

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paul Van Loon,	:
Petitioner	:
	:
v.	: No. 480 C.D. 2010
	: Submitted: August 20, 2010
Unemployment Compensation	:
Board of Review,	:
Respondent	:

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: November 9, 2010

Paul Van Loon (Claimant), *pro se*, petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) denying his claim for unemployment benefits under Section 402(h) of the Unemployment Compensation Law (Law).¹ In doing so, the Board reversed the Referee's decision,

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

In which he is engaged in self-employment: Provided, however, That an employee 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 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 employee 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).

concluding that Claimant was self-employed and, therefore, ineligible for benefits. Finding no error in the Board's adjudication, we affirm.

Claimant was employed by St. Joseph's Center (Employer) as a consultant from June 6, 2009 until August 31, 2009. After his employment with Employer ended, Claimant sought unemployment compensation benefits. The Scranton UC Service Center determined that Claimant was self-employed and, therefore, ineligible for benefits under Section 402(h) of the Law. Claimant appealed, and a hearing was held before a Referee.

Employer did not participate in the hearing, and Claimant testified on his own behalf. Claimant testified that he had previously worked for Unison Engine Components for 30 years as a purchasing manager, which included the duty to supervise the company's IT department. When Claimant lost the Unison Engine job in May 2009, he began collecting unemployment compensation benefits. Two weeks later, on June 6, 2009, Claimant accepted a position with Employer and signed a contract.

Claimant did not have an official title, but both he and Employer considered Claimant to be a consultant. Claimant's primary responsibility was to document Employer's day-to-day computer procedures. Claimant was not given a deadline for completing the project, though he presumed it would take several months. Claimant was minimally supervised. He met with Bob Gordon, Employer's Chief Financial Officer, approximately once a week to discuss his progress and determine which employees he would need to meet with regarding their computer activities. Claimant needed no specialized tools or equipment to complete the project.

Claimant and Gordon agreed that Claimant would be paid \$75 per hour. Claimant was required to submit invoices for his work. Claimant estimated that he worked four hours per day, two to four days per week. Employer did not withhold taxes from Claimant's salary and provided him with a Form 1099. Claimant testified that he did not invest any money into his work for Employer, nor was he at risk of sustaining a profit or loss.

At the conclusion of the hearing, Claimant informed the Referee that when he applied for unemployment compensation benefits, he thought he was reopening the claim he had filed against his previous employer, Unison Engine Components. Claimant testified that before he started his job with Employer, he told the UC Service Center that he had a potential consulting job, and asked a Department representative how to proceed. According to Claimant, he was told that his claim with Unison Engine Components would be closed while he was working and could be reopened when his work with Employer was complete.

The Referee determined that because Claimant was not customarily engaged in an independently established trade, occupation, profession, or business, he was not self-employed under Section 402(h) of the Law, 43 P.S. §802(h). Accordingly, the Referee held that Claimant was eligible for unemployment benefits. The Referee did not address Claimant's concern that his claim was proceeding against the wrong employer.

Employer appealed to the Board, claiming that the Referee erred in determining Claimant was its employee. The Board adopted the Referee's findings of fact, but rejected the Referee's conclusion of law. The Board determined that Claimant was self-employed because he was free from Employer's control and direction, and his business was one customarily engaged in by independent

contractors. Therefore, the Board reversed the Referee's decision, and determined that Claimant was ineligible for unemployment compensation benefits. Claimant now petitions this Court for review.

On appeal,² Claimant raises two issues. First, Claimant argues that the UC Service Center mistakenly opened a new claim against Employer when he intended to reopen an existing claim for benefits owed by Unison Engine Components. Second, Claimant argues that the Board erred in concluding that he was self-employed and, therefore, ineligible for unemployment compensation benefits. Claimant argues that he was not self-employed because he never made any investment of money in any company or took steps to start his own company. Claimant contends that he was hired by Employer for a specific project, which he completed.

Claimant first argues that the UC Service Center, the Referee and the Board mistakenly allowed Employer to defend his claim for benefits when it was his intent all along to reopen a closed claim against his previous employer, Unison Engine Components. We may quickly dispose of this issue because the Claimant Questionnaire that Claimant completed and signed lists his employer as St. Joseph's Center. Certified Record, Item No. 2 (C.R. ____). If Claimant had meant to reopen his previous claim for unemployment benefits against Unison Engine Components and not a new claim against St. Joseph's Center, he should have so indicated on his Claimant Questionnaire. Claimant asserts that he was misinformed by the UC

² Our scope of review is limited to determining whether the Board's adjudication is in violation of constitutional rights, errors of law were committed, or whether 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). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Korpics v. Unemployment Compensation Board of Review*, 833 A.2d 1217, 1219 n.1 (Pa. Cmwlth. 2003).

