IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Aloe,	:	
Petitioner	:	
v.	:	No. 2365 C.D. 2010
	:	Submitted: February 4, 2011
Unemployment Compensation Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** June 15, 2011

Petitioner William Aloe (Claimant), acting *pro se*, petitions for review of an order of the Unemployment Compensation Board of Review (Board), which reversed the Referee's decision and denied Claimant emergency unemployment compensation (EUC) benefits pursuant to Section 4001(d)(2) of the Emergency Unemployment Act of 2008[1] (EUC Act of 2008) and Section 402(h) of the Unemployment Compensation Law (Law).[2] For the reasons set forth below, we affirm.

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[1] Title IV of the Supplemental Appropriation Act of 2008, Public Law 110-252, 122 Stat. 2323, Section 4001, 26 U.S.C. § 3304.

[2] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(h). EUC benefits are federally funded and were created by Congress pursuant to the EUC Act of 2008. *McKenna v. Unemployment Comp. Bd. of Review*, 981 A.2d 415, 417 (Pa. Cmwlth. 2009). The EUC benefits programs are administered by the states. *Id.* In Pennsylvania, unemployed claimants who are not eligible for regular UC benefits from Pennsylvania, another

Claimant entered into an Owner/Operator Agreement with SCI on July 24, 2009, to perform part-time work as a courier for Corporate Transit American (Employer). Claimant performed work as a courier for Employer until November 6, 2009. (Certified Record (C.R.), Item 9 at 6.) Claimant thereafter applied for EUC[3] benefits, and the Duquesne UC Service Center (Service Center) found Claimant eligible for EUC benefits under Section 4001(d)(2) of the EUC Act of 2008 and Section 402(h) of the Law. (C.R., Item 4 at 1.) Employer appealed.

Following a hearing, the Referee affirmed the Service Center determination, finding that Claimant was eligible for EUC benefits under Section 402(h) of the Law. (C.R., Item 10.) The Referee reasoned that although Claimant largely was free from Employer's direction and control, Claimant had not taken any steps toward being self-employed. (*Id.*) The Referee noted that Claimant purchased nothing, made no investment, did not advertise, and did not hold himself out to the public as a courier. (*Id.*) Employer appealed to the Board, which reversed the Referee's determination and denied Claimant EUC benefits. (C.R., Item 12 at 4.)

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state, the federal government, or Canada may be eligible for EUC benefits. *Id.* Eligibility requirements for receipt of regular UC benefits are also applicable to EUC benefits, along with additional requirements imposed by the EUC Act of 2008. *Id.* Section 4001(d)(2) of the EUC Act of 2008 provides that the terms and condition of the State law which apply to claims for regular compensation and to the payment thereof shall apply to claims for emergency unemployment compensation and the payment thereof.

[3] It appears that Claimant applied for and was granted unemployment compensation benefits in December 2008, and was granted an extension of benefits in June 2009, in accordance with the EUC Act of 2008. Thereafter, Claimant began performing courier work for Employer in July 2009.

On appeal, the Board issued the following findings of fact:

1. The claimant worked as a courier for Corporate Transit American (CTA) from July 20, 2009, until November 6, 2009, his last day of work.

2. On July 24. 2009, the claimant and SCI, a general contractor, entered into an Owner/Operator Agreement, in which the claimant agreed that he was not an employee. SCI refers drivers to its clients, such as CTA. CTA deposits money into an account with SCI, then SCI pays the couriers.

3. The claimant was paid per route.

4. Taxes were not deducted from the claimant's pay.

5. The claimant filled out an IRS W-9 form when hired.

6. The claimant reported his income on his taxes as self-employment and took a $867 loss.

7. The claimant was required to supply his own vehicle and insurances.

8. The claimant paid for his own gasoline and maintenance on his vehicle.

9. CTA did not reimburse the claimant for his expenses.

10. CTA would give the claimant a list of customers he needed to go to in order to drop off and pick up packages. The list included suggested times that the customers would be ready with their product.

11. The claimant would record the number of pieces dropped off and picked up.

12. The claimant could perform the work accepted in any order or sequence he wanted, but he had to work in between the daily start and end times provided by the customer.

13. The claimant could accept or reject any assignment.

> 14. The claimant could hire other workers to perform his job duties for him.
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> 15. Nothing in the Agreement between the claimant and SCI prohibited the claimant from performing similar work for other entities.

