

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Louis F. Bernstein, :  
 :  
 : Petitioner :  
 :  
 : v. : No. 1793 C.D. 2009  
 :  
 : Unemployment Compensation : Submitted: January 29, 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 5, 2010

Louis F. Bernstein (Claimant), *pro se*, petitions for review of an order of the Unemployment Compensation Board of Review (Board) which reversed 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 grant of benefits under the Law made by an Unemployment Compensation Service Center, and the Board’s reversal of the Referee’s order denied benefits 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 worked as a computer programmer/developer consultant for a client of MAP Consulting (Employer), an assignment that Claimant was aware was temporary and due to last for four to six weeks. Upon taking the assignment

from Employer, Claimant signed an independent contractor's agreement with Employer, which stated that Claimant and the client were responsible for supplying the tools necessary for the work to be performed. Employer did not set Claimant's work hours, and did not supervise Claimant's work assignments, which were made by the client. Claimant bore the expense of all of his ordinary business expenses, for which he was not reimbursed, and Employer did not provide any insurance or vacation benefits.

Following the end of his assignment for Employer's client, Claimant applied for benefits at the UC Service Center, which awarded benefits under the Law. Employer timely appealed to a Referee, who conducted a hearing thereon and affirmed the UC Center's determination. Employer then appealed to the Board.

Following its review of the record, including Claimant's and Employer's testimony before the Referee, the Board found the facts as articulated above, and concluded that Employer had credibly established that it did not exercise control over the Claimant's work. Additionally, the Board concluded that Claimant worked in an independently established trade or business, and that Employer had met its burden of establishing that Claimant's work for Employer could not be deemed employment subject to the Law. Accordingly, the Board reversed the Referee's order, and denied benefits, by decision and order dated July 27, 2009. Claimant now petitions 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 presents two issues<sup>1</sup> for review: 1.) whether Employer's testimony before the Referee was credible, as determined as such by the Board, and; 2.) whether the Board erred in concluding that Claimant's six weeks of employment constituted self-employment under the Law.

Regarding Claimant's first issue attacking the credibility determinations of the Board, Claimant actually advances no legal argument. Claimant cites to selected testimony of record that he finds to be more credible and/or persuasive, and further argues that either additional documentary evidence and/or additional witness testimony not presented in this case would result in support for his position. Claimant's arguments on this issue are without merit.

We first note that Claimant was free to call any additional witnesses, and to submit any additional documentary evidence, at the hearing previously held in this matter. Having failed to do so, we will not now entertain arguments based on the speculative nature of what that testimony and/or evidence could possibly have adduced.

Further, and dispositively on this issue, credibility determinations regarding witnesses are exclusively within the province of the Board as the fact finder in unemployment cases. Melomed v. Unemployment Compensation Board

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<sup>1</sup> Claimant's issues have been reordered in the interests of clarity.

of Review, 972 A.2d 593 (Pa. Cmwlth. 2009). It is a long-standing axiom that this Court will not disturb the Board's credibility determinations on appeal. Id. As such, Claimant's arguments on this issue must fail.

Next, Claimant argues that the Board erred in concluding that Claimant's six weeks of employment constituted self-employment under the Law. Under this general issue, Claimant first argues that certain selected portions of the testimony and evidence favor his preferred conclusions that Employer potentially could have extended his temporary position, that Employer did in fact set his schedule of working, and that other indicia of Employer's control over Claimant's work exist.<sup>2</sup> 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. Thus, Claimant's argument is without merit.

To the extent that Claimant's arguments can be read as an assertion that the Board erred as a matter of law in its conclusion that Claimant's six weeks

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<sup>2</sup> We note that Claimant has chosen not to directly challenge any of the findings of fact made by the Board, which our review of the record reveals are all supported by substantial evidence of record. Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. Hercules v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992).

of employment constituted self-employment under the Law, our review of the record reveals no such error. As noted, Section 402(h) of the Law provides that an employee “shall be ineligible for compensation for any week in which he is engaged in self-employment.” 43 P.S. § 802(h). Although the term “self-employment” is not further defined within the Law, “the courts have utilized Section 4(1)(2)(B) [of the Law] to fill the void because its obvious purpose is to exclude independent contractors from coverage.” Glatfelter Barber Shop v. Unemployment Compensation Board of Review, 957 A.2d 786, 789 (Pa. Cmwlth.), petition for allowance of appeal denied, 599 Pa. 712, 962 A.2d 1198 (2008) (citation omitted).

Section 4(1)(2)(B) of the Law provides, in relevant part, that:

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(1)(2)(B). This Court has held that Section 4(1)(2)(B) creates a two-pronged test in order to determine whether a person is an employee or not: 1.) whether the person was free from control and direction in the performance of the work, and; 2.) whether the business was one which is customarily engaged in as an independent trade or business. Thomas Edison State College v. Unemployment

Compensation Board of Review, 980 A.2d 736, 741 (Pa. Cmwlth. 2009) (citation omitted). In Thomas Edison State College we further stated:

It is presumed that an individual is an employee, rather than an independent contractor, but the presumption can be overcome “if the putative employer sustains its burden of showing that the claimant was free from control and direction in the performance of his service, and that, as to such service, was customarily engaged in an independent trade or business.” Glatfelter, 957 A.2d at 789 (citation omitted). As to whether an individual is free from direction and control not only with regard to the work done, but also with regard to the manner of performing it, we must look at the factors considered by the courts. . . . Control is premised upon an actual showing of control with regard to the work to be done and the manner in performing it. [].

Thomas Edison State College, 980 A.2d at 741 (citation omitted).

Based upon the facts of record found by the Board as articulated herein, which findings are all supported by substantial evidence of record, the Board did not err in concluding that Employer met its burden of establishing that it did not exercise control and direction over Claimant's work in this matter, and that Claimant engaged in an independently established trade or business. Id. Thus, the Board did not err in denying Claimant benefits under Section 402(h) of the Law. Id.

Accordingly, we affirm.

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JAMES R. KELLEY, Senior Judge

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Petitioner	:	
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v.	:	No. 1793 C.D. 2009
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 5th day of May, 2010, the order of the Unemployment Compensation Board of Review dated July 27, 2009, at Appeal No. B-09-09-D-3477, is affirmed.

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JAMES R. KELLEY, Senior Judge