

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eugenia White-Butler, :  
Petitioner :  
 :  
v. :  
 :  
Unemployment Compensation :  
Board of Review, : No. 622 C.D. 2010  
Respondent : Submitted: August 27, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: September 29, 2010

Eugenia White-Butler (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's denial of benefits under Section 402(h) of the Unemployment Compensation Law (Law).<sup>1</sup>

The facts, as initially found by the referee and confirmed by the Board, are as follows:

2. On June 22, 2009, Claimant signed a Services Agreement identifying her as an independent contractor.
3. Delta-T Group is a referral agent. Its business is to match qualified social service workers with its clients.

---

<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(h).

4. Delta-T performs background checks and certifies the accuracies and authenticity of the credentials of each of the people on its registry as social service workers.
5. Claimant's particular area of expertise is as a mental health worker.
6. The CareerLink Office that Claimant reported to referred her to Delta-T for employment.
7. Claimant never intended to be self-employed.
8. Claimant never [held] herself out as being her own businessperson.
9. Claimant continues to look for full-time work.
10. Claimant is free to accept or reject any assignment from Delta-T.
11. Delta-T does not supervise Claimant.
12. Claimant is free to register with other, competing concerns.

Referee's Decision (Decision), November 5, 2009, Findings of Fact Nos. 2-12 at 1.

The referee determined:

In the present case, Delta-T exercised no control whatsoever over the manner in which Claimant performed her job. Further, Claimant was free to register with a variety of competing concerns to increase her chances of finding work. This satisfies the two prong test set forth under the statute. Therefore, regrettably, the Referee must [find] Claimant ineligible for benefits under this section.

Decision at 2.

Claimant appealed to the Board. In addition to her appeal, Claimant requested another hearing date to prove that she never signed a contract with Delta-T.

The Board affirmed. The Board also denied Claimant's request to schedule another hearing.

Claimant contends that the Board erred when it determined she was ineligible for benefits and that the Board erred when it granted "an appeal for a premature 804(B) on April 28, 2010, while petitioner [Claimant] was still in the appeal process for a 402(h) hearing." Claimant's Brief at 7.<sup>2</sup>

Section 402(h) of the Law, 43 P.S. § 802(h), provides that "[a]n employe shall be ineligible for compensation for any week- [i]n which he is engaged in self-employment . . . ." The term "self-employment" is not defined in the Law; "however the courts have utilized section 4(l)(2)(B) [43 P.S. § 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 Compensation Board of Review, 910 A.2d 103, 107 (Pa. Cmwlth. 2006).

Section 4(l)(2)(B) of the Law, 43 P.S. § 753(l)(2)(B), provides:

---

<sup>2</sup> This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

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.

In Beacon Flag, this Court noted:

This provision presumes that an individual is an employee, as opposed to an independent contractor, but this presumption may be overcome if the putative employer sustains its burden of showing that the claimant was free from control and direction in the performance of his service and that, as to such service, was customarily engaged in an independent trade or business.

Id. at 107.

Initially, Claimant asserts that Delta-T failed to meet the two prong test to establish that she was an independent contractor. She asserts that she never signed a contract with Delta-T, that she never negotiated a salary with Catch, Delta-T's client, and that her hours were not flexible. She further adds that she never held herself out as self-employed. She also argues that Delta-T gave her direction in a "302 mental health court hearing." Claimant's Brief at 11. She alleges that she would not have attended the "hearing" if Christina Fazio of Delta-T had not directed her to do so.

In evaluating control, Delta-T must establish that the client, not Delta-T, had the right to control the work as well as the manner in which the work was to

be performed. In reviewing the question of control, courts will consider a variety of factors, such as:

Whether there was a fixed rate of remuneration; whether taxes were deducted from the claimant's pay; whether the presumed employer supplied equipment and/or training; whether the presumed employer had the right to monitor the claimant's work and review his performance; and the requirements and demands of the presumed employer.

Resource Staffing, Inc. v. Unemployment Compensation Board of Review, 961 A.2d 261, 264 (Pa. Cmwlth. 2008).

Kelly Wright (Wright), corporate counsel for Delta-T, explained Delta-T's business:

What we do is register people. They sign an independent contractor agreement with us. We background check and credential them as a service to our client[s] so that our clients know anybody that we're offering an opportunity to is somebody that meets their requirements in term so [sic] licensing, education, background, skills set. We have an opportunity come in from a client. We will then look in our registry. We'll find somebody that has those qualifications. We'll offer them the opportunity. They're free to accept or reject the opportunity depending on their . . . needs or desires. Delta T doesn't in anyway supervise the performance of the services. None of the services by the Claimant or any other contractors are performed at Delta T. Delta T doesn't employ anybody that would be qualified to oversee a group counselor or recreational aide . . . recreational therapist. Our clients would have people that would do that. They would simply relay the . . . basic information about their referral in terms of the compensation rate that the clients [sic] willing to pay, the hours that the client would like the . . . contractor to be there and we relay that information to the contractor when we're offering them the referral and . . . they can accept or reject it.