(*Id.*) In considering whether Claimant was an employee or an independent contractor of Employer (not SCI), the Board focused on whether Claimant was "free from control" of Employer and whether Claimant was engaged in an independently established trade. Applying the above facts to that framework for analysis, the Board concluded that Claimant was employed as an independent contractor and, therefore, ineligible for benefits under Section 402(h) of the Law. Claimant then filed the subject petition for review with this Court.

On appeal,[4] Claimant essentially argues that the Board committed an error of law when it concluded that Claimant was an independent contractor and not an employee and, therefore, was self-employed.[5] Section 402(h) of the Law provides that an employee shall be ineligible for compensation for any week he is engaged in self-employment. "The term 'self-employment' is not defined in the Law; however, the courts have utilized [S]ection 4(*l*)(2)(B) of the Law[,[6]] 43 P.S.

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[4] This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704. Whether an individual is an employee or an independent contractor is a determination of law subject to our review. *Applied Measurement Professionals, Inc. v. Unemployment Comp. Bd. of Review*, 844 A.2d 632, 635 (Pa. Cmwlth. 2004).

[5] Claimant's separation from employment is not at issue in this appeal; instead, we are asked to determine whether Claimant was an employee of Employer or was a self-employed, independent contractor.

[6] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 753(*l*)(2)(B).

§ 753(*l*)(2)(B), to fill the void because its obvious purpose is to exclude independent contractors from coverage." *Beacon Flag Car Co., Inc. v. Unemployment Comp. Bd. of Review*, 910 A.2d 103, 107 (Pa. Cmwlth. 2006). Section 4(*l*)(2)(B) of the Law provides:

> 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.

The courts have interpreted the language of Section 4(*l*)(2)(B) of the Law as establishing a two-prong test to determine if a claimant is engaged in "self-employment" and, therefore, ineligible for unemployment compensation benefits. *Kuhn v. Unemployment Comp. Bd. of Review*, 432 A.2d 1156, 1158 (Pa. Cmwlth. 1981). Under the two-prong test, "where the claimant's services are performed free of the employer's control *and* the claimant's services are the type performed in an independent trade or business, the claimant is not in an employment relationship." *CE Credits Online v. Unemployment Comp. Bd. of Review*, 946 A.2d 1162, 1167 (Pa. Cmwlth. 2008) (emphasis in original), *appeal denied*, 601 Pa. 689, 971 A.2d 493 (2009). The putative employer asserting that the claimant is not eligible for reason of Section 4(*l*)(2)(B) of the Law bears the burden to prove that the employee is not in an employment relationship. *Id.* This provision assumes that the claimant was an employee, but this presumption may be overcome if the putative employer proves that the claimant was free from control and direction in the performance of his service and that he was customarily engaged in an independent trade or business. *Beacon Flag Car*, 910 A.2d at 107.

Unless both of these requirements are met, it is presumed that the claimant was an employee. *Id.* at 108.

As to the first prong—whether a claimant was free from control and direction—courts consider whether the putative employer exercised "control" as to the work to be done and the manner in which the work is to be performed. *Id.* This Court has identified a number of factors relevant to whether an employee is free of "control" for purposes of Section 4(*l*)(2)(B) of the Law. *CE Credits Online*, 946 A.2d at 1168. These factors include: "whether there is a fixed rate of remuneration; whether taxes are withheld from the claimant's pay; whether the employer supplies the tools necessary to carry out the services; whether the employer provides on-the-job training; and whether the employer holds regular meetings that the claimant was expected to attend." *Id.* Our Court has also considered whether periodic progress reports were to be made. *Monroe G. Koggan Assocs. Inc. v. Unemployment Comp. Bd. of Review*, 472 A.2d 277, 279 (Pa. Cmwlth. 1984). In *Beacon Flag Car*, a decision in which we concluded that a driver for a flag car dispatch service was an independent contractor, we also considered whether the employer determined the time, place and destination of the trip; whether the employer determined the route for the drivers or required drivers to report their progress throughout the route; whether the employer supervised the drivers; whether drivers were free to make their own arrangements with clients as long as appropriate compensation was received by the employer; whether drivers were paid on an hourly basis or per job basis; and most importantly, whether drivers were free to refuse any client or trip without repercussions. *Beacon Flag Car*, 910 A.2d at 108. The existence of an independent contractor agreement is not dispositive, although it is a significant factor to be considered. *Glatfelter Barber*

Shop v. Unemployment Comp. Bd. of Review, 957 A.2d 786, 798 (Pa. Cmwlth.), *appeal denied*, 599 Pa. 712, 962 A.2d 1198 (2008). While courts have considered a variety of factors, no one factor is dispositive of the ultimate question of whether the employer "controls" the work to be done and the manner in which it is done. *CE Credits Online*, 946 A.2d at 1168-69.

