IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael W. Moran, Petitioner	:	
v.	:	No. 474 C.D. 2011
	:	Submitted: September 30, 2011
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: December 8, 2011**

Michael W. Moran (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board) that denied his claim for benefits under Sections 402(h) and 4(*l*)(2)(B) of the Unemployment Compensation Law (Law) (relating to self-employment).[1] Claimant contends the Board erred in determining he was an independent contractor rather than an employee. Upon review, we reverse the order of the Board.

I. Background

For several weeks in July 2010, Claimant worked full-time as a mechanical engineer for Cosmos Technologies, Incorporated (Employer). Upon

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §§ 802(h), 753(*l*)(2)(B).

his termination, Claimant applied for unemployment benefits, which were initially granted. Employer appealed.

At the hearing,[2] Employer was represented by counsel, and Claimant appeared on his own behalf. Before the referee, Claimant was the only witness to testify. Employer presented no evidence on its own behalf, except through its cross-examination of Claimant.

After the hearing, the referee found the following:

> 1. [C]laimant began providing services for [Employer] on July 5, 2010 and last provided services on July 28, 2010 as a full-time Project/Senior Engineer Consultant at a final rate of pay of $47.00 per hour.
>
> 2. [C]laimant was under a verbal contract as an Independent Contractor.
>
> 3. [C]laimant was responsible for his own taxes and expenses.
>
> 4. [C]laimant actively engaged in negotiations of the wage.
>
> 5. [C]laimant was free to establish his own hours and could come in and go as he deemed necessary.
>
> 6. [C]laimant was free from the direction or control over the performance of his services, both under his contract of services and in fact.

[2] This hearing was the second hearing scheduled for this matter. At the first hearing, the referee granted Employer a continuance after Employer requested an attorney be present on its behalf following the referee's colloquy explaining the proceeding.

> 7. [C]laimant held himself out to be a Project Manager/Senior Engineer Consultant to [E]mployer.
>
> 8. [C]laimant had no prior experience as a [c]onsultant.
>
> 9. [C]laimant was free to perform for [sic] same services for any other employer.

Referee's Decision, 9/13/09, Findings of Fact (F.F.) Nos. 1-9.

Based on these findings, the referee concluded Claimant was free from Employer's direction and control during his performance of his services. Therefore, Claimant engaged in self-employment as an independent contractor and was ineligible for unemployment benefits. Claimant appealed.

On appeal, the Board adopted the referee's findings of fact and conclusions of law and affirmed. Additionally, the Board stated that Employer met its burden by demonstrating Claimant was free from its control and was permitted to work for other entities under the contract. Claimant petitions for review.

II. Issue

Now represented, Claimant contends the Board erred in determining he was self-employed, as its conclusion is not supported in law or by the testimony given before the referee. The Board responds that Claimant failed to preserve a challenge to the findings of fact in his petition for review, and further, Claimant was an independent contractor, and therefore, ineligible for benefits.

Our review is limited to determining whether the Board's necessary findings were supported by substantial evidence, whether the Board committed an

error of law, or whether the Board violated claimant's constitutional rights. Danielle Viktor, Ltd. v. Dep't of Labor & Indus., 647 A.2d 289 (Pa. Cmwlth. 1994). The determination of whether a worker is an employee or independent contractor is a question of law, which depends on the unique facts of each case; thus, for this issue, our scope of review is plenary and our standard of review is de novo. Resource Staffing, Inc. v. Unemployment Comp. Bd. or Review, 961 A.2d 261 (Pa. Cmwlth. 2008).

After a careful reading of Claimant's petition for review, we conclude Claimant does not challenge the sufficiency of the evidence for any finding; rather, he questions whether the Board's determination that he was self-employed as an independent contractor is supported by the Law as it applies to the unique facts of this case. As he raises a question of law rather than of fact, waiver is not appropriate.

III. Discussion

Section 402(h) of the Law provides an employee "shall be ineligible for compensation for any week … in which he is engaged in self-employment." 43 P.S. §802(h). The legislature did not define the term self-employment in Section 402 of the Law. Therefore, this Court utilizes the language of Section 4(*l*)(2)(B) of the Law to fill the gap. Beacon Flag Car Co. v. Unemployment Comp. Bd. of Review, 910 A.2d 103 (Pa. Cmwlth. 2006) (holding the clear purpose of Section 402(h) of the Law is to exclude independent contractors from coverage); see also Glatfelter Barber Shop v. Unemployment Comp. Bd. of Review, 958 A.2d 786 (Pa. Cmwlth. 2008). In pertinent part 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 and 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).