Notes of Testimony, November 4, 2009, (N.T.) at 8.

Wright also testified that Claimant was free to have full time employment with another company or register with a competitor of Delta-T's. N.T. at 9. Delta-T also submitted into evidence a Services Agreement signed by Claimant and Delta-T. The agreement stated that Claimant was an independent contractor and was free to market her services through other means, that Claimant was responsible for all tools, materials, transportation, office space and/or supplies, that Delta-T would not provide training, and that Claimant had the sole right to control and direct the means, manner, and method by which she would perform services for the client. At the hearing, Claimant admitted that she did not read the contract.

The Board accepted the evidence presented by Delta-T as credible. In unemployment compensation proceedings, the Board is the ultimate fact-finding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded evidence. Unemployment Compensation Board of Review v. Wright, 347 A.2d 328 (Pa. Cmwlth. 1975). Findings of fact are conclusive upon review provided that the record, taken as a whole, provides substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). Delta-T's evidence satisfied the first prong of Section 4(l)(2)(B) of the Law, 43 P.S. § 753(l)(2)(B).

In Viktor v. Department of Labor and Industry, 586 Pa. 196, 892 A.2d 781 (2006)<sup>3</sup>, our Pennsylvania Supreme Court addressed the second criterion of Section 4(l)(2)(B) of the Law, 43 P.S. § 753(l)(2)(B), and determined:

The Commonwealth Court did not rest its determinations solely on the fact that Drivers were free to work for more than one company. The court considered the facts that Drivers were hired on a job-to-job basis, could refuse any assignment, and were not dependent on Appellees [limousine companies] for ongoing employment . . . . Further, the court also specifically determined that Drivers suffered a risk of loss if expenses exceeded income . . . .

. . . .

The record supports the holdings of the Commonwealth Court that Appellees [limousine companies] demonstrated that Drivers met subsection (b), for several reasons, including: (1) the Drivers' ability to perform their services for more than one entity, including competitors, with no adverse consequences; (2) the operation of their businesses and their ability to perform work did not depend on the existence of any one of the Appellees [limousine companies]; and (3) the fact that Drivers bring all necessary prerequisites of providing driving services to limousine companies, even though they do not own the limousines or bear all of the financial risk. (citations omitted).

Id. at 218-223 and 229-30, 892 A.2d at 794-97 and 801-02.

Here, Delta-T established that Claimant could perform her services with more than one entity without any adverse consequences and Claimant could

---

<sup>3</sup> In Viktor, our Pennsylvania Supreme Court was asked to “determine whether individuals who drive limousines (Drivers) . . . for six limousine companies [Appellees] . . . are independent contractors or employees pursuant to Section 43 P.S. § 753(l)(2)(B) of the . . . Law . . . . For the reasons that follow, we affirm the Orders of the Commonwealth Court that held Drivers are independent contractors . . . .” Id. at 199, 892 A.2d at 783.

accept or reject any assignment presented to her by Delta-T. This Court finds no error with the Board's determination that Delta-T met both prongs of the statutory test to rebut the presumption that Claimant was an employee.<sup>4</sup>

Accordingly, this Court affirms.<sup>5</sup>

---

BERNARD L. MCGINLEY, Judge

---

<sup>4</sup> Claimant requests an additional hearing to present evidence that she did not sign the Services Agreement and because she now desires legal representation. Claimant had the opportunity to present such evidence at the hearing. With respect to legal representation, in cases where a claimant chooses to proceed without legal representation after the referee has advised and assisted a claimant "compatible with the impartial discharge of its official duties," 34 Pa. Code §101.21(a), a claimant cannot "complain on appeal that his case might have been presented more effectively or with greater credibility with the assistance of counsel." Rodgers v. Unemployment Compensation Board of Review, 476 A.2d 1014, 1016 (Pa. Cmwlth. 1984).

<sup>5</sup> Claimant also refers to an apparently premature issuance of a notice of determination of overpayment of benefits after she appealed the denial of benefits. The Board states in its brief that, following a hearing on April 28, 2010, the referee vacated the notice of determination of overpayment of benefits and remanded the case to the Unemployment Compensation Service Center pending this Court's decision.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eugenia White-Butler,	:
Petitioner	:
	:
v.	:
	:
Unemployment Compensation	:
Board of Review,	: No. 622 C.D. 2010
Respondent	:

**ORDER**

AND NOW, this 29th day of September, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

---

BERNARD L. McGINLEY, Judge