Service Center, but this Court can only decide the case that is before us.³ All of the documentation of record lists St. Joseph's Center as the employer.

Claimant next challenges the Board's determination that he was self-employed. It is well settled that the purpose of Section 402(h) of the Law, 43 P.S. §802(h), is not to compensate an unemployed individual who has failed at a business venture. *Starinieri v. Unemployment Compensation Board of Review*, 447 Pa. 256, 258, 289 A.2d 726, 727 (1972). An individual who is self-employed but later finds himself as an "unemployed businessman" is ineligible for unemployment compensation benefits. *Id.* Therefore, pursuant to Section 402(h), an individual is ineligible for unemployment benefits for any week in which he was engaged in self-employment.

In determining whether a claimant is an employee or an independent contractor, our courts have relied on the definition of "employment relationship" in Section 4(l)(2)(B) of the Law, 43 P.S. §753(l)(2)(B), since the purpose of Section 4(l)(2)(B) is to exclude independent contractors from coverage. *Thomas Edison State College v. Unemployment Compensation Board of Review*, 980 A.2d 736, 741 (Pa. Cmwlth. 2009). Section (4)(l)(2)(B) defines employment relationship as:

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.

³ Indeed, the question of whether Claimant can reinstate benefits as a result of his separation from employment from Unison Engine Components is not before the Court. There is no question, apparently, that Claimant was an employee of Unison Engine Components.

43 P.S. §753(l)(2)(B). Thus, Section 4(l)(2)(B) creates a two-pronged test to determine whether a person is self-employed: first, whether the person was free from control and direction in the performance of his work; *and* second, whether the business was one which is customarily engaged in as an independent trade or business. *Thomas Edison State College*, 980 A.2d at 741.

The first prong of the above test requires us to consider whether Employer exercised sufficient control over Claimant's services so as to render him an employee. We find that it did not. Claimant testified that he was minimally supervised and met with Employer only once per week to provide a progress report. Additionally, Claimant set his own hours and bought his own supplies. In light of these facts, we agree with the Board that Claimant was free from Employer's control.

The second prong of the test requires us to determine whether Claimant's business is one which is customarily engaged in as an independent trade or business.⁴ Our inquiry focuses on two factors: first, whether the individual was capable of performing the services in question for anyone who wished to avail themselves of the services; and second, 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 Compensation Board of Review*, 631 A.2d 1384, 1388 (Pa. Cmwlth. 1993). An individual is considered customarily engaged in an independent trade when the individual's services are performed without interference from an employer and those services could be undertaken without regard

⁴ The test for an employment relationship is comprised of two conjunctive prongs, and it must be shown that both have been satisfied to exclude a worker from coverage. *C.A. Wright Plumbing Co. v. Unemployment Compensation Board of Review*, 293 A.2d 126, 128 (Pa. Cmwlth. 1972).

to the identity of the employer. *Unemployment Compensation Board of Review v. Kessler*, 365 A.2d 459, 462 (Pa. Cmwlth. 1976).

Here, there is no evidence that Claimant was not free to perform similar consulting services for another company. Moreover, the nature of the activities he was performing was not such that he was compelled to look only to Employer for the continuation of such services.

In summary, we agree with the Board that Claimant was self-employed while under contract with Employer and, therefore, he is ineligible for benefits under Section 402(h) of the Law, 43 P.S. §802(h). Accordingly, we affirm the decision of the Board.⁵

MARY HANNAH LEAVITT, Judge

⁵ Claimant raises an additional issue in his brief, *i.e.*, that a non-fault overpayment assessed against him should be limited to claim weeks September 5, 2009, through September 26, 2009. Claimant has also filed a motion with this Court to supplement the certified record with two documents purportedly related to the non-fault overpayment: (1) a Notice of Determination - Overpayment of Benefit for claim weeks ending September 5, 2009, through November 28, 2009, and (2) a Notice of Financial Determination showing Claimant's wages for 2008 from Unison Engine Components. We will deny Claimant's motion to supplement the record, and decline to address this issue, since the non-fault overpayment pertains to a different claim for benefits against a different employer.

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ORDER

AND NOW, this 9th day of November, 2010, Petitioner's Motion to Supplement the Certified Record, dated September 14, 2010, is DENIED. The order of the Unemployment Compensation Board of Review in the above-captioned matter, dated February 8, 2010, is AFFIRMED.

MARY HANNAH LEAVITT, Judge