IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Judith B. Wall,	:	
Petitioner	:	
	:	
v.	:	No. 1175 C.D. 2012
	:	Submitted: November 9, 2012
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: January 28, 2013**

Petitioner Judith B. Wall (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed a Referee's determination that denied Claimant unemployment compensation benefits under Section 402(h) of the Unemployment Compensation Law (Law).[1] For the reasons set forth below, we reverse the Board's order.

Claimant became affiliated with Professional Automotive Relocation Services (Employer) on August 3, 2011. We note that before that date, Claimant had been receiving unemployment compensation benefits as a result of the cessation of prior employment. While working for Employer, Claimant reported

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

her earnings to the unemployment compensation authorities. (Certified Record (C.R.), Item No. 1.) Consequently, the Department of Labor and Industry, Bureau of Unemployment Compensation Benefits and Allowances, requested that Claimant and Employer complete a questionnaire regarding Claimant's eligibility for benefits. (Reproduced Record (R.R.) at 1a-7a.) Thereafter, the Scranton UC Service Center (Service Center) issued a determination finding Claimant eligible for unemployment compensation benefits beginning with the compensable week ending July 30, 2011. (C.R., Item No. 5.) Employer appealed the Service Center's determination, and a Referee conducted an evidentiary hearing in which Claimant did not participate. Following the hearing, the Referee issued a decision reversing the Service Center's determination and denying Claimant unemployment compensation benefits under Section 402(h) of the Law and Section 4(*l*)(2)(B) of the Law.[2] (C.R., Item No. 11.)

Claimant appealed the Referee's decision to the Board, which remanded the case to the Referee to act as Hearing Officer for the Board. (C.R., Item No. 15.) The Board ordered the remand hearing for the purpose of receiving testimony and evidence on Claimant's reason for her non-appearance at the initial hearing. (*Id.*) The Board indicated that the parties were permitted to offer new or additional testimony and evidence on the merits, which the Board would consider if it found that Claimant had proper cause for her non-appearance at the initial hearing. (*Id.*)

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

Following the remand hearing, the Board affirmed the Referee's decision and denied Claimant unemployment compensation benefits. (C.R., Item No. 19.) In doing so, the Board issued its own findings of fact and conclusions of law. The Board made the following findings of fact:

> 1. The claimant became affiliated with [Employer] on August 3, 2011.
>
> 2. The claimant currently supplies services as a vehicle transporter.
>
> 3. The claimant was issued a Form 1099 for income tax purposes for the year 2011.
>
> 4. The claimant is free to accept or reject any offers of employment.
>
> 5. The claimant was told the roads to take and the roads not to take.
>
> 6. The claimant calls [Employer] during and at the end of the trip.
>
> 7. The claimant had to deliver the vehicle within a certain time line.
>
> 8. The claimant fills out the employer's paperwork and expense sheet for each trip.
>
> 9. The claimant did sign an independent contractor agreement with [Employer].
>
> 10. The claimant is paid for her services based on the trip and mileage.
>
> 11. The claimant is free to perform the same services subject to a non-compete agreement that she did not work for a competitor.

12. The vehicles that the claimant drives are insured by [Employer].

13. The claimant has no financial interest in [Employer].

14. The claimant paid for the gasoline for the vehicles and was reimbursed.

15. The claimant did not receive the Notice of Continuance.

16. As a result, the claimant did not appear at the first hearing.

(*Id.*)

After concluding that Claimant had good cause for her failure to appear at the first hearing and stating that it would base its decision on the testimony presented at both hearings, the Board addressed the merits of Claimant's appeal. The Board resolved the conflicts in the evidence, in relevant part, in favor of Employer and found Employer's evidence to be credible. (*Id.*) The Board reasoned that Employer's representative provided testimony that Claimant entered into an independent contractor agreement with Employer. (*Id.*) The Board determined that Claimant was contacted and offered assignments to transport cars from one location to another for third parties. (*Id.*) The Board determined that Claimant had the ability to accept or reject the offers and had no supervision in the performance of her duties. (*Id.*) The Board also determined that Claimant was paid by the trip and mileage, was issued a Form 1099 at the end of the year, and was able to perform transporting services for any other non-competitor while still performing such services for Employer. (*Id.*) The Board concluded that based on the testimony given, Claimant was considered an independent contractor under

Section 402(h) of the Law and Section 4(*l*)(2)(B) of the Law. (*Id.*) The Board, therefore, affirmed the decision of the Referee, concluding that Claimant was ineligible for unemployment compensation benefits. (*Id.*) Claimant now petitions this Court for review.[3]

On appeal,[4] Claimant essentially argues that the Board erred when it determined that she was an independent contractor and not an employee and, therefore, was self-employed.

Section 402(h) of the Law provides that an employee shall be ineligible for compensation for any week in which he is engaged in self-employment. The term "self-employment" is not defined in the Law. Courts, however, have utilized Section 4(*l*)(2)(B) of the Law "to fill the void because its obvious purpose is to exclude independent contractors from [unemployment compensation] 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

[3] Claimant also filed a request for reconsideration with the Board. (C.R., Item No. 20.) The Board denied the request. (C.R., Item No. 21.)

[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 Prof'ls, Inc. v. Unemployment Comp. Bd. of Review*, 844 A.2d 632, 635 (Pa. Cmwlth. 2004).

> fact; and (b) as to such services such individual is customarily engaged in an independently established trade, occupation, profession or business.

Section 4(*l*)(2)(B) of the Law establishes 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), *appeal denied*, 601 Pa. 689, 971 A.2d 493 (2009). The putative employer asserting that the claimant is not eligible for reasons 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. Generally, the employer bears the burden of proving that a claimant is self-employed. *Silver v. Unemployment Comp. Bd. of Review*, 34 A.3d 893, 896 n.7 (Pa. Cmwlth. 2011) (citing *Teets v. Unemployment Comp. Bd. of Review*, 615 A.2d 987 (Pa. Cmwlth. 1992)). Where the Bureau of Unemployment Compensation Benefits and Allowances, however, initiates proceedings that result in a suspension of benefits due to self-employment, the bureau bears the burden. *Id.* Importantly, "neither the intent of the parties nor the terminology used by the

parties to describe their relationship is dispositive. Instead, the court must examine the actual relationship between the parties." *Hartman v. Unemployment Comp. Bd. of Review*, 39 A.3d 507, 511 (Pa. Cmwlth.) (citations omitted), *appeal denied*, ___ Pa. ___, 54 A.3d 350-51 (2012).

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. *Silver*, 34 A.3d at 897. 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). Moreover, the mere existence of a non-compete clause in an independent contractor agreement does not render the party agreeing to it an employee of the other party. *See Electrolux Corp. v. Dep't of Labor & Industry, Bureau of Emp'r Tax Operations*, 705 A.2d 1357, 1361 (Pa. Cmwlth. 1998).

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. Moreover, courts recognize a difference between control of a work product versus control over the time, place, and manner of performance, the former of which suggests an independent contractor relationship and the latter of which suggests an employment relationship. *Id*. at 1169. As explained in *CE Credits Online*:

> "[C]ontrol of the result only and not of the means of accomplishment" d[oes] not transform an independent contractor relationship into an employer-employee relationship. Every job, whether performed by an employee or by an independent contractor, has parameters and expectations. "Control" for purposes of Section 4(*l*)(2)(B) of the Law is not a matter of approving or directing the final work product so much as it is a matter of controlling the means of its accomplishment.

Id. (footnotes omitted).

Relying on *Beacon Flag Car*, the Board argues that Employer did not control or have authority to control Claimant's day-to-day operations in the performance of her work. In *Beacon Flag Car*, this Court held that the employer

met its burden under the first prong of the test set forth in Section 4(*l*)(2)(B) of the Law. *Beacon Flag Car*, 910 A.2d at 108. There, the employer did not determine the time, place, and destination of the trip or the route for its drivers; did not require drivers to report on their progress, attend meetings, or report to a workplace; did not supervise its drivers; and did not provide training or equipment for its drivers. *Id.* Moreover, drivers were paid per job rather than hourly, were free to refuse any client or trip without repercussions, and could make their own arrangements with the employer's clients as long as the employer was compensated. *Id.* *Beacon Flag Car*, however, is distinguishable. For instance, Employer, in the case now before the Court, determined the route Claimant was to use and required Claimant to report on her progress when transporting vehicles. Thus, Employer exercises more control over the *manner* in which the work is performed than did the employer in *Beacon Flag Car*.

In addition to the factors discussed above, Claimant was required to deliver the vehicle within a certain time line.[5] Employer reimbursed Claimant for the gasoline she used while transporting the cars and covered other expenses.[6]

[5] The Board argues in its brief that the time by which Claimant was required to deliver a particular vehicle was set by a third party; however, we find no evidence of record indicating this to be the case. The Board's finding in this regard provides only that "[C]laimant had to deliver the vehicle within a certain time line." (Finding of Fact (F.F.) no. 7.)

[6] The Board argues that Employer supplied Claimant only with gasoline for the vehicles that she drove. Employer, however, also provided the insurance for the vehicles Claimant transported. (F.F. no. 12.) Moreover, although the Board made no finding in this regard, the testimony of Employer's representative and Claimant indicated that Employer also made arrangements for Claimant's return trip upon her completion of a vehicle transport. (R.R. at 25a; C.R., Item No. 9 at 5.) Employer either provided Claimant with a "trail car" owned by Employer or reimbursed Claimant for her use of other travel methods. (R.R. at 25a; C.R., Item No. 9 at 5.)

Claimant also filled out Employer's paperwork[7] and expense sheet for each trip. Lastly, Claimant's ability to provide services to other potential employers was limited by a non-compete clause. These circumstances, taken as a whole, lead us to conclude that as a matter of law, Claimant was not free from Employer's direction and control with regard to the work to be done and, in particular, the *manner* in which the work was to be performed. The bureau, therefore, did not meet its burden of proving the first prong of the test set forth in Section 4(*l*)(2)(B) of the Law.[8]

As a result of our conclusion above, we need not consider the second prong of the test—*i.e.*, whether Claimant's services are the type performed in an independent trade or business. Thus, the Board erred in determining that Claimant was ineligible for benefits because she was self-employed.

Accordingly, we reverse the Board's order.

P. KEVIN BROBSON, Judge

[7] Claimant testified that she was required to fill out a "check sheet" concerning the condition of the transported car, and Employer trained Claimant on how to perform the check. (R.R. at 26a.)

[8] We recognize that some of the Board's findings support a contrary conclusion. This case, however, is similar to *Hartman*. In *Hartman*, this Court held that based on the totality of the circumstances, the claimant was an employee rather than an independent contractor because the employer exercised significant control over the claimant's work. *Hartman*, 39 A.3d at 512. The Court reached this result despite the Board's findings that the claimant was free to accept or reject assignments from the employer without consequence, could work for other companies offering the same services as long as the claimant did not solicit customers from the employer, received a tax Form 1099, did not have taxes withheld from his pay, and considered himself to be a contractor. *Id.* at 508-09.

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O R D E R

AND NOW, this 28th day of January, 2013, the order of the Unemployment Compensation Board of Review is hereby REVERSED.

P. KEVIN BROBSON, Judge