

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Larry A. Schappell, :  
Petitioner :  
 :  
v. : No. 1259 C.D. 2009  
 : Submitted: November 13, 2009  
Unemployment Compensation :  
Board of Review, :  
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: February 25, 2010

Larry Schappell (Claimant) petitions this Court for review of an adjudication of the Unemployment Compensation Board of Review (Board) denying his claim for benefits under the Unemployment Compensation Law (Law).<sup>1</sup> The Board affirmed the determination of the Referee that Claimant was self-employed and, thus, ineligible for benefits under Section 402(h) of the Law, 43 P.S. §802(h).<sup>2</sup> Finding no error by the Board, we affirm.

The facts as found by the Referee and adopted by the Board are as follows. Claimant, a chemical engineer, worked for Lithium Technology Corporation (Lithium) as a manager responsible for the production of prototype lithium batteries. When Lithium ceased manufacturing lithium batteries in July 2008, Claimant was

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§ 751-914.

<sup>2</sup> Section 402(h) states, in pertinent part: “An employe shall be ineligible for compensation for any week . . . [i]n which he is engaged in self-employment.” 43 P.S. §802(h).

separated from his employment at Lithium. Shortly thereafter, Porous Power Technologies, LLC (Porous) purchased Lithium's assets to reestablish production of the prototype lithium batteries for commercial sale, using the Lithium facility and the equipment it had purchased from Lithium.

Claimant was the only individual who understood the technology of the manufacturing process Porous had acquired. Accordingly, Porous entered into a "Subcontractor Agreement" with Claimant for a term of three months, beginning September 10, 2008. The contract stated that Claimant was not an employee of Porous; set Claimant's compensation rate at \$55 per hour, which was commensurate with his salary at Lithium; limited Claimant's hours to 16 per week; and allowed Claimant to offer his services to others. Porous reported Claimant's income on an IRS Form 1099; Claimant was responsible for payment of his taxes.

Claimant scheduled his work for Porous based upon the availability of the production equipment. Claimant continued working for Lithium part-time in the same facility, but at different times and on different days than he worked for Porous. In his work for Porous, Claimant met with Vice President Kirby Beard to consult and exchange information concerning technology and production matters. Claimant worked for Porous until February 11, 2009.

At the conclusion of his contract with Porous, Claimant filed for unemployment compensation benefits. The Allentown UC Service Center awarded benefits, and Porous appealed.

At the Referee's hearing, Beard testified on behalf of Porous. He explained that the company's contract with Lithium was essentially a sublease of space and equipment. He also confirmed that under the contract between Claimant and Porous, Claimant set his own hourly rate of compensation; Claimant set his own

schedule for performing 16 hours of work per week for Porous; and Claimant paid his own income taxes. Whether Claimant worked for Porous or Lithium on a particular day was a matter for Claimant to decide. Beard testified that his contact with Claimant was limited and that they would talk, on average, for five minutes, four or five times on the days Beard was present at the facility. Beard's conversations with Claimant concerned the reestablishment of the lithium battery production line. Beard testified that Claimant provided his own office equipment, such as a computer, cell phone, copier and fax machine, in his work for Porous.

Claimant testified on his own behalf. He agreed with the majority of Beard's testimony. Claimant contended, however, that Beard supervised and directed Claimant's projects. When asked whether his meetings with Beard involved an "exchange of information" or "instructions given," Claimant responded that it was "usually exchange of information" regarding problems with the production of lithium batteries. Notes of Testimony, March 27, 2009, at 25 (N.T. \_\_\_\_). Claimant acknowledged that the office equipment he used was either his own or the property of Lithium. Claimant also acknowledged that he set his own schedule.

The Referee reversed the determination of the UC Service Center and held that Claimant was ineligible for benefits. The Referee reasoned that Porous proved that Claimant was self-employed because in his work he was free from the direction and control of Porous. Claimant appealed to the Board, and the Board affirmed the Referee's decision. Claimant now petitions for this Court's review.<sup>3</sup>

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<sup>3</sup> Our review is limited to determining whether constitutional rights were violated, an error of law was committed, or necessary findings of fact were not supported by substantial evidence. *Craighead-Jenkins v. Unemployment Compensation Board of Review*, 796 A.2d 1031, 1033 n.2 (Pa. Cmwlth. 2002).

Claimant raises one issue for our consideration. Claimant contends that the Board erred in finding him to be a self-employed independent contractor, free from Porous' direction and control. Accordingly, Claimant believes the Board erred in denying him benefits.

Determining self-employment requires a two-part inquiry. First, the claimant must be free of the direction and control of the putative employer, in contract and in actual fact. Second, the claimant must be engaged in an occupation, business or profession customarily done by independent contractors. This test is derived from Section 4(l)(2)(B) of the Law, which provides, in relevant part, 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.

43 P.S. §753(l)(2)(B) (emphasis added). This Court has explained that it is the employer's burden to prove both elements and "[u]nless both of these showings are made, the presumption stands that one who performs services for wages is an employee." *Beacon Flag Car Co., Inc. (Doris Weyant) v. Unemployment Compensation Board of Review*, 910 A.2d 103, 107 (Pa. Cmwlth. 2006).

Claimant challenges the Board's finding on the first element alone, *i.e.*, that he was free from Porous' control and direction. To prevail on this element, an

employer must demonstrate that it did not control either the claimant's work or his manner of performing the work. *Id.* at 108 (citing *Erie Independence House, Inc. v. Unemployment Compensation Board of Review*, 559 A.2d 994, 995 (Pa. Cmwlth. 1989)). This determination involves a consideration of the following factors: who determines the days and times the claimant works; who determines the claimant's method for accomplishing his work; whether the employer provided the claimant with training; and who provides the claimant with the equipment used in the performance of services. *Id.* Compensation based upon an hourly wage does not automatically mean that a claimant is an employee, but it is a factor. *C.E. Credits OnLine v. Unemployment Compensation Board of Review*, 946 A.2d 1162, 1168 (Pa. Cmwlth. 2008).

*Beacon Flag Car Company* is instructive. In that case, the putative employer provided flag car driver escorts to clients who were transporting oversized truck loads. Beacon selected a driver for each assignment from a pool of drivers, all of whom had contracted with Beacon. *Beacon*, 910 A.2d at 104-105. This Court held that the drivers were independent contractors because Beacon did not determine the time or routes of the trips; did not supervise the drivers; provided no equipment or training to the drivers; and allowed the drivers to refuse assignments without repercussions. *Id.* at 108.

Here, Claimant was similarly free from Porous' control. Claimant's agreement with Porous expressly stated that he was not an employee of Porous. Porous did not train Claimant. Indeed, Porous relied upon Claimant's specialized knowledge of the lithium battery manufacturing process.<sup>4</sup> Porous paid Claimant an

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<sup>4</sup> Claimant argues that he operated "a coding system that had been previously operated by [Beard], however, [he] had never operated that coder, so [they] worked together to get that . . . running and **(Footnote continued on the next page . . .)**

hourly wage, but Claimant set the rate of that compensation and invoiced Porous as he performed the work.<sup>5</sup> Porous did not withhold income tax from Claimant's salary and issued him an IRS Form 1099. Claimant was free to work for other employers and did, in fact, continue to work for Lithium when he was not working for Porous.

Likewise, Porous did not supervise Claimant's work. Claimant set his own work schedule and was free to report to the facility when he chose. Claimant had complete autonomy over the manner in which he discharged his job responsibility, which was to reestablish the lithium battery manufacturing process. Beard did speak with Claimant almost daily; however, by Claimant's own admission, these conversations involved exchanges of ideas and progress reports, as opposed to Beard giving direction to Claimant.

Finally, Claimant provided his own office equipment in order to complete his work for Porous, including a cell phone, computer and other miscellaneous supplies. Claimant argues that because much of this equipment was owned by Lithium, it defeats a finding that he was an independent contractor. We disagree. It matters not whether Lithium or Claimant or some other entity held title to

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**(continued . . . )**

do some trials.” N.T. 25. While this may show that Porous provided Claimant with limited training, this was a required task under Claimant's contract in order to reestablish Lithium's production process for Porous. It is not sufficient to demonstrate that Porous exercised the control of an employer over Claimant.

<sup>5</sup> Claimant acknowledges that he set his own rate of pay; however, he contends that Porous had to agree to this rate and, thus, maintained a degree of control. Claimant fails to recognize that almost all independent contractor agreements involve negotiation over remuneration. Claimant was still able to dictate his own hourly rate of pay based upon his unique experience with Lithium's production process. In actuality, Porous had little or no control over this factor.

each piece of office equipment. The salient point is that Porous did not provide the equipment.<sup>6</sup>

In sum, the Board did not err in finding that Claimant was free of the direction and control of Porous. Accordingly, we affirm.

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MARY HANNAH LEAVITT, Judge

Judge Pellegrini concurs in the result only.

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<sup>6</sup> Claimant does not challenge the Board’s holding that he was engaged in “an independently established trade, occupation, profession or business.” 43 P.S. §753(l)(2)(B). Whether an individual provides services as an independently established business requires an examination of two factors:

- (1) whether the individual held himself out to, or was capable of performing the activities in question for, anyone who wished to avail themselves of his 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.

*Borough of Grove City v. Unemployment Compensation Board of Review*, 928 A.2d 371, 376 (Pa. Cmwlth. 2007). Claimant was permitted to work for other companies while under contract with Porous, and he did engineering work for Lithium at the same time. Claimant did not look to Porous as his single employer. Thus, even if Claimant had challenged the Board’s application of the “independently established trade” factor, he would not prevail.

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**ORDER**

AND NOW, this 25<sup>th</sup> day of February, 2010, the order of the Unemployment Compensation Board of Review, dated May 29, 2009, is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge