

issue preserved for review is whether Claimant, who worked for Gaughen as a real estate salesman, was self-employed or an independent contractor. After review, we affirm.

We begin by noting that our analysis and ultimate conclusion in this matter have been limited by the manner in which the claim record was developed before the referee and the issues raised on appeal. From the beginning, the parties defined the issue and the unemployment compensation authorities evaluated Stine's application for benefits on the basis of whether he was disqualified as an independent contractor under 402(h), 43 P.S. § 802(h). The record reflects that Stine worked part-time as a real estate salesperson for Gaughen; in that position, he was paid on a commission basis and he received a Form 1099 for tax purposes.² Stine testified before the referee that in order to work as a salesman, he had "to be licensed through a broker and the broker dictates for [sic] whatever my job is and every broker's different and they have different requirements." Notes of Testimony of May 28, 2010, at 7, Original Record (O.R.) Item 7. Apparently, Stine ceased working for Gaughen due to a lack of work.

Stine's application for benefits was initially granted and Gaughen appealed. The subsequent notice of hearing noted that the specific issue before the referee was whether "claimant is engaged in self-employment." See Notice of Hearing, O.R. Item 4. Stine appeared before the referee unrepresented and no one appeared on behalf of Gaughen. Based upon the very limited testimony, the referee

² In general, an employer issues a Form W-2 to an employee to report, *inter alia*, the wages, tips or other compensation paid to the employee. A Form 1099-MISC, on the other hand, is generally used to "report payments made in the course of a trade or business to a person who is not an employee" See <http://www.irs.gov/faqs/faq/0.,id=199636,00.html> (frequently asked questions: "What is the difference between a Form W-2 and a Form 1099-MISC?").

made findings similar to the facts set forth above in addition to finding that Stine “is not free from control or direction over the work as a real estate [salesperson].” Referee’s decision and order, finding of fact no. 3. The referee further noted that as a real estate salesperson, Stine was required to work for a broker. Based upon those findings, the referee concluded that Stine was not engaged in self employment and affirmed the initial determination that Stine was not disqualified from benefits under Section 402(h), 43 P.S. § 802(h).

Gaughen appealed, contending that Stine was not an employee because he was not subject to its direction and control. Noting that the Real Estate Licensing and Registration Act (Licensing Act)³ requires real estate salesmen to work under a broker’s license and limits such sales people to working for only one broker at a time, the Board similarly found that Stine was not free from Gaughen’s direction and control, nor engaged in an independently established business, trade or profession. Accordingly, the Board affirmed and the present appeal followed.

Gaughen first argues that it should not be responsible for any portion of Stine’s benefits because Section 4(l)(4)(17) of the Law, 43 P.S. § 753(l)(4)(17), provides that the term “employment” does not include services performed as a real estate salesperson if such service is performed solely for commission.⁴ While

³ Act of February 19, 1980, P.L. 15, *as amended*, 63 P.S. §§ 455.101 – 455.902.

⁴ Section 4(l)(4)(17) provides in pertinent part that, “employment” shall not include “[s]ervice performed by an individual for an employer as an insurance agent or real estate salesman . . . or as a real estate broker . . . if all such service performed by such individual for such employer is performed for remuneration solely by way of commission” 43 P.S. § 753(l)(4)(17).

In response, the Board contends:

The Board concedes that these conditions appear to have been satisfied when Claimant performed his services for [Gaughen]. The wages he earned as a licensed real estate salesperson should be excluded from Claimant’s base year under

(Footnote continued on next page...)

Gaughen is correct in its interpretation of the Law,⁵ we agree with the Board that this argument is not properly before us. Not only did Gaughen fail to raise this issue before the referee, but it also failed to raise it before the Board. During the administrative proceedings, Gaughen argued only that Stine was self-employed and thus barred from benefits under Section 402(h). In its appeal to the Board, Gaughen's representative stated only that, "Mr. Stine is not considered their employee because he is not under their direction and control." Gaughen's argument that Stine is disqualified under Section 4(l)(4)(17) is raised for the first time on appeal to this court.⁶ Accordingly, it has been waived. *See* Pa. R.A.P.

(continued...)

the Law. This issue, however, was not properly before the Referee of [sic] the Board as the Department simply ruled under Section 402(h) [Gaughen] should request that the Department of Labor and Industry remove any of [Stine's] real estate salesperson wages from his base year. When and if the Department . . . complies, Employer will not be charged for any wages received by [Stine]. The Board submits that the instant proceeding is not the forum within which [Gaughen] may seek relief from charges.

Board's brief at 17 (footnote omitted).

⁵ *See Frames v. Commonwealth, Unemployment Comp. Bd. of Review*, 449 A.2d 789 (Pa. Cmwth. 1982) (holding that, the claimant, an insurance salesman who received remuneration solely by commission, was ineligible for benefits under Section 4(l)(4)(17) because base year compensation was comprised of commissions only); *Coogler v. Commonwealth, Unemployment Comp. Bd. of Review*, 440 A.2d 692 (Pa. Cmwth. 1982). *See also Shoemaker v. Unemployment Compensation Board of Review*, 588 A.2d 100 (Pa. Cmwth. 1991), wherein this court held that a claimant's subsequent job as a commissioned-only real estate saleswoman would not preclude her continued receipt of benefits because such position did not constitute "employment" for purposes of the Law. *But see Kelly v. Unemployment Compensation Bd. of Review*, 840 A.2d 469 (Pa. Cmwth. 2004) (holding unemployed claimant's subsequent job as commissioned-only real estate salesperson precluded further receipt of benefits because claimant was no longer "unemployed" for purposes of the Law).

⁶ It appears that Gaughen was first represented by counsel on appeal to this court. Litigants who choose to represent themselves or rely upon non-lawyer representatives assume the risk that significant legal issues may be overlooked.

1551(a); *see also* *Wing v. Commonwealth, Unemployment Comp. Bd. of Review*, 496 Pa. 113, 436 A.2d 179 (1981); *Schaal v. Unemployment Comp. Bd. of Review*, 870 A.2d 952 (Pa. Cmwlth. 2005).

Gaughen's second contention is that the Board erred in concluding that: (1) Stine's performance was not free from Gaughen's direction and control; and (2) Stine was not engaged in an independent business, trade or profession.⁷ While the term "self-employment" is not expressly defined by the Law, our appellate courts have applied Section 4(l)(2)(B) to determine whether a claimant is working as an independent contractor. *Osborne Assoc., Inc. v. Unemployment Comp. Bd. of Review*, 3 A.3d 722 (Pa. Cmwlth. 2010). Although it would not appear to apply to real estate salesmen who are compensated only by commission under the plain terms of Section 4(l)(4)(17), we will address this issue since it is raised by Gaughen. Section 4(l)(2)(B) provides, in pertinent part:

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

⁷ In support of these arguments, Gaughen relies predominantly on the answers listed on the Claimant Questionnaire that an employee of the Department of Labor and Industry completed following an interview with Stine. *See* O.R. Item 3. The Claimant Questionnaire is a preprinted form comprising a series of questions mainly requiring either a yes or no answer, and appears to be designed to determine whether a claimant is working as an independent contractor.

With respect to whether Stine was subject to Gaughen's direction and control, Gaughen notes that Stine indicated that he sets his own work hours, begins and ends work on a job independently, has his own tools and has a contract with Gaughen that indicates that he is an independent contractor. This document does not support the conclusion advocated by Gaughen. Neither the Board's nor referee's findings stem from this evidence. Second, some of Stine's answers could also support the conclusion that he was not self-employed. For instance, in response to whether he was "free from control or direction in the performance of [his] work," Stine apparently responded that: "I do have a manager who provides some guidance." *See* Question 17.

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(l)(2)(B). The above section establishes the presumption that an individual is presumed to be working as an employee rather than an independent contractor. *Osborne Assoc.* The presumption is overcome, however, if the employer establishes both that the claimant was: (1) free from direction and control in the performance of his services; and (2) engaged in an independent trade, occupation, profession or business. *Id.* Unless the employer can demonstrate that both criteria exist, the presumption is not overcome. *Id.* Because Gaughen cannot demonstrate that Stine was engaged in an independently established trade, occupation, profession or business, we need only discuss that factor.