Accordingly, both prongs of the test stated in Section 4(*l*)(2)(B) of the Law must be satisfied before an individual will be deemed an independent contractor. Venango Newspapers v. Unemployment Comp. Bd. of Review, 631 A.2d 1384 (Pa. Cmwlth. 1993). In employment cases, a strong presumption exists that an individual receiving wages for his services is an employee, and the burden to overcome that presumption rests on the employer. Sharp Equip. Co. v. Unemployment Comp. Bd. of Review, 808 A.2d 1019 (Pa. Cmwlth. 2002). Thus, "unless the employer can show that the employee [is] not subject to his control and direction and [is] engaged in an independent trade, occupation or profession, then [the worker is an employee]." C.A. Wright Plumbing Co. v. Unemployment Comp. Bd. of Review, 293 A.2d 126, 129 (Pa. Cmwlth. 1972) (en banc).

We conclude that Employer did not overcome the strong presumption that Claimant was an employee. While we question the Board's determination that Employer did not exercise control over Claimant, it is clear that the Board erred in its resolution of the second prong involving an independent trade or business.

The relevant word to our inquiry for this prong is the term "independent." Danielle Viktor, Ltd. v. Dep't of Labor & Indus., 586 Pa. 196, 892 A.2d 781 (2006). In Viktor, our Supreme Court weighed several factors in determining whether the particular claimants' businesses, limousine driving, operated independently, including:

> (1) the [workers'] ability to perform services for more than one entity, including competitors, with no adverse consequences; (2) the operation of [the workers'] businesses and [the workers'] ability to perform work did not depend on the existence of any one of the [potential employers]; and (3) the fact that [the workers] bring all necessary perquisites of providing [services] to [the employers], even though they do not own [their own tools or supplies] or bear all of the financial risk.

Id. at 229-230, 892 A.2d 801-802. As such, a worker can only be considered an independent contractor if he is in business for himself, and is not dependent on another for the continuance of employment. Id. (citing Commonwealth. v. Hecker and Co., 409 Pa. 117, 185 A.2d 549 (1962)).

Here, the Board erred when it relied solely on the referee's finding that Claimant was free to perform the same services he supplied to Employer for any other potential employer. Bd. Op., 2/14/11, at 1; F.F. No. 9. Additionally, the Board's consideration was limited to whether Claimant was free to compete with Employer under his contract, and not whether Claimant was actually capable of working for another enterprise. See Beacon Flag, 910 A.2d at 109 n. 11 (holding a non-compete agreement is not definitive to our determination, and "we are particularly loathe to hold … such an agreement [created] … an employer-employee relationship").

As we previously held in Beacon Flag, "the ability to work for more than one enterprise is an important factor in determining independent contractor status," but it is not the only factor. Id. at 109. The Board erred in determining Claimant engaged in an independent business when its conclusion was supported by a single finding that Claimant was contractually free to work for another entity during his contract with Employer.

We must look at the totality of the circumstances relevant to a worker's independence, including those considerations stated in Viktor. Here, Claimant had no experience as a consultant or independent contractor. F.F. No. 8. Because he had no prior experience as an independent contractor, Claimant did not have his own office, tools, supplies, or detached business entity. See F.F. No. 8; N.T. at 6-7, 10. Instead, Employer supplied Claimant will all necessary supplies and facilities that Claimant needed in order to provide his services. N.T. at 17-19. Furthermore, unlike the limousine drivers in Viktor, Claimant was not free to accept or reject assignments issued by Employer. N.T. at 11.

Additionally, Claimant did not advertise or solicit his services, as an independent business, to gain employment. N.T. 6-7. It is particularly noteworthy that the parties here entered their own arrangement after Employer contacted Claimant's past employer looking for workers. N.T. at 7. As a result, Employer hired Claimant to a full-time position lasting the duration of Employer's then-current project, pending Claimant's production of satisfactory work during that time. See F.F. No. 1; N.T. at 7, 9. Additionally, for his services Employer paid Claimant an hourly wage rather than job-to-job or per assignment. F.F. Nos. 1-2.

Thus, regardless of Claimant's potential contractual freedom to compete with Employer, the Board's other findings do not support the conclusion that Claimant was capable of performing engineering services as an independent enterprise for other employers. See Beacon Flag. Additionally, Claimant had no experience as an independent contractor, and thus, did not have his own tools or facilities to operate independently from Employer. See Glatfelter Barber Shop. Lastly, Claimant's testimony demonstrates that the nature of Claimant's trade compelled him to seek work from only one employer, and he was dependent upon Employer for his continual employment. See Viktor; Venango Newspaper. Therefore, Claimant was not engaged in an independent business, but rather was an employee.

Accordingly, we conclude the Board erred in finding Claimant was self-employed as an independent contractor under Sections 402(h) and 4(*l*)(2)(B) of the Law. Therefore, we reverse the Board's order.

ROBERT SIMPSON, Judge

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O R D E R

AND NOW, this 8th day of December, 2011, the order of the Unemployment Compensation Board of Review is **REVERSED**.

ROBERT SIMPSON, Judge