

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John K. Hayes, :
Petitioner :
 :
v. : No. 1818 C.D. 2010
 : Submitted: February 11, 2011
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: March 17, 2011

John K. Hayes (Claimant) appeals from the determination of the Unemployment Compensation Board of Review (Board) affirming the decision of the Referee denying him unemployment compensation benefits because he was an independent contractor. For the reasons that follow, we affirm.

Since 1990, Claimant worked as a distributor of Tasty Baking Company (Tastykake) bakery products in a fixed territory in Philadelphia. This work was pursuant to a contract signed with Tastykake. In pertinent part, the contract provided as follows: Claimant was considered an independent businessman who bought products from Tastykake and received a commission when he sold them to retailers. Tastykake provided the suggested retail price for each product and maintained a security interest in all products Claimant bought. Claimant was required to develop and maximize the sale of products, maintain an adequate and fresh supply in all

outlets, keep a route book, and properly rotate all products. Claimant was also required to cooperate with Tastykake marketing programs and to maintain proprietary information in confidence. He was forbidden to carry products in competition with Tastykake. For the first several years, Claimant was required to personally perform and carry out all obligations under the contract, though he could hire part-time, temporary help subject to Tastykake's approval. This was later modified to allow Claimant to hire whomever he wanted without Tastykake's approval and to supervise the help however he wanted. (Claimant chose not to hire anyone.) Claimant was required to have a delivery truck in his own name and was not required to have his truck painted with Tastykake's colors and logo, but he could agree to pay Tastykake to do so. Claimant was permitted to incorporate his business, but Tastykake controlled the terms and manner of incorporation. (Claimant chose not to incorporate.) Claimant was also permitted to sell his distribution rights subject to Tastykake's approval following an interview of the proposed purchaser by Tastykake, and if Claimant became disabled or died, Tastykake reserved the right to force him or his heirs to sell the distribution rights back to Tastykake.

In January 2009, following an audit taken the previous month, Tastykake alleged that Claimant had billed Tastykake for more bakery products than he had purchased from them. It is unclear what happened next, as Tastykake contradicted itself in different parts of the record, sometimes claiming that it terminated Claimant's contract and sometimes claiming that Claimant voluntarily sold his rights to the territory. Claimant himself testified that he was discharged.

Claimant filed for unemployment compensation benefits, which were conditionally granted because it was determined that all evidence alleging that Claimant had committed willful misconduct was uncorroborated hearsay. However, the Board, in rendering this decision and pursuant to arguments made by Tastykake, directed the Department of Labor and Industry (Department) to investigate whether Claimant was an employee of Tastykake or an independent contractor; if Claimant was an independent contractor, he would be ineligible for benefits pursuant to Section 402(h) of the Unemployment Compensation Law (Law)¹ regardless of the circumstances of his loss of work. Because neither party raised the issue of whether the evidence alleging that Claimant engaged in willful misconduct was indeed uncorroborated hearsay, if Claimant was an employee of Tastykake, he would be eligible for benefits.

The Department then determined that Claimant was an employee of Tastykake, making him eligible for unemployment compensation benefits. Tastykake appealed to the Referee, before whom two hearings were held. Additionally, the transcript of the earlier hearing on the willful misconduct issue, which also contains information pertinent to the present appeal, was incorporated into the record.

Before the Referee, Claimant testified that he considered himself to be a Tastykake employee. His job consisted of going to the Tastykake distribution facility between 1:30 and 8:30 a.m. to pick up the products he would deliver that day. He

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(h). Section 402(h) provides, in relevant part, “An employe shall be ineligible for compensation for any week in which he is engaged in self-employment.”

would purchase the products he came to pick up via a special Tastykake computer that he rented; Tastykake kept track of what he picked up and billed him for it. While at the distribution center, he would check his mailbox and talk to whomever was there to make sure everything was all right. Joe Ricciardi (Ricciardi) was his district manager, and he would speak to him once or twice a week on matters such as making sure he purchased the proper products and dealing with customer complaints. In general, he would be in touch with someone from Tastykake almost every day. Sometimes he would receive notices of sales or other meetings in his mailbox that he was asked to attend. He then would leave for his route.

Claimant further testified that the time he picked up the product as well as the route he took and the outlets he sold the product to were all determined by Tastykake. Tastykake also controlled when he took vacation days, and he had to check with Ricciardi to make sure any vacation he took was acceptable so Ricciardi could find a replacement driver for his route. Tastykake would tell him what products were on sale and how to comply with the sale. Tastykake repeatedly told him that he represented the company, and it provided him with Tastykake clothing that it wanted him to wear. He also had his truck wrapped in Tastykake colors and logo. When delivering the product, he could only use Tastykake forms and labels, and he was not allowed to distribute any other products besides Tastykake's.

Various employer witnesses also testified before the Referee. On many points, they disagreed with Claimant. Some of these disagreements included that he was an independent operator and not an employee, that he set his own hours and working schedule, that he determined his own route, that he could sell the product for

whatever price he wanted, and that he could sell other products as long as they were not in competition with Tastykake products, although there was no definition as to what products were “in competition” with Tastykake products. Furthermore, Claimant was not required to personally perform the contract or to attend any meetings and had no supervisor at Tastykake.

In addition, there was extensive testimony as well as documentation concerning the issues of how Claimant bought and sold his distribution rights and whether Tastykake withheld taxes. With regard to the first issue, Tastykake witnesses testified that Claimant was free to buy or sell his exclusive distribution rights at any time and, in fact, Claimant bought his territory from another independent operator and ultimately sold it to another independent operator. However, Tastykake witnesses also testified that when he purchased his territory and rights, he paid for part of it upfront while the rest – more than half – was financed by Tastykake. Whenever a distributor wanted to purchase or sell distribution rights, the selling distributor could set the purchase price, but Tastykake interviewed both the buyer and seller, prepared the bill of sale and distributor’s agreement, and generally facilitated the transaction. The settlement sheet dealing with Claimant’s sale of his territory showed that it was facilitated by Tastykake and that he was required to pay over \$26,000 to Tastykake as part of the agreement.

With regard to the taxes, Lisa A. Hanssen (Hanssen), Tastykake’s Vice President and Assistant General Counsel, testified that Claimant was a “statutory employee” but not a “common-law employee.” Specifically, she stated:

In December of 1997 Tasty Baking Company entered into a private settlement agreement with the Internal Revenue Service pursuant to which we agreed from January 1st, 1998 forward to classify our non-incorporated independent owner/operators sales distributors as statutory employees for payroll purposes only, with respect to FICA and FUDA. In other words, with respect to federal tax and to issue W-2s. Specifically the agreement stated that the Claimant – that the independent owner/operators [were] not to be considered common law employees And there was no 1099 issued because we didn't pay the independent contractor for his services, which would explain why there was no 1099. And the reason there is a W-2 is purely because of our settlement with the Internal Revenue Service with respect to Federal FICA and FUDA.

(Certified Record, March 3, 2010 Transcript, p. 18). At another point in the hearing, when pressed on the issue, Hanssen attempted, with little success, to explain that the withholdings were not taxes. “I really can't speak to if those are taxes or not...I don't know if those are liabilities or taxes...I would prefer not to characterize them as that [i.e. taxes].” (C.R., March 3, 2010 Transcript, p. 30). Claimant's W-2s, which were admitted into evidence, confirmed that Tastykake withheld social security and Medicare taxes, but did not withhold either federal or state income taxes. Unfortunately for Claimant, the IRS settlement itself, which may well have been dispositive in determining if he was an employee of Tastykake, was never entered into evidence and is not part of the record, so we are left with Tastykake's characterization of it and questions as to why the IRS was so insistent that Claimant and others in his position were “statutory employees.”²

² There also was no explanation as to what a “statutory employee” was or how it differed, if at all, from a “common-law employee.”

After considering this evidence, the Referee determined that Claimant was an independent contractor not eligible for unemployment compensation benefits. Claimant then appealed to the Board which, based on the above evidence, affirmed, finding that Claimant was an independent contractor. Whenever the testimony of Claimant and the Tastykake witnesses differed, the Board credited Tastykake's position. The Board mentioned the tax issues with the IRS as well as that Claimant sold his business, but did not elaborate on either and stated that whether Tastykake withheld Claimant's taxes was not dispositive of whether he was an employee or an independent contractor. Claimant then appealed to this Court.³

On appeal, Claimant contends that he was an employee of Tastykake and is eligible to receive unemployment compensation benefits. He argues that the Board's findings of facts showed that he was not free from Tastykake's control in how he performed his work; thus, Tastykake failed to overcome the presumption that Claimant was an employee and not an independent contractor.