In the instant case, we agree with the Board's analysis that Employer met its burden of proof as to the first-prong of the test under Section 4(*l*)(2)(B) of the Law. The Board wrote:

> Here, there are many factors that weigh in favor of finding an independent contractor relationship: The claimant entered into an Owner/Operator Agreement in which he agreed that he was not an employee; the claimant was paid per route rather than per hour worked; taxes were not deducted from the claimant's pay[;] the claimant filled out a tax form W-9 rather than W-2[;] the claimant declared himself self-employed on his taxes and took a loss; the claimant supplied his own vehicle and insurances; the claimant paid for his own gasoline and maintenance on the vehicle and did not receive reimbursement for expenses; the claimant could work the jobs in any sequence he wished; the claimant could hire workers to take the routes for him; and the claimant could accept or reject any assignment. The evidence shows that the claimant worked free from direction and control in the performance of his job duties as a courier. Providing the customers and the range of time to perform the duties is control over the result only, not the manner of performance.

(Board's decision and order, dated September 21, 2010, attached to Employer's brief in "Appendix.") While each of these factors identified by the Board would not be controlling individually, viewed as a whole they are sufficient to support a conclusion that Claimant was free from Employer's control and direction with

regard to the work to be done and, in particular, the *manner* in which the work was to be performed.

As to the second prong of the test under Section 4(*l*)(2)(B) of the Law—whether the claimant is customarily engaged in an independently established trade, occupation, profession or business—courts consider "whether the individual was capable of performing the activities in question [for] anyone who wished to avail themselves of the services and whether the nature of the business compelled the individual to look to only a single employer for the continuation of such services." *Venango Newspapers v. Unemployment Comp. Bd. of Review*, 631 A.2d 1384, 1388 (Pa. Cmwlth. 1993). Although not set forth in the language of Section 4(*l*)(2)(B), courts often associate the second prong with some proprietary interest of claimant involving risk of financial loss. *Danielle Viktor, Ltd. v. Dept. of Labor and Indus., Bureau of Employer Tax Operations*, 586 Pa. 196, 892 A.2d 781 (2006).

We also agree with the Board's analysis that Employer met its burden under the second prong of Section 4(*l*)(2)(B) of the Law. As noted by the Board, there was nothing in the Owner/Operator agreement that prohibited Claimant from working for other entities. Also, there was no evidence that Employer was the only company that required courier services. Claimant, therefore, could have performed courier services for other entities that wished to avail themselves of his services. We also note that Claimant in this case clearly bore the risk of financial loss, as he reported a loss on his tax return.

Although Claimant urges the Court to conclude that Employer failed to meet the second prong of Section 4(*l*)(2)(B) because he performed courier services for *only* Employer, the fact that Claimant chose not to perform courier

services for other entities is of no consequence to our analysis. The Board found that Claimant was available to perform such services and was in no way prohibited from doing so as a result of his relationship with Employer. To conclude that Claimant's lack of independent contractor or employee status with another entity somehow transforms him into an employee of Employer (when he would otherwise meet the requirements of independent contractor status) would result in an unworkable framework. An employer could have *exactly* the same type of relationship with several individuals, and their individual status as an employee or independent contractor would be determined not by their relationship with the putative employer but rather by their relationship with another entity. Moreover, an individual's status with the putative employer could be in a continual state of flux based upon changes in his relationships with other entities. Such a framework would be untenable and require fact-finding in an unemployment compensation forum as to a claimant's relationship with a third-party. [7]

[7] In his brief, Claimant also argues that the Board did not show sufficient cause to reverse the decision of the Referee and did not adequately explain its reasoning. We reject this argument. The Board recognized that the Referee mischaracterized the second prong of the analysis set forth in Section 4(*l*)(2)(B) of the Law as requiring an employer to establish that the claimant took positive steps toward becoming self-employed, such as investing money, advertising, or holding himself out to the public as being engaged in the courier service. The Board, in its decision and order, merely set forth the correct analysis and applied the facts as testified to by Claimant. In other words, the Board determined that the Referee committed an error of law, and it is entirely appropriate for the Board to reverse on that basis. Moreover, the Board adequately explained the proper analysis to be applied, issued relevant findings of fact, and explained why, based on those findings, Claimant was ineligible for benefits.

Also, we note that we can find no case law that analyzes the second prong of Section 4(*l*)(2)(B) it terms of taking a "positive step" towards self-employment. If a positive step were required, we note that Claimant engaged in a positive step toward self-employment when he entered into the Owner/Operator Agreement with SCI (not Employer). In addition, although the Referee considered it significant that Claimant made no initial financial investment or advertised his services, our courts have never concluded that such an investment or advertisement is

Claimant urges this Court to conclude that the Board erred as to the second prong of the analysis because the record does not establish that he is "customarily" engaged as an independent contractor as required by Section 4(*l*)(2)(B) of the Law. Claimant contends that the Board omitted the word "customarily" from its analysis, and the omission of the word changes the interpretation of the Law.[8]

The term "customarily" is not defined under the Law. Where a term is not expressly defined in a statute, this Court will construe the term according to its common and approved usage. 1 Pa. C.S. § 1903(a). To do so, we may look to dictionary definitions. *Educ. Mgmt. Servs., Inc. v. Dep't of Educ.*, 931 A.2d 820, 825 (Pa. Cmwlth. 2007). Black's Law Dictionary defines "customarily," as

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required for independent contractor status, and Claimant cites no case law in support of his contention to the contrary.

Finally, we note that in the case at hand, Claimant was the only person to testify before the Referee. Although the Board issued its own findings of fact, it is clear that both the Board and the Referee found Claimant's testimony to be credible. This case does not involve a situation where the Board reversed based on issues of credibility or conflicting findings of fact. Rather, the Board reversed due to an error of law.

[8] When interpreting a statute, this Court is guided by the Statutory Construction Act of 1972, 1 Pa. C.S. §§ 1501-1991, which provides that "the object of all interpretation and construction of all statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a). "The clearest indication of legislative intent is generally the plain language of a statute." *Walker v. Eleby*, 577 Pa. 104, 123, 842 A.2d 389, 400 (2004). "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b). Only "[w]hen the words of the statute are not explicit" may this Court resort to statutory construction. 1 Pa. C.S. § 1921(c). "A statute is ambiguous or unclear if its language is subject to two or more reasonable interpretations." *Bethenergy Mines, Inc. v. Dep't of Envtl. Prot.*, 676 A.2d 711, 715 (Pa. Cmwlth.), *appeal denied*, 546 Pa. 668, 685 A.2d 547 (1996). Moreover, "[e]very statute shall be construed, if possible, to give effect to all its provisions." 1 Pa. C.S. § 1921(a). It is presumed "[t]hat the General Assembly intends the entire statute to be effective and certain." 1 Pa. C.S. § 1922(2). Thus, no provision of a statute shall be "reduced to mere surplusage." *Walker*, 577 Pa. at 123, 842 A.2d at 400. Finally, it is presumed "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa. C.S. § 1922(1).

follows: "Means usually, habitually, according to the customs; general practice or usual order of things; regularly." BLACK'S LAW DICTIONARY at 385 (6th ed. 1990). The Board's application of Section 4(*l*)(2)(B)'s phrase "customarily engaged in an independently established trade, occupation, profession or business" is consistent with the definition of "customarily" as set forth above. The record establishes that Claimant "regularly" or "usually" performed courier services for Employer. Nothing in the definition of "customarily" requires that an individual engage in the "trade, occupation, profession or business" for more than one client or that the individual be engaged on a full-time basis, as Claimant contends. The Board, therefore, did not err in its application of Sections 4(*l*)(2)(B) and 402(h) of the Law.

Accordingly, we affirm the order of the Board.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Aloe, Petitioner	:	
v.	:	No. 2365 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 15th day of June, 2011, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

P. KEVIN BROBSON, Judge