

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James Fellabaum, :
Petitioner :
 :
v. : No. 2319 C.D. 2009
 : Submitted: June 18, 2010
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: August 25, 2010

James W. Fellabaum (Claimant), *pro se*, petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) that denied his claim for unemployment compensation benefits. In doing so, the Board affirmed the decision of the Referee that Claimant was self-employed and, thus, ineligible for benefits under Section 402(h) of the Unemployment Compensation Law (Law).¹ Finding no error by the Board, we affirm its order.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(h). Pursuant to Section 402(h) an employee is ineligible for benefits for any week:

In which he is engaged in self-employment: Provided, however, That an employe who is able and available for full-time work shall be deemed not engaged in self-employment by reason of continued participation without substantial change during a period of unemployment in any activity including farming operations undertaken while customarily employed by an employer in full-time work
(Footnote continued on the next page . . .)

Claimant filed a claim for unemployment benefits on March 11, 2009. On his questionnaire, he indicated that he operates Quality Installed Services LLC, a drywall installation and construction business, out of his home. When he has work, he hires employees to do the construction and he pays himself a salary. Claimant asserted that he needed unemployment benefits because work was slow, and that he would not continue on unemployment once Quality received new work orders. The UC Service Center rejected Claimant's claim, finding he was ineligible for benefits because he was self-employed. Claimant appealed and a hearing was held before a Referee.

At the hearing,² Claimant testified that he has been the "sole proprietor" of Quality since July 2007. Notes of Testimony, June 30, 2009, at 2. Claimant stated that Quality has no other officers and, as sole proprietor, he is solely responsible for controlling the operations of the business and the hiring of employees. Claimant testified that work had been slow since December 2008 and that he filed for benefits effective March 1, 2009, because he had fallen into debt. Claimant asserted that because he pays unemployment compensation tax on his salary and the salary of his employees, he is entitled to receive unemployment benefits in his time of need.

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whether or not such work is in "employment" as defined in this act and continued subsequent to separation from such work when such activity is not engaged in as a primary source of livelihood. Net earnings received by the employe with respect to such activity shall be deemed remuneration paid or payable with respect to such period as shall be determined by rules and regulations of the department.

43 P.S. §802(h).

² Claimant was the sole witness at the hearing.

Based upon Claimant's admission that he exercised total control over the operations of the business, the Referee determined Claimant was an unemployed businessperson, as opposed to an unemployed worker. The Referee denied benefits, finding Claimant was self-employed. The Referee noted that paying money into the Unemployment Compensation Fund³ does not automatically make a person eligible for benefits.

Claimant appealed to the Board. In his appeal, he argued that because Quality was a limited liability corporation and had obtained S corporation status in 2008, he was not self-employed. The Board adopted the findings and conclusions of the Referee and affirmed without further comment. Claimant now petitions for this Court's review.⁴

Claimant raises two issues for our review, *i.e.*, whether the Board erred in denying his request for unemployment benefits when he was out of work and whether he is entitled to benefits because he made contributions to the Unemployment Compensation Fund. Claimant contends that if he is not entitled to benefits, he should be reimbursed for his payments into the Fund.

Self-employment is not defined in the Law, but it has been construed to encompass a claimant who is "free from control or direction over the performance of his or her services" and "who engage[s] in business and the

³ The Unemployment Compensation Fund is created by Section 601 of the Law, 43 P.S. §841, and is funded by "contributions paid by employers and employes, together with penalties and interest thereon, received or collected by the department from employers under the provisions of [the Law]." *Id.*

⁴ Our review is limited to determining whether constitutional rights have been violated, errors of law were committed, or whether the findings of fact are supported by substantial evidence. *Sheets v. Unemployment Compensation Board of Review*, 708 A.2d 884, 885 n.3 (Pa. Cmwlth. 1998).

solicitation of clients.” *LaChance v. Unemployment Compensation Board of Review*, 987 A.2d 167, 173, 174 (Pa. Cmwlth. 2009), *appeal denied*, ___ Pa. ___, ___ A.2d ___ (No. 123 MAL 2010, filed August 9, 2010). In sum, we look to “whether the claimant engaged in positive acts to establish an independent business venture.” *Id.* at 170. As we have explained, “the Law ‘was not designed to insure a weekly income to those engaged in business ventures who may not realize a profit therefrom during various weekly periods.’” *Id.* (quoting *Urban v. Unemployment Compensation Board of Review*, 151 A.2d 655, 656 (Pa. Super. 1959)).

