

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

John T. Riebling,	:	
	:	
Petitioner	:	
	:	Nos. 1751 C.D. 2010
v.	:	1833 C.D. 2010
	:	
	:	
Unemployment Compensation	:	Submitted: June 3, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: July 26, 2011**

In these consolidated appeals, John T. Riebling (Claimant) asks whether the Unemployment Compensation Board of Review (Board) erred in denying him benefits on the ground he was a self-employed businessman, and, therefore, ineligible for unemployment compensation benefits. See Section 402(h) of the Unemployment Compensation Law (Law), 43 P.S. §802(h).<sup>1</sup> Claimant also challenges the Board’s assessment of a fault overpayment, a fraud overpayment and penalty weeks based on his failure to disclose a material fact on his application for benefits. Upon review, we affirm the Board’s determination that Claimant was self-employed and, therefore, ineligible for benefits. However, we reverse the Board’s assessment of fault and fraud overpayments and penalty weeks because the record does not support such assessments.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended.

## **I. Factual and Procedural Background**

Claimant applied for unemployment benefits in October 2008.<sup>2</sup> Between October 2008 and April 2009, Claimant collected regular unemployment compensation (UC) benefits and emergency unemployment compensation (EUC) benefits pursuant to the Emergency Unemployment Act of 2008<sup>3</sup> (EUC Act).

In March 2010, the Department of Labor and Industry (Department), Office of Unemployment Compensation Benefits issued six determinations: (1) declaring Claimant ineligible for UC benefits under Section 402(h) of the Law; (2) imposing a fault overpayment of \$14,014 in UC benefits; (3) assessing 28 penalty weeks for improperly received UC benefits; (4) determining Claimant was ineligible for EUC benefits because he did not exhaust UC benefits; (5) imposing a fraud overpayment of \$12,936 in EUC benefits; and, (6) assessing 26 penalty weeks for improperly received EUC benefits. Claimant appealed these determinations. A referee hearing ensued.

At hearing, Claimant appeared without counsel and testified on his own behalf. He also submitted a 2005 employment agreement between himself and Child Guard LLC (Child Guard), his former company, as well as various correspondence and e-mail. No one appeared on behalf of Child Guard.

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<sup>2</sup> Claimant's application for benefits is not contained in the certified record.

<sup>3</sup> Title IV of the Supplemental Appropriations Act of 2008, Act of June 30, 2008, P.L. 110-252, as amended, Sections 4001-4007, 26 U.S.C. §3304 note.

After hearing, the referee issued two decisions. The first referee decision denied Claimant UC benefits under Section 402(h) of the Law, established a fault overpayment of \$14,014, and imposed 28 penalty weeks. The second referee decision denied EUC benefits, established a fraud overpayment of \$12,936, and imposed 26 additional penalty weeks. Claimant, represented by counsel for the first time, appealed to the Board.

Ultimately, the Board affirmed both referee decisions. In affirming the first referee decision (regarding the denial of UC benefits), the Board found:

1. [C]laimant was last employed as the Chief Innovative Officer of Child Guard from January 15, 2001 to September 2008. His final rate of pay was \$100,000.00 per year.
2. Initially, [C]laimant was the sole owner of Child Guard. In that capacity, he had complete control over the daily operation of the corporation.
3. Prior to September 2005, [C]laimant sought out investment partners.
4. [C]laimant maintained ownership in the company.
5. [C]laimant permitted Blair Mohn or his designee to vote, on behalf of [C]laimant's shares, on all business decisions by proxy.
6. Additionally, [C]laimant had an employment contract with Child Guard.
7. [C]laimant answered to Child Guard's chief executive officer.
8. [C]laimant applied for and received \$14,014.00 in unemployment compensation benefits for claim weeks ending October 25, 2008 through April 18, 2009.

9. [C]laimant withheld his status as a corporate office[r] from the Department on his application for benefits.

Bd. Op., 7/30/10, Findings of Fact (F.F.) Nos. 1-9.

In the discussion section of its decision, the Board explained that Claimant founded a limited liability company to sell a product he invented, and he was initially the company's sole owner. As a result, Claimant rebutted the presumption that he was an employee. At some point, Claimant obtained an investor who agreed to provide him a loan if he agreed to allow the investor to vote his ownership shares by proxy. While Claimant admitted he remained an owner of the company, he offered no credible evidence establishing the percentage of the company he owned, the terms of his agreement with the investor, or the circumstances by which he could revoke his permission to allow the investor to vote by proxy.

The Board determined Claimant did not offer credible evidence that he could not, if he chose, revoke the investor's permission to vote as his proxy and assert control over the company. Further, Claimant did not establish his employment agreement changed his ability to exert control over the company. The Board stated it was irrelevant that Claimant also worked as an employee of the company if he could exert control over the company's decision making process. Because Claimant did not prove he could not exercise a substantial degree of control over the company, the Board concluded Claimant was ineligible for benefits under Section 402(h) of the Law. See Starinieri v. Unemployment Compensation Board of Review, 447 Pa. 256, 289 A.2d 726 (1972) (individuals

who exercise a substantial degree of control over a corporation and become unemployed when the corporation fails are ineligible for benefits).

Additionally, the Board determined Claimant admitted he did not fully disclose his ownership interest in the company when he applied for benefits. Thus, the Board assessed a \$14,014 fault overpayment. Further, the Board imposed 28 penalty weeks based on its determination that Claimant “knowingly failed to fully disclose his relationship in an effort to obtain benefits he would not otherwise have been entitled to receive.” Bd. Op., 7/30/10 at 3.

In affirming the second referee decision, involving Claimant’s receipt of EUC benefits and the assessment of a fraud overpayment of \$12,936, and 26 additional penalty weeks in connection with Claimant’s receipt of those benefits, the Board adopted and incorporated the referee’s decision. Claimant appealed both decisions to this Court. We consolidated Claimant’s appeals, which are now before us for disposition.

## **II. Issues**

On appeal,<sup>4</sup> Claimant raises three issues. First, he asserts the Board erred in determining he was self-employed under Section 402(h) of the Law. In

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<sup>4</sup> Our review is limited to determining whether necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Oliver v. Unemployment Comp. Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010). In addition, the Board is the ultimate finder of fact in unemployment cases. Id. Thus, matters of credibility and the weight to be given conflicting testimony fall within the Board’s province. Id.

addition, he argues the record contains no evidence that he knowingly failed to disclose a material fact in order to obtain UC and EUC benefits.

### **III. Discussion**

#### **A. Self-employment**

Claimant first argues the Board erred in determining he was self-employed under Section 402(h) of the Law and Starinieri. Claimant contends while he owned and controlled Child Guard from 2001 through 2005, he sold the company in 2005, and he was removed as president and board chairman. He then signed an employment agreement under which he was simply an employee. Claimant asserts the record does not support the Board's finding that he exercised substantial control over Child Guard after he sold it in 2005 and before he was laid off in 2008. He maintains the Board's decision is based on the fact that he could not state precisely how many shares or units he owned in the company. However, he argues, because he relinquished any right to vote or assert control over the company to the new investor, the number of shares or units is irrelevant.

The Board counters Claimant was the controlling owner and day-to-day operator of Child Guard prior to 2005. It asserts that in September 2005, Claimant gave his voting rights, by proxy, to an investor in order to secure an investment in the company. The Board argues the investor continued to vote Claimant's controlling interest in Child Guard until the business decided to close. It contends that, because Claimant maintained control, via proxy, of Child Guard, he was an independently established businessman who is ineligible for benefits under Section 402(h) of the Law and Starinieri.

Section 402(h) of the Law states: “An employe[e] shall be ineligible for compensation for any week -- ... In which he is engaged in self-employment. ...” 43 P.S. §802(h). Thus, a self-employed person who becomes an “unemployed businessman” is ineligible to receive unemployment compensation. Starinieri. “The Law was not enacted to compensate individuals who fail in their business ventures and become unemployed businessmen.” Id. at 258, 289 A.2d at 727.

Although the Board finds the facts in unemployment cases, the question of whether a person is self-employed is a question of law. Baer v. Unemployment Comp. Bd. of Review, 739 A.2d 216 (Pa. Cmwlth. 1999).

In Starinieri, our Supreme Court held the proper test in determining whether an individual is self-employed is “whether the employee exercises a substantial degree of control over the corporation; if so, he is a businessman and not an employee.” Id. at 260, 289 A.2d at 728. Thus, in Starinieri, our Supreme Court held that a claimant, who was a minority shareholder of a corporation and served as secretary-treasurer and general manager of the corporation, was self-employed where he exercised substantial control over the corporation.

The type of control required is control over the management and policies of the corporation as a whole. Baer. This determination is based on the facts of each case. Id. Thus,

the percentage of stock owned is not in and of itself determinative of the issue, the fact that [the] [c]laimant is an officer of the corporation is not in and of its self determinative of the issue, and, the [c]laimant’s title is not determinative in and of itself[.] ... It is only when consideration is given to all

of those factors as well as any others which might be indicia of control, that a determination of whether the [c]laimant is self-employed can be made.

Geever v. Unemployment Comp. Bd. of Review, 442 A.2d 1227, 1229 (Pa. Cmwlth. 1982) (citations omitted). Further, “even if a claimant did at one time have control over [a] business, he may still receive unemployment compensation if he did not have such control at the time of his termination.” Michno v. Unemployment Comp. Bd. of Review, 532 A.2d 69, 71 (Pa. Cmwlth. 1987) (citing Geever).

Here, the Board determined that, as founder and president of Child Guard, Claimant admittedly exercised a substantial degree of control over the company’s operations. The Board also rejected Claimant’s attempts to prove he relinquished control of the company’s operations prior to his separation from the company. Our review of the record supports the Board’s determinations.

At the outset, we note, an analysis of the factors used in determining whether Claimant is a self-employed businessman is hindered by the lack of a more fully developed record. To that end, we agree with the Board that the lack of a clear record is attributable to Claimant’s “evasiveness and failure to offer evidence as to key factual elements at the hearing.” Respondent’s Br. at 8.

Based on the limited testimony Claimant provided, we discern the following. Claimant founded Child Guard, a limited liability company, in order to sell a child safety device he invented. Notes of Testimony (N.T.), Hearing of 4/15/10, at 8, 11. Claimant initially served as president of Child Guard. N.T. at

11. In that capacity, he had direct control over the Child Guard's day-to-day operations. Id.

Approximately four years later, Claimant located an investor, Blair Mohn, who invested in Child Guard in exchange for the right to vote Claimant's shares in the company. N.T. at 15-17. Claimant retained ownership of the shares, but he gave Mohn permission to vote his shares. N.T. at 16-17. The referee characterized Claimant's permission to allow Mohn to exercise his voting rights as a "proxy"; Claimant agreed with this characterization. N.T. at 10. Claimant also signed an employment agreement with Child Guard in which he became "Chief Innovation Officer" of the company, reporting to Child Guard's Chief Executive Officer. N.T. at 11; Ex. C-1.

Despite repeated questioning by the referee, Claimant did not offer any clear testimony as to the percentage or number of shares he owned in Child Guard. N.T. at 9, 10, 11, 14, 15. Also, Claimant did not clearly explain whether he retained the right to revoke the permission he gave Mohn to vote his shares. Further, Claimant could not produce any evidence to support his testimony that he was removed from his role as president of Child Guard. N.T. at 14.

In short, the record supports the Board's key determinations that, as founder and president of Child Guard, Claimant exercised a substantial degree of control over the company, and Claimant did not relinquish this control prior to his separation from the company. Contrary to Claimant's assertions, the record does not contain "uncontroverted" evidence that Claimant relinquished his voting rights

and any further control of Child Guard as of 2005. Petitioner's Br. at 6. Because the record supports the Board's factual determinations, we must defer to the Board on these issues of fact. Additionally, we discern no error in the Board's conclusion that Claimant's apparent failure to relinquish his right to assert substantial control over the company rendered him ineligible for UC benefits. Cf. Gelb v. Unemployment Comp. Bd. of Review, 486 A.2d 559 (Pa. Cmwlth. 1985) (where claimant had authority to control corporation he was self-employed, and, therefore, ineligible for unemployment benefits, despite the fact he declined to exercise his authority).

Moreover, our decisions in Ebert v. Unemployment Compensation Board of Review, 427 A.2d 1271 (Pa. Cmwlth. 1981) and George v. Unemployment Compensation Board of Review, 426 A.2d 1248 (Pa. Cmwlth. 1981), upon which Claimant relies, are distinguishable. In those cases, we awarded UC benefits to claimants who were minority stockholders and did not exercise a significant degree of control over the management or policies of the companies. In both Ebert and George, the claimants were responsible for specific components of the companies in which they worked rather than the companies as a whole.

Unlike in Ebert and George, here Claimant founded a company and served as its president, a role he acknowledged placed him in control of the company's day-to-day operations. N.T. at 11. As determined by the Board, Claimant did not establish he later relinquished the right to assert control over the company in the period before his separation.

Further, to the extent Claimant's brief seeks to cure various deficiencies in his elusive presentation to the referee (such as the percentage of shares he may have possessed in the company), we may not consider these extra-record statements. City of Phila. v. Workers' Comp. Appeal Bd. (Ford-Tilghman), 996 A.2d 569 (Pa. Cmwlth. 2010), appeal denied, \_\_\_ Pa. \_\_\_, \_\_\_ A.3d \_\_\_ (No. 196 EAL 2010, filed April 7, 2011). Nor may Claimant avail himself of deficiencies created by his ambiguous responses at hearing.

Finally, we reject Claimant's reliance on Geever, which he cites as support for his argument that the Board erred in basing its decision on facts that were no longer true as of the time of Claimant's separation.

Specifically, in Geever, the claimant served as president of a corporation that operated a restaurant, and she performed the functions necessary to operate the restaurant for a two-year period. As of the time of her separation from the corporation, however, the claimant served as a bookkeeper, and she lacked ultimate decision-making authority. Viewing the facts as they existed at the time of the claimant's termination, this Court stated, "it is clear from the record that the [c]laimant no longer exercised substantial control or any control but rather took orders from the other shareholders ...." Geever, 442 A.2d at 1229. Thus, we held the claimant was not a self-employed businesswoman, but rather an employee who was entitled to UC benefits.

Here, unlike in Geever, the Board determined the record lacked evidence that Claimant relinquished his right to exercise control over the company

as of the time of his separation. Contrary to Claimant's assertions, the Board did not disregard the facts as they existed as of the time of Claimant's separation; rather, it determined the facts presented did not show that Claimant's ability to exercise control over the company ceased prior to his termination. Thus, Geever is distinguishable.

In short, we discern no error in the Board's denial of UC benefits on the ground Claimant was self-employed under Section 402(h) of the Law.<sup>5</sup>

### **B. Assessment of Fault/Fraud Overpayment & Penalty Weeks**

Claimant next argues the Board erred in assessing a fault overpayment of UC benefits, a fraud overpayment for EUC benefits and 54 penalty weeks. Claimant contends there is no evidence that he received benefits to which he was not entitled by reason of his fault or that he committed fraud in order to obtain benefits. Further, Claimant contends there is no support for the Board's

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<sup>5</sup> Alternatively, Claimant asserts, if this Court declines to award benefits, a remand is appropriate for an additional hearing to gather information about the company's shares or units, which the Board deemed relevant. Claimant contends that if this Court deems this information relevant, Board regulations and case law from this Court require a remand—because the record is “incomplete” on a material point.

Despite raising this issue in his brief, Claimant did not raise this issue in his petitions for review to this Court. As such, this issue is waived. See Jimoh v. Unemployment Comp. Bd. of Review, 902 A.2d 608 (Pa. Cmwlth. 2006) (issues not contained in petition for review or fairly comprised therein are deemed waived).

In any event, Claimant does not assert that any evidence he now wishes to present was unavailable at the referee hearing. Thus, a remand is not warranted. See Fisher v. Unemployment Comp. Bd. of Review, 696 A.2d 895, 897 (Pa. Cmwlth. 1997) (“a remand hearing is generally granted to allow a party the opportunity to present evidence not offered at the original hearing because it was not then available”); see also Paxos v. Workmen's Comp. Appeal Bd. (Frankford-Quaker Grocery), 631 A.2d 826 (Pa. Cmwlth. 1993) (purpose of granting a remand is to allow a party to present newly-discovered, non-cumulative evidence; remand will not be granted to permit the party to strengthen weak proofs already presented).

determination that he knowingly failed to disclose a material fact on his application for benefits given that his application is not of record. Claimant also asserts, contrary to the Board's decision, he did not admit that he failed to disclose a material fact. Claimant distinguishes the facts presented here from those presented in Chishko v. Unemployment Compensation Board of Review, 934 A.2d 172 (Pa. Cmwlth. 2007), in which we upheld a finding of "fault" where a claimant received benefits to which he admitted he was not entitled.

The Board counters that, because Claimant did not disclose his controlling interest, which was voted by proxy, it properly established a fault overpayment of UC benefits, a fraud overpayment of EUC benefits and penalty weeks. The Board asserts Claimant testified that when he applied for UC and EUC benefits he informed the Department he was unemployed because of lack of work. It argues Claimant never contested the fact that he did not inform the Department that he was a stock owner in Child Guard or that he gave his right to vote his controlling share by proxy. To the contrary, Claimant asserted he was not an owner of the company and, therefore, had no information to disclose.

However, the Board maintains, Claimant admitted he owned stock in Child Guard, of which he relinquished control to Mohn to vote as his proxy in exchange for an investment. The Board contends Claimant not only intentionally neglected to inform the Department of this arrangement, but he also specifically admitted he informed the Department he was seeking UC benefits based only on lack of work. The Board argues Claimant's admissions, coupled with his intentional failure to admit his ownership interest to the Department, resulted in his

improper receipt of UC benefits. As such, the Board argues it properly imposed a fault overpayment, a fraud overpayment, and penalty weeks.

### **1. Fault Overpayment of UC Benefits**

With regard to the “fault overpayment” of UC benefits, Section 804(a) of the Law, 43 P.S. §874(a),<sup>6</sup> states that if a person receives UC benefits by reason of his fault, he will be responsible for repaying the amount received in error plus interest. The word “fault” within the meaning of Section 804(a) “connotes an act to which blame, censure, impropriety, shortcoming or culpability attaches ....” Chishko, 934 A.2d at 177 (citation omitted). Conduct that is designed to improperly and intentionally mislead the unemployment compensation authorities is sufficient to establish a fault overpayment. Id. An intentional misstatement on an application for benefits can support a finding of fault. Id. To find fault, the Board must make findings regarding a claimant’s state of mind. Id.

Here, the Board stated Claimant “admittedly failed to fully disclose his ownership with Child Guard when applying for benefits. As a result, he received benefits he would not otherwise have been entitled to receive. [C]laimant has failed to offer sufficient credible testimony or evidence for his failure to fully

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<sup>6</sup> Section 804(a) provides:

Any person who by reason of his fault has received any sum as compensation under this act to which he was not entitled, shall be liable to repay to the Unemployment Compensation Fund to the credit of the Compensation Account a sum equal to the amount so received by him and interest at the rate determined by the Secretary of Revenue ....

43 P.S. §874(a).

disclose his ownership to the Department.” Bd. Op. at 3. Thus, the Board assessed a fault overpayment of \$14,014. Despite this determination, the Board made no findings regarding Claimant’s state of mind. Compare Chishko, 934 A.2d at 177 (where the Board found the claimant “deliberately misled the Department” ... and the record supported this finding, the claimant was “at fault” within the meaning of Section 804(a) of the Law). Further, although the Board determined Claimant admitted that he did not disclose a material fact on his application for UC benefits, Claimant’s application for benefits is not contained in the certified record; thus, review of the Board’s determination on this point is precluded. Additionally, at hearing, the only colloquy on this issue was as follows:

[Referee] Okay. And when you reported this [claim for UC benefits] you did that based on lack, reporting lack of work at the time. Is that correct?

[Claimant] That the company had been closed and I had been ...

[Referee] The report of the Service Center (inaudible).

[Claimant] ... laid off or whatever.

N.T. at 10-11.

Clearly, this testimony does not support a determination regarding Claimant’s state of mind. As such, the Board’s assessment of a fault overpayment cannot stand.

## **2. Fraud Overpayment of EUC Benefits**

Next, with regard to the Board’s determination that Claimant received a “fraud overpayment” of EUC benefits, Section 4005 of the EUC Act provides:

(a) In general.- If an individual knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and as a result of such false statement or representation or of such nondisclosure such individual has received an amount of [EUC] under this title to which such individual was not entitled, such individual-

(1) shall be ineligible for further [EUC] under this title in accordance with the provisions of the applicable State unemployment compensation law relating to fraud in connection with a claim for unemployment compensation; and

(2) shall be subject to prosecution under section 1001 of title 18, United State Code.

(b) Repayment.- In the case of individuals who have received amounts of [EUC] under this title to which they were not entitled, the State shall require such individuals to repay the amounts of such [EUC] to the State agency, except that the State agency may waive such repayment if it determines that-

(1) the payment of such [EUC] was without fault on the part of any such individual; and

(2) such repayment would be contrary to equity and good conscience.

(c) Recovery by state agency.-

(1) In general.- The State agency may recover the amount to be repaid, or any part thereof, by deductions from any [EUC] payable to such individual under this title or from any unemployment compensation payable to such individual under this title or from any unemployment compensation payable to such individual under any State or Federal unemployment compensation law administered by the State agency or under any other State or Federal law administered by the State agency which provides for the payment of any assistance or

allowance with respect to any week of unemployment, during the 3-year period after the date such individuals received the payment of the [EUC] to which they were not entitled, except that no single deduction may exceed 50 percent of the weekly benefit amount from which such deduction is made.