The Law does not define self-employment, but Section 4(1)(2)(B) of the Law⁴ defines "employment" as:

³ Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704. Whether Claimant is an employee or an independent contractor is a determination of law subject to our review. *Krum v. Unemployment Compensation Board of Review*, 689 A.2d 330 (Pa. Cmwlth. 1997).

⁴ 43 P.S. §753(2)(B).

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.

Thus, in order for an individual to be ineligible for unemployment compensation benefits under Section 402(h) of the Law, the burden is on the purported employer to show both that the individual is free from control or direction over the performance of the job and that the job is an independently established trade, occupation, profession or business.

As for the first element, the issue of control encompasses not only the nature of the work to be done but also the manner of performing it. *Erie Independence House, Inc. v. Unemployment Compensation Board of Review*, 559 A.2d 994 (Pa. Cmwlth. 1989). No one factor is determinative as to whether the purported employer exercises control over the claimant's work, but such factors that can be considered include whether the claimant determined the time or place of work, the claimant was directly supervised, the company provided the claimant with training or equipment or required attendance at meetings, the claimant was free to make his own arrangements with clients, an hourly wage was paid, the claimant could refuse work without repercussions, taxes were deducted from the claimant's pay, etc. *See, e.g., Beacon Flag Car Co., Inc. (Doris Weyant) v. Unemployment Compensation Board of Review*, 910 A.2d 103, 108 (Pa. Cmwlth. 2006); *Venango Newspapers v.*

Unemployment Compensation Board of Review, 631 A.2d 1384, 1387-88 (Pa. Cmwlth. 1993).

According to the facts as found by the Board, Claimant purchased both his territory and delivery truck from a former distributor, not from Tastykake. Claimant was completely responsible for the truck and, while he chose to have the Tastykake logo painted on it, he was not required to do so. Likewise, he was allowed to but not required to wear Tastykake promotional clothing and encouraged but not required to attend meetings with Tastykake sales managers. He could order any product he saw fit and pick it up at any day at any time during a several-hour window. He could deliver the product whenever he wanted to wherever he wanted and at any price he wanted. Tastykake did not pay him a salary; rather, he received a commission based on the number of products he sold, which was completely up to him. He could take vacations with limited input from Tastykake and could hire his own employees to assist him with the distribution. While he had contacts with Tastykake, he had no supervisor there, and he had to rent the computer he used to make purchases from Tastykake.

On the other hand, Tastykake took certain federal taxes out of Claimant's pay and provided him with a W-2. In addition, Claimant could not sell products that directly competed with Tastykake products, and the scope of this restriction is unknown. Furthermore, although Claimant was able to buy and sell his distribution rights, this ability was significantly constrained by the control Tastykake exerted over the process. Because of the Board's findings, however, these facts are

not enough to show that Tastykake exerted control over the manner in which Claimant worked.

As to the second element, relevant factors include whether the individual was capable of performing the work for anyone who wished to utilize his services and whether the nature of the business compelled the individual to look to only a single employer for the continuation of such services. *Beacon Flag; Venango Newspapers*. Here, again, according to the facts as found by the Board, the second element was also met, as the Board found that Claimant could distribute any product as long as it did not directly compete with Tastykake and was free to pursue any additional work that he desired. In addition, Claimant, not Tastykake, owned his territory and delivery truck and could sell his services to any other non-competing entity, albeit with various constraints.

Because Tastykake met its burden – barely and largely based on the Board’s findings discounting Claimant’s testimony concerning his relationship with Tastykake – that Claimant was not its employee but rather was an independent contractor, the Board’s order denying Claimant unemployment compensation benefits is affirmed.

DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John K. Hayes,	:
Petitioner	:
	:
v.	: No. 1818 C.D. 2010
	:
Unemployment Compensation	:
Board of Review,	:
Respondent	:

ORDER

AND NOW, this 17th day of March, 2011, the order of the Unemployment Compensation Board of Review, Decision No. B-503381, dated July 22, 2010, is affirmed.

DAN PELLEGRINI, JUDGE