Although Claimant believes that the status of Quality as an S corporation somehow changes the outcome of the case, he does not provide any support for his claim.⁵ In any event, the tax status of the company is irrelevant. As explained in *Baer v. Unemployment Compensation Board of Review*, 739 A.2d 216, 218 (Pa. Cmwlth. 1999), a person who formerly exercised a substantial degree of control over the management and policy-making aspects of a corporation is deemed an unemployed businessperson and, thus, self-employed. Accordingly, it is Claimant’s control over the business, not the corporate tax form used by that business, that determines the outcome of the case.⁶

⁵ Small businesses in Pennsylvania that meet certain requirements may elect S corporation status. This allows the taxes of the corporation to be reported on the tax returns of the individual shareholders. The shareholders are taxed based on the personal income tax rate, not the corporate net income tax rate. *See* Act of March 4, 1971, P.L. 6, *as amended*, added by the Act of December 23, 1983, P.L. 370, No. 90 §4, 72 P.S. §§7307-7307.12. “Corporations that do not make this election are commonly referred to as C corporations.” *Tool Sales & Service Co., Inc. v. Commonwealth*, 613 A.2d 143, 144 n.1 (Pa. Cmwlth. 1992).

⁶ In *Baer* the claimant owned 50 percent of the capital stock of Baer Pizza Ltd. and maintained substantial policy-making authority. We found this constituted sufficient evidence that she was self-employed. Also, in *Losito v. Unemployment Compensation Board of Review*, 415 A.2d (Footnote continued on the next page . . .)

Here, Claimant testified that he was the sole owner of Quality; that he solicited clients; and that he hired employees as needed. He agreed that he had sole control and direction over his actions and the actions of the business. Therefore, Claimant was a self-employed businessperson and ineligible for benefits pursuant to Section 402(h) of the Law, 43 P.S. §802(h).⁷

Claimant also argues that he is automatically eligible for benefits because unemployment taxes were deducted from his paycheck. We considered and rejected the same argument in *Sam v. Unemployment Compensation Board of Review*, 528 A.2d 1067 (Pa. Cmwlth. 1987). In *Sam*, co-owners of a family-held corporation claimed that because they contributed to the Unemployment Compensation Fund as employees they established a “quid pro quo entitlement” to benefits. *Id.* at 1068. We rejected their argument, holding that mere payment into the Fund by an employee does not establish a quid pro quo entitlement to benefits in that employee. As self-employed individuals who all exercised a substantial degree of control over their corporation’s affairs, the Sams were ineligible for benefits under Section 402(h). The same is true for Claimant in the case at bar.⁸

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1279 (Pa. Cmwlth. 1980), we found an owner of one-third of the stock of a corporation, who controlled its operations, to be self-employed. These cases are distinguishable from *Friedman v. Unemployment Compensation Board of Review*, 513 A.2d 560 (Pa. Cmwlth 1986), where the vice-president of a corporation, who had a 20 percent interest in the company and whose decisions were subject to the veto power of the president, was found not to be self-employed. We note that in the present case, Claimant admits to owning 100 percent of the company and being the sole decisionmaker.

⁷ Section 402.4 of the Law, 43 P.S. §802.4, provides an exception to the self-employment disqualification where a claimant’s business is forced into involuntary bankruptcy. Here, Claimant makes no such assertion.

⁸ Claimant also argues that if he is not eligible for unemployment compensation benefits, then the taxes he and Quality Installed Services paid to the Unemployment Compensation Fund should be refunded to him. The Law provides no authority for the Board to consider tax issues, **(Footnote continued on the next page . . .)**

Accordingly, the order of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

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nor will we consider such issues in an appeal from an order of the Board. If Claimant believes he is entitled to a refund of his taxes, he should pursue the matter by other procedural means.

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Board of Review,	:	
Respondent	:	

ORDER

AND NOW, this 25th day of August, 2010, the order of the Unemployment Compensation Board of Review dated September 24, 2009, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge