

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

J. Scott Detweiler,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	No. 482 C.D. 2009
Respondent	:	Submitted: January 29, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: March 12, 2010

J. Scott Detweiler (Claimant) petitions this Court for review of the February 27, 2009, Decision and Order of the Unemployment Compensation Board of Review (Board) affirming a Referee's decision to deny Claimant benefits based on the conclusion that Claimant was an independent contractor, not an employee. Claimant essentially presents two issues for the Court's review: 1) whether the Board erred as a matter of law in deeming Claimant an independent contractor for purposes of unemployment compensation; and 2) whether the Board erred in failing to remand this matter for an evidentiary hearing in light of the fact that Claimant failed to appear for the prior evidentiary hearing. For reasons that follow, we reverse the Board's decision and order.

On November 24, 2008, the Allentown UC Service Center issued a determination finding Claimant eligible for unemployment compensation benefits.

Aton Pharma (Employer) appealed the determination on December 9, 2008, at which time a hearing was scheduled to take place before a Referee on January 5, 2009. Employer attended the scheduled hearing; Claimant did not. Claimant's stated reason for his failure to attend the hearing was his misunderstanding that a Certification of Documents stating, "Department participation in the hearing is not required," somehow absolved him of responsibility to present his evidence before the Referee. The Referee, thus, held the hearing in Claimant's absence, ultimately concluding that Claimant was an independent contractor and, therefore, not eligible for unemployment compensation. The Referee issued her decision and order on January 7, 2009. Claimant then sought reconsideration by the Referee, and appealed to the Board seeking reversal or remand for a second evidentiary hearing.

In affirming the decision of the Referee in this matter and denying Claimant's request for remand, the Board provided no substantive analysis, but incorporated and adopted the findings and conclusions of the Referee in full. The Referee's findings are as follows:

1. For purposes of this appeal, the claimant performed services as a consultant for Aton Pharma beginning in September 2008.
2. The employer was familiar with the claimant's work from the claimant's previous employment and hired the claimant as a consultant to help the employer set up and qualify equipment.
3. The claimant was paid \$100 an hour plus expenses and given dates by the employer as to when the equipment needed to be reviewed.
4. The claimant received no benefits and will receive a 1099 Form from the employer for income tax purposes.

(Referee Decision, Findings of Fact ¶¶ 1-4).

Having made these factual findings, the Referee noted that Claimant had been duly notified regarding the hearing, and had, nonetheless, failed to appear for the same. The Referee then framed the pending issue as a question of whether Claimant was an independent contractor. To decide the issue, the Referee looked to, and quoted, a portion of Section 4 of the Unemployment Compensation Law (Law).¹ Section 4(l)(2)(B), in relevant part, reads as follows:

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.

(Emphasis added).

Within this context, the Referee explained her reasoning. To quote the reasoning section of her opinion in full, the Referee stated:

In this case, the record indicates that the claimant was hired as a consultant for this company based on the claimant's previous experience, with which the employer was familiar. The claimant was given dates, by the employer, as to when they needed his help qualifying equipment, however, the claimant was free to perform these duties as he needed. The claimant was paid an hourly rate plus expenses and receives no benefits from the employer and will receive a 1099 Form for income tax purposes. Consequently, the claimant must be considered an independent contractor within the meaning of Section 4(l)(2)(B)(1) [*sic*²] of the Law and he is denied benefits under those provisions of the Law.

(Referee Decision at 2).

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 753.

² We note that Section 4(l)(2)(B) has no sub-section (1).

Claimant now appeals to this Court. Our review is limited to determining whether Claimant's constitutional rights were violated, whether the necessary factual findings are supported by competent evidence, and/or whether an error of law was committed below. *Sheets v. Unemployment Comp. Bd. of Review*, 708 A.2d 884 (Pa. Cmwlth. 1998); 2 Pa. C.S. § 704. Given that we discern legal error as to the issue of whether Claimant was an independent contractor under the Law, we disagree with the analysis of the Referee and the Board.

Without addressing the various factors that suggest Claimant did not have sufficient control or direction over his own performance so as to make him an independent contractor under the Law, we note a fundamental flaw in the Referee's analysis. The fundamental, and indeed fatal, flaw is that while the Referee applied sub-section (a) of Section 4(l)(2)(B) (pertaining to control and direction over performance), she failed to apply sub-section (b) of Section 4(l)(2)(B), which requires that in order to make the determination that an individual is an independent contractor, sub-section (b) must be satisfied as well as sub-section (a). According to sub-section (b), an individual can only be an independent contractor if the services at issue are services as to which the individual is customarily engaged in an independently established trade, occupation, profession or business. The Referee, and likewise the Board, failed to address sub-section (b).

We hold that Claimant was not an independent contractor because Employer failed to meet its burden to show that Claimant was customarily engaged in an independently established trade, occupation, profession or business.

The law is settled that:

Section 4(l)(2)(B) creates a two-pronged test in order to determine whether a person is an employee or not: first, whether the person was free from control and direction in the performance of the work; and second, whether the

business was one which is customarily engaged in as an independent trade or business.

Thomas Edison State Coll. v. Unemployment Comp. Bd. of Review, 980 A.2d 736, 741 (Pa. Cmwlth. 2009). Further, “[i]t is presumed that an individual is an employee, rather than an independent contractor,” and the burden is on the putative employer to show otherwise by demonstrating that both prongs of the two-pronged test have been satisfied. *Id.* “Unless both of these showings are made, the presumption stands that one who performs services for wages is an employee.” *Resource Staffing, Inc. v. Unemployment Comp. Bd. of Review*, 961 A.2d 261, 264 (Pa. Cmwlth. 2008). Moreover, the courts have identified two relevant factors in determining whether an individual is involved in an independently established trade or business. Those factors are:

(1) whether the individual was capable of performing the activities in question for anyone who wished to avail themselves of the services; and (2) whether the nature of the business compelled the individual to look to only a single employer for the continuation of such services.

Beacon Flag Car Co., Inc. (Doris Weyant) v. Unemployment Comp. Bd. of Review, 910 A.2d 103, 108-109 (Pa. Cmwlth. 2006).

Here, there is an indication in Claimant’s papers that Claimant’s work involved consultation in the manufacturing of a single product that would be produced exclusively by Employer. Thus, Claimant has a viable argument that he was not an independent contractor because he was not capable of performing the activities in question for another employer, as the nature of the business compelled Claimant to look only to Employer for the continuation of the services at issue. We make no findings with respect to this argument, other than to note that it was not addressed below. The Board and Referee failed to address the second prong of the

two-pronged test. Thus, there was no finding that Employer met its burden with respect to the second prong of the two-pronged test to overcome the presumption that Claimant was an employee.

Having decided that Employer did not meet its burden to prove Claimant was an independent contractor under the Law, we do not reach the issue of whether the Board properly denied Claimant's request for a remand to present evidence.

For the above reasons, the order of the Board is reversed.³

JOHNNY J. BUTLER, Judge

³ As the Allentown UC Service Center determined on November 24, 2008, the Claimant is eligible for unemployment compensation benefits.