(2) Opportunity for hearing.- No repayment shall be required, and no deduction shall be made, until a determination has been made, notice thereof and an opportunity for a fair hearing has been given to the individual, and the determination has become final.

Sections 4005(a), 4005(b), and 4005(c) of the EUC Act, 26 U.S.C. §3304.

In imposing a “fraud overpayment” under the EUC Act here, the Board adopted and incorporated the referee’s findings and determinations. The referee determined Claimant failed to disclose his corporate officer status in connection with his claim for EUC benefits. Referee Op., 5/3/10, at 3. However, the referee made no determination under Section 4005(a) of the EUC Act that Claimant “knowingly” made a “false statement” or “knowingly” failed to disclose this material fact. Additionally, neither the Board nor the referee made a determination as to whether Claimant received such overpayment “without fault” under Section 4005(b) of the EUC Act. In short, both the referee and Board failed to address Claimant’s state of mind. Also, as set forth above, the record lacks substantial evidence on the issue. Thus, we reverse the Board’s determination that Claimant received a fraud overpayment of EUC benefits.

### 3. Penalty Weeks

Finally, as to the imposition of “penalty weeks,” Section 801(b) of the Law, 43 P.S. §871(b),<sup>7</sup> allows the Board to impose an additional penalty on a claimant who receives benefits to which he was not entitled. The Board may disqualify the claimant with regard to future claims for benefits, for a penalty period of two weeks and one additional week for each current week of improper payment. Chishko. Disqualification is authorized under Section 801(b) when an applicant “makes a false statement knowing it to be false, or knowingly fails to disclose a material fact to obtain or increase” his unemployment benefits. 43 P.S. §871(b); Chishko.

Here, the Board imposed penalty weeks in connection with Claimant’s receipt of UC benefits and EUC benefits. With regard to the 26 penalty weeks imposed in connection with Claimant’s receipt of EUC benefits, neither the Board nor the referee made a finding that Claimant “knowingly” made a “false statement” or “knowingly” failed to disclose a material fact in order to obtain compensation. Therefore, the Board erred when it imposed penalty weeks in connection with Claimant’s receipt of EUC benefits.

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<sup>7</sup> Section 801(b) of the Law states, in pertinent part:

Whoever makes a false statement knowing it to be false, or knowingly fails to disclose a material fact to obtain or increase any compensation or other payment under this act or under an employment security law ... may be disqualified in addition to such week or weeks of improper payments for a penalty period of two weeks and for not more than one additional week for each such week of improper payment.

43 P.S. §871(b).

As to the Board's assessment of 28 penalty weeks in connection with Claimant's receipt of UC benefits, however, the Board determined Claimant "knowingly failed to disclose his relationship in an effort to obtain benefits he would not otherwise have been entitled to receive." Bd. Op. at 3 (emphasis added). However, our review of the record does not reveal support for this determination. As noted above, although the Board determined Claimant did not disclose a material fact when applying for benefits, Claimant's benefit application is not included in the certified record. Further, as set forth more fully above, Claimant's testimony before the referee does not support a determination that Claimant "knowingly" made a "false statement" or "knowingly" failed to disclose a material fact in order to obtain compensation. See N.T. at 10-11. Therefore, the Board erred in imposing penalty weeks in connection with Claimant's receipt of UC benefits.

#### **IV. Conclusion**

In sum, we discern no error in the Board's determination that Claimant was self-employed and, therefore, ineligible for benefits under Section 402(h) of the Law. However, we agree with Claimant that the Board erred in assessing a fault overpayment, a fraud overpayment and penalty weeks. Therefore, we reverse the imposition of fault and fraud overpayments and penalty weeks.

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ROBERT SIMPSON, Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

John T. Riebling,	:	
	:	
Petitioner	:	
	:	Nos. 1751 C.D. 2010
v.	:	1833 C.D. 2010
	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

**ORDER**

**AND NOW**, this 26<sup>th</sup> day of July, 2011, the order of the Unemployment Compensation Board of Review dated July 30, 2010 at Decision No. B-503687 is **AFFIRMED in part and REVERSED in part**. Petitioner's ineligibility for benefits under Section 402(h) is **AFFIRMED**. The imposition of a fault overpayment and penalty weeks is **REVERSED**. In addition, the order of the Unemployment Compensation Board of Review dated July 30, 2010 at Decision No. B-503688 is **REVERSED** to the extent it imposed a fraud overpayment and penalty weeks.

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ROBERT SIMPSON, Judge