 A.2d 434 (Pa. Cmwlt. 1988).

Secondly, Claimant argues that the Referee's use of an air purifier made it difficult for the parties to hear the testimony, resulting in a transcript of proceedings with omissions and inaudible breaks. Claimant argues that the lack of notice of these conditions resulted in a difficult and unfair hearing. Claimant, however, has also waived this argument by failing to raise it before the Referee. Dehus.

Claimant also argues that the resultant transcript of proceedings, with its multiple omissions and inaudible gaps, mandate remand for a new hearing. Claimant argued this issue to the Board and requested that the matter be remanded, which request the Board denied. To the extent that Claimant is arguing that the record precludes an effective review of his appeal because of the omissions, we note that the Board addressed this argument, and concluded that it was able to obtain the necessary information of record to effect its determination.³ We have previously recognized that the Board has an affirmative duty to ascertain all

³ We emphasize that to the extent that Claimant argues that the record omissions preclude his own execution of his appeal, we disagree. Claimant has not advanced even one example of where or how an omission has prejudiced the preparation of his case. Further, our review reveals that the omissions in the testimony do not render the testimony as a whole without meaning, and do not preclude the reader from ascertaining the witness's meaning. As such, no remand is necessary. See W. C. McQuaide, Inc. v. Unemployment Compensation Board of Review, 413 A.2d 14 (Pa. Cmwlt. 1980).

information relevant to determining a claim properly, and we have concomitantly held that in our appellate function, we will not reverse the decision of the Board in determining the need for a remand directed towards that purpose, absent an abuse of discretion. Kiehl v. Unemployment Compensation Board of Review, 747 A.2d 954 (Pa. Cmwlth. 1999). In the matter *sub judice*, Claimant has not argued that the Board abused its discretion⁴ in failing to remand this matter; additionally, our review of the record herein reveals no such abuse of discretion.

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

⁴ An abuse of discretion occurs if the Board's decision demonstrates evidence of bad faith, fraud, capricious action, or an abuse of power. Enslie v. Unemployment Compensation Board of Review, 740 A.2d 775 (Pa. Cmwlth. 1999).

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 20th of May, 2010, the order of the Unemployment Compensation Board of Review, dated May 4, 2009, at B-09-09-B-0173, is affirmed.

JAMES R. KELLEY, Senior Judge