In addressing this latter factor, courts have generally considered the following:

(1) whether the individual was capable of performing his services [for] anyone who wished to avail themselves of the services and was not compelled . . . to look to only a single employer for the continuation of such services; (2) whether the individual was dependent on the presumed employer for employment; and (3) whether the individual was hired on a job-to-job basis and could refuse any assignment.

Id. at 728 [quoting *Danielle Viktor, Ltd. v. Dep't of Labor & Indus., Bureau of Employer Tax Operations.*, 586 Pa. 196, 214-15, 892 A.2d 781, 792-93 (2006); internal quotations omitted].

In *Glen Mills Schools v. Unemployment Compensation Board of Review*, 665 A.2d 561 (Pa. Cmwlth. 1995), this court examined The Dental Law⁸

⁸ Act of May 1, 1933, P.L. 216, *as amended*, 63 P.S. §§ 120 – 130j.

to determine whether a dental hygienist was disqualified from the receipt of benefits as an independent contractor. Noting that Section 2 of the Dental Law, 63 P.S. § 121, required hygienists to work under the supervision of a licensed dentist in a dentist's office or in a public or private institution, the court concluded that a dental hygienist could not operate an independent business because he or she was required to work under the supervision of a dentist, and the failure to work without supervision could result in the revocation of a license. Accordingly, the court concluded that dental hygienists could not be self-employed as a matter of law. 665 A.2d at 565.⁹

Glen Mills dictates a similar conclusion in this case. The Licensing Act imposes similar restrictions on real estate salespersons. Section 522 of the Licensing Act, 63 P.S. § 455.522, provides that in applying for a license as a salesperson, the applicant “shall submit a sworn statement by the broker with whom he desires to be affiliated certifying that the broker will actively supervise and train the applicant.” In addition, no salesperson “shall be employed by any other broker than is designated upon the current license issued to said . . . salesperson.” Section 603(a), 63 P.S. § 455.603(a). The Licensing Act also prohibits a salesperson from accepting a commission from anyone other than the broker with whom he is affiliated and, in turn, a broker is prohibited from paying a

⁹ Compare *Osborne Associates, Inc. v. Unemployment Compensation Board of Review*, 3 A.3d 722 (Pa. Cmwlth. 2010). There, in addressing whether a cosmetologist was self-employed, this court held that the Board erred in relying on the Cosmetology Law, Act of May 3, 1933, P.L. 242, *as amended*, 63 P.S. §§ 507 – 527, to conclude that the claimant was statutorily prohibited from working as an independent contractor rather than applying the factors used to determine whether an individual is self-employed for purposes of Section 4(l)(2)(B). *Osborne* does not command a different result as that case is distinguishable from both *Glen Mills* and the instant matter. There, as we noted, unlike the Dental Law, the Cosmetology Law did not expressly require cosmetologists to work under the direct supervision of another person.

commission to anyone other than his licensed employees or another broker. Section 604(a)(12), (12.1), 63 P.S. § 455.604(a)(12), (12.1). Commission of the aforesaid acts can result in sanctions, including the suspension or revocation of a license. *Id.* Finally, a broker who fails to adequately supervise his licensed salespersons can be subject to sanctions as well. Section 604(a)(16), 63 P.S. § 455.604(a)(16). *See also Gibbons v. Bureau of Prof'l & Occupational Affairs*, 921 A.2d 551 (Pa. Cmwlth. 2007) (affirming suspension of broker's license for failure to adequately supervise real estate salesperson). Thus, it would appear that a real estate salesperson can never be an independent contractor under the terms of Section 4(l)(2)(B).

Of course, as noted above, Section 4(l)(2)(B) does not apply to real estate salespersons who are paid only by commission because Section 4(l)(4)(17) specifically excepts them from the definition of employment. However, because Gaughen's only preserved argument is made under Section 4(l)(2)(B), under which he cannot prevail, the Board's order is affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jack Gaughen LLC	:	
d/b/a Jack Gaughen ERA,	:	
Petitioner	:	
	:	
v.	:	No. 1884 C.D. 2010
	:	
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

ORDER

AND NOW, this 20th day of May, 2011, the order of the Unemployment Compensation Board of Review in the above captioned matter is affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge