

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Marion Shultz,	:	
Petitioner	:	
	:	
v.	:	No. 1324 C.D. 2009
	:	
Unemployment Compensation	:	Submitted: November 25, 2009
Board of Review,	:	
Respondent	:	

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: January 7, 2010**

Marion Shultz, representing herself, petitions for review from an order of the Unemployment Compensation Board of Review (Board) that ruled her ineligible for unemployment compensation benefits under Section 402(h) of the Unemployment Compensation Law (Law).<sup>1</sup> The Board found Clamant ineligible because she was a self-employed, independent contractor while delivering newspapers for Ottaway Newspapers of Pennsylvania, LP, d/b/a the Pocono Record (Employer). Discerning no error in the Board’s determination, we affirm.

The Board found the following facts. Beginning in 1989, Claimant delivered newspapers for Employer. In January 2006, Claimant signed an

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §§802(h). Section 402(h) provides “[a]n employe shall be ineligible for compensation for any week ... [i]n which he is engaged in self-employment ....” 43 P.S. §802(h).

independent contractor agreement with Employer. That agreement assigned Claimant a specific delivery area and provided Employer would pay Claimant based on the number of newspapers she delivered. Claimant used her personal vehicle to deliver the newspapers. Claimant had a timeframe in which she was to complete her deliveries. The independent contractor agreement allowed Claimant to have someone else deliver the newspapers, and Claimant did so and paid that individual out of her own compensation. Claimant received a Form 1099 for tax purposes. In addition, under the terms of the agreement, Employer permitted Claimant to perform services for any other entity. Employer terminated Claimant's contract on October 26, 2008, for allegedly poor customer service.

In December 2008, Claimant applied for unemployment benefits, which were initially granted pursuant to Section 402(e) of the Law, 43 P.S. §802(e) (relating to willful misconduct) as well as the Emergency Unemployment Compensation Act of 2008.<sup>2</sup> Employer appealed that determination to a referee, who held a hearing at which Claimant and two witnesses for the newspaper, with counsel, appeared and testified. Ultimately, the referee issued a decision affirming the initial grant of benefits under Section 402(e).

Employer appealed, asserting the referee erred in failing to consider this case under Section 402(h) of the Law; the Board agreed and remanded the case for consideration under Section 402(h). After the remand hearing, the Board issued a decision in which it denied benefits under Section 402(h). The Board stated:

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<sup>2</sup> See 26 U.S.C. §3304.

[C]laimant controlled the manner in which she performed her newspaper route within the parameters of her contract. She used her own vehicle and she was free to subcontract the route to someone else if she chose. She was paid by the amount of newspapers delivered, rather than hourly. [C]laimant was also free to deliver newspapers for any other entity.

The facts of this case are nearly identical to [Venango Newspapers v. Unemployment Comp. Bd. of Review, 631 A.2d 1384, 1387 (Pa. Cmwlth. 1983)]. The court held in that case that the newspaper carrier was an independent contractor because the carrier controlled the means of delivery and was not restricted to working for one newspaper. Therefore, [C]laimant is denied benefits under Section 402(h) of the Law.

Bd. Op., 6/10/09, at 2. Claimant petitions for review.<sup>3</sup>

While not entirely clear,<sup>4</sup> we discern two issues from Claimant's petition for review and brief: whether the Board had authority to remand the matter after the referee's initial grant of benefits; and, whether the Board properly

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<sup>3</sup> Our review is limited to determining whether the Board's findings were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008). The party that prevailed below is entitled to the benefit of all reasonable inferences drawn from the record. Id.

<sup>4</sup> In her brief, Claimant asserts she previously received unemployment compensation benefits based on her separation from employment with a different employer in 2006. As the Board notes in its brief, however, Claimant's prior separation from a different employer and her claim for unemployment benefits in connection with that separation are not at issue here. Further, although Claimant briefly mentioned this issue at the remand hearing, she did not develop this issue in any cognizable manner. As such, it is not surprising that the Board's decision makes no mention of Claimant's prior claim. In short, because Claimant's prior claim is not before this Court, we will not address that issue here.

determined Claimant was a self-employed, independent contractor rather than one of Employer's employees.

As to whether the Board properly remanded this matter, we note, under the Law, the Board has the discretion to determine whether a remand is appropriate. Section 504 of the Law, 43 P.S. §824; Kiehl v. Unemployment Comp. Bd. of Review, 747 A.2d 954 (Pa. Cmwlth. 1999). Therefore, we will not reverse a decision granting a remand absent an abuse of discretion. Kiehl.

Section 504 of the Law states, in relevant part:

The board shall have power, on its own motion, or on appeal, to remove, transfer, or review any claim pending before, or decided by, a referee, and in any such case and in cases where a further appeal is allowed by the board from the decision of a referee, may affirm, modify, or reverse the determination or revised determination, as the case may be, of the department or referee on the basis of the evidence previously submitted in the case, or direct the taking of additional evidence.

43 P.S. §824. In addition, Board regulations provide:

§ 101.104. Allowance or disallowance of appeal.

(c) If the further appeal is allowed by the Board, or if the Board removes an appeal from the referee to the Board and on its own motion assumes jurisdiction of the appeal, notification shall be mailed to the last known post office address of each interested party. The Board will review the previously established record and determine whether there is a need for an additional hearing. Under section 504 of the [Law] (43 P.S. § 824), the Board may affirm, modify or reverse the decision of the referee on the basis of the evidence previously submitted in the case, or the Board may direct the taking of additional evidence, if in

the opinion of the Board, the previously established record is not sufficiently complete and adequate to enable the Board to render an appropriate decision. The further appeal shall be allowed and additional evidence required in any of the following circumstances:

- (1) Whenever the further appeal involves a material point on which the record below is silent or incomplete or appears to be erroneous. ...

34 Pa. Code §101.104(c)(1). The Board possesses wide latitude under this provision to order a remand. Stop-N-Go of W. Pa., Inc. v. Unemployment Comp. Bd. of Review, 707 A.2d 560 (Pa. Cmwlth. 1998).

Here, the UC service center and the referee granted Claimant benefits under Section 402(e) of the Law. Employer appealed these determinations, asserting Claimant was an independent contractor. Certified Record (C.R.), Item Nos. 5, 11. Additionally, through pre-hearing correspondence (sent by both e-mail and fax), Employer's counsel stated that although the referee's notice of hearing indicated Section 402(e) was at issue, Employer's position was that Claimant was an independent contractor. C.R., Item No. 8, Referee's Ex. #1, 2. After Employer appealed the referee's decision granting benefits (again raising the independent contractor issue), the Board issued an order remanding this case to a referee to act as hearing officer for the Board. C.R., Item No. 15. That order stated:

Please schedule another hearing in the above matter. The purpose of this hearing is to notify the parties that Section 402(h) is at issue. The parties may provide further testimony and evidence on this issue, or they may stipulate that the record, including the Referee's hearing on February 6, 2009, is complete.

Id.

In light of Employer's repeated assertions that Claimant was, in fact, an independent contractor rather than an employee of Employer and the referee's failure to consider the issue of Claimant's eligibility under Section 402(h) of the Law, we discern no abuse of discretion in the Board's decision to remand this matter.<sup>5</sup>

We next consider whether the Board properly determined that Claimant was self-employed and therefore ineligible for benefits under Section 402(h) of the Law.

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<sup>5</sup> We note that, although Employer did not raise the independent contractor issue in its initial questionnaire, it was not required to do so in order to properly preserve this issue. To that end, in Sharp Equipment Co. v. Unemployment Compensation Board of Review, 808 A.2d 1019 (Pa. Cmwlth. 2002), this Court stated:

[The] [e]mployer did not raise the issue of voluntary termination on the Employer's Notice of Application. However, the form is informal and is for informational purposes only. The purpose of this notice is to inform the employer that claimant has applied for unemployment benefits, and to require the employer to provide wage and length of service information needed to calculate benefits.

Further, the employer does not have to raise an issue until it is aggrieved. Here, [the] [e]mployer was not aggrieved until the Bureau rendered its decision to grant [the] [c]laimant benefits; [the] [e]mployer raised the issue of whether [the] [c]laimant voluntarily terminated her employment at its earliest opportunity by filing a Petition to Appeal. In both of its petitions, [the] [e]mployer requested the referee and the Board to address the issue of voluntarily termination.

Id. at 1027 n.13 (emphasis added) (citations omitted). Here, as in Sharp Equipment, although Employer did not raise the independent contractor issue in its initial filing, it did raise this issue in both of its appeal petitions to the referee and the Board. In so doing, Employer properly preserved this issue.

“For a claimant to be ineligible for benefits, the one against whom the claim is made has the burden to establish that the claimant was (a) free from control and direction in the performance of the work; and (b) the business is one customarily engaged in as an independent trade or business.” Venango Newspapers, 631 A.2d at 1387. “Unless both of these showings are made, the presumption stands that one who performs services for wages is an employee.” Id.

To determine whether a claimant is free from control for purposes of Section 4(l)(2)(B) of the Law<sup>6</sup> (delineating what constitutes “employment” under the Law), we look to how the claimant performed the job and other factors such as a fixed rate of remuneration, whether taxes were deducted from the claimant’s pay, whether the employer supplied the necessary tools, whether the employer offered on the job training, and the employer’s job requirements. Id. (citing Pavalonis v. Unemployment Comp. Bd. of Review, 426 A.2d 215 (Pa. Cmwlth. 1981)).

Our decision in Venango Newspapers is controlling. There, two claimants contracted with Venango to deliver newspapers to Venango’s subscribers. In holding that the claimants were independent contractors rather than Venango employees, this Court applied the two-pronged test delineated in Section

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<sup>6</sup> Section 4(l)(2)(B), 43 P.S. §753(l)(2)(B), relevantly 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.

4(l)(2)(B), to the facts found by the Board. As to the first prong (whether the claimants were free from control and direction in the performance of the work), the Board's findings revealed: Venango did not provide the claimants with any training; Venango did not directly supervise the claimants, but rather the claimants could complete their deliveries in any manner they chose; Venango required the claimants to use their own vehicles for deliveries; Venango computed the claimants' wages by papers delivered rather than an hourly wage, from which no taxes were deducted; and, the claimants were free to hire and pay subcontractors. The findings further indicated the only control exercised by Venango was over the territory the claimants could cover, the time for picking up the newspapers, and the requirement that the claimants provide prompt, dependable delivery. As to the second prong (whether the business is one customarily engaged in as an independent trade or business), this Court pointed out that the claimants were free to perform services for anyone who wished to contract with them, even Venango's competitors. In addition, this Court noted, the business of delivering newspapers is, by its very nature, not limited to a single employer. Based on these facts, this Court concluded the claimants were independent contractors.

The facts here are virtually identical to those in Venango Newspapers. In particular, Claimant testified she delivered a set number of newspapers each day. Notes of Testimony (N.T.), Hearing of 2/6/09, at 18. Employer paid Claimant per paper delivered. N.T. at 17-18. Claimant delivered the newspapers using her own vehicle and paid her own insurance for that vehicle. N.T. at 18. Claimant was permitted to, and did, in fact, use a substitute delivery person for her route. N.T. at 18-19. Claimant also acknowledged Employer issued her a Form 1099 for tax purposes. N.T. at 19. Also, at the remand hearing, Claimant



acknowledged she changed from being one of Employer's employees to a "contracted driver" in 2005. N.T., Hearing of 4/24/09, at 2.

In addition, Claimant's supervisor testified carriers who deliver newspapers for Employer are independent contractors, and Employer did not control the manner of delivery other than setting forth a required pick-up time and requiring prompt service. N.T. at 3, 6. Further, Claimant's supervisor identified, and the referee admitted into evidence, an "Independent Contractor Home Delivery Distribution Agreement" (Agreement), a contract entered into between Employer and Claimant. Hearing of 2/6/09, Employer Ex. 1. A review of the Agreement reveals that Employer required Claimant to pick up the newspapers at a designated time and place; nevertheless, the mode, manner, method and means used by Claimant was left to her sole direction and control, Claimant retained the right to provide the same or similar services for competing and non-competing companies, Claimant was free to use a sub-contractor to perform deliveries, Claimant was required to pay all taxes, including unemployment taxes, Claimant was not required to attend Employer's meetings for its employees, and Claimant would not be subject to Employer's rules for its employees. Id.

The above-cited testimony of Claimant and her supervisor as well as the terms of the Agreement support the Board's determination that Claimant was free from Employer's direction and control in delivering newspapers. Venango Newspapers. Although Employer required Claimant to pick up the papers at a certain time, this factor does not indicate control over the rendering of a service. Id. Rather, it is merely a parameter of the contract for service between Employer and Claimant. Id. In addition, Employer did not restrict Claimant from delivering

for another company. This is sufficient to indicate Claimant was engaged in an independent delivery business. Id.

For these reasons, we conclude our decision in Venango Newspapers is controlling and the Board did not err in ruling Claimant ineligible for benefits under Section 402(h) of the Law as a self-employed, independent contractor.

Accordingly, we affirm.

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ROBERT SIMPSON, Judge

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	:	
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**ORDER**

**AND NOW**, this 7<sup>th</sup> day of January, 2010, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

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ROBERT SIMPSON, Judge