

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REG Investment Properties, LLC,	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation Board	:	
of Review,	:	No. 1685 C.D. 2010
Respondent	:	Submitted: January 28, 2011

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE BUTLER

FILED: March 8, 2011

REG Investment Properties (REG) appeals the June 21, 2010 order of the Unemployment Compensation Board of Review (UCBR) affirming the decision of the Referee granting Unemployment Compensation (UC) benefits to Elizabeth Spaeder (Claimant). There is essentially one issue before the Court: whether the UCBR erred in finding that REG was Claimant's employer. For reasons that follow, we affirm the order of the UCBR.

In response to Claimant's application for Emergency Unemployment Compensation Benefits (EUC), the Lancaster UC Service Center mailed a notice of determination on February 8, 2010, granting Claimant EUC benefits under Section 402(h) of the Unemployment Compensation Law (Law).<sup>1</sup> REG appealed, and a hearing was held by a Referee on April 2, 2010, at which neither party appeared. On

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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).

April 5, 2010, the Referee mailed his decision affirming the determination of the UC Service Center to grant UC benefits. REG appealed to the UCBR. The UCBR affirmed the decision of the Referee. REG appealed to this Court.<sup>2</sup>

REG argues that it was never Claimant's employer. REG contends that the UCBR erred in not finding that Claimant was an independent contractor. We disagree.

Initially, we recognize that

[t]here is a presumption that one who performs services for wages is an employee and not an independent contractor. This presumption can be overcome *if an employer sustains its burden* in proving that a claimant was (a) free from control and direction in the performance of the work, where the ability to control and not actual control is determinative; and (b) as to such services, [claimant] was customarily engaged in an independent trade or business.

*Schneider v. Unemployment Comp. Bd. of Review*, \_\_\_ A.3d \_\_\_ (Pa. Cmwlth. No. 2238 C.D. 2009, filed June 18, 2010), slip op. at 2 (citation and quotation marks omitted) (emphasis added). In addition, “[i]f a party notified of the date, hour and place of a hearing fails to attend a hearing without proper cause, the hearing may be held in his absence. In the absence of all parties, the decision may be based upon the pertinent available records.” 34 Pa. Code § 101.51.

Here, neither party appeared at the hearing before the Referee. The documents submitted to the UC Service Center included: the Notice of Hearing, the List of Issues, Certification of Documents, Petition for Appeal, Notice of Determination, the Adjudication Worksheet, Claimant's Questionnaire, and REG's

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<sup>2</sup> This Court's review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Johnson v. Unemployment Comp. Bd. of Review*, 869 A.2d 1095 (Pa. Cmwlth. 2005).

Questionnaire.<sup>3</sup> Based on those documents, the UC Service Center found that because Claimant was not at risk of sustaining a profit or loss, she was not customarily engaged in an independent trade or business. Original Record, Item No. 5. The Referee subsequently found that because the record was void of any firsthand testimony or evidence that Claimant was free from the direction and control of REG in the performance of her work, or that the services were customarily performed in an independently established trade or business, he was constrained to affirm the decision of the UC Service Center. We agree. Clearly, based on the submitted documents, REG has not met its burden of proving that it was not Claimant's employer. Accordingly, we hold that the UCBR did not err in finding that REG was Claimant's employer.

For all of the above reasons, the order of the UCBR is affirmed.

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JOHNNY J. BUTLER, Judge

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<sup>3</sup> This Court notes that REG provided an Independent Contractor Agreement (Agreement) between Claimant and REG as part of its Supplemental Record. However, because the Agreement was not part of the record below, this Court cannot consider it on appeal. *Hempfling v. Unemployment Comp. Bd. of Review*, 850 A.2d 773 (Pa. Cmwlt. 2004).

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ORDER

AND NOW, this 8<sup>th</sup> day of March, 2011, the June 21, 2010 order of the Unemployment Compensation Board of Review is affirmed.

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JOHNNY J. BUTLER, Judge