

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Stangel,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 1333 C.D. 2012
	:	
Respondent	:	Submitted: January 4, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY

FILED: January 23, 2013

Michael Stangel (Claimant), pro se, petitions this Court for review of the Unemployment Compensation Board of Review's (UCBR) May 31, 2012 order affirming the Referee's decision denying Claimant unemployment compensation (UC) benefits. The sole issue before this Court is whether the UCBR properly determined that Claimant was a self-employed businessman and, thus, ineligible for UC benefits under Section 402(h) of the Unemployment Compensation Law (Law).¹ We affirm.

Claimant worked from November 19, 2009 through November 28, 2011 as president and chief executive officer of Botaneco, Inc. (Botaneco) pursuant to an employment agreement (Agreement). Claimant reported to Botaneco's board of directors (Board), which had the sole authority to control the policies of the company.

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

Under the Agreement, the Board had authority to terminate Claimant's employment at any time. Claimant had responsibility for all day-to-day operations of the business, which included sales, marketing and operations as well as for the hiring and firing of employees. On November 28, 2011, in a meeting with the Board, Claimant was informed that his employment was terminated, effective three days earlier.

On December 4, 2011, Claimant filed for UC benefits. On February 17, 2012, the Allentown UC Service Center issued a determination finding Claimant ineligible for benefits under Section 402(h) of the Law because Claimant exercised substantial control over Botaneco's day-to-day operations. Claimant appealed, and a hearing was held by a Referee on April 6, 2012. Claimant attended the hearing with his counsel, but Botaneco did not appear. On April 9, 2012, the Referee affirmed the UC Service Center's determination, similarly concluding that Claimant exercised substantial control over Botaneco's operations and, thus, was a self-employed businessman who was ineligible for benefits under Section 402(h) of the Law. Claimant appealed to the UCBR. On May 31, 2012, the UCBR affirmed and adopted the Referee's decision. Claimant appealed to this Court.²

Claimant argues that the UCBR erred when it adopted the Referee's decision concluding that Claimant was ineligible for UC benefits because he was a self-employed businessman at the time his employment was terminated. Specifically, Claimant contends that he did not have substantial control over the company. We disagree.

Section 402 of the Law provides, in pertinent part, "[a]n employe shall be ineligible for compensation for any week – (h) [i]n which he is engaged in self-employment" 43 P.S. § 802. Although the UCBR is the fact-finder, "the

² This Court's review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Johnson v. Unemployment Comp. Bd. of Review*, 869 A.2d 1095 (Pa. Cmwlth. 2005).

determination of whether one is or is not self-employed is a question of law subject to our review.” *Geever v. Unemployment Comp. Bd. of Review*, 442 A.2d 1227, 1229 (Pa. Cmwlth. 1982). Our Supreme Court has held that to determine whether someone is self-employed under Section 402(h) of the Law, “the proper test is whether the employee exercises a substantial degree of control over the corporation; if so, he is a businessman and not an employee.” *Starinieri v. Unemployment Comp. Bd. of Review*, 447 Pa. 256, 260, 289 A.2d 726, 728 (1972) (quotation marks omitted).

In the instant matter, we conclude that there was sufficient evidence to find that Claimant exercised substantial control over Botaneco, and thus support the UCBR’s conclusion that Claimant was self-employed. At the April 6, 2012 hearing, Claimant testified as follows:

R[eferee]: For your role as CEO and President, what were you charged to do?

C[laimant]: To run the business. Sales, marketing, operations. We manufactured product, we sold product, I’d establish financial obligations of the company. And, make it tick. People.

R[eferee]: Hire, fire, both?

C[laimant]: Yes.

R[eferee]: Some companies . . .

C[laimant]: I’d restructure the company.

R[eferee]: Okay. Some companies have a whole [inaudible] of essentially the Board hires the CEO, then the CEO does everything else.

C[laimant]: Correct.

R[eferee]: That was your arrangement?

C[laimant]: Yes, it was.

. . . .

[Claimant's Lawyer]: Now however, you were responsible for – would it be fair to say you were responsible for all the day[-]to[-]day operations?

C[laimant]: Yes.

[Claimant's lawyer]: Okay. Board, however, established a policy in governance?

C[laimant]: To some extent, yes.

R[eferee]: What did the Board – what were the marching orders that the Board gave you?

C[laimant]: It wasn't as clear as you would hope it to be. It was a small company, 19 employees. The charge was to grow sales, and to make the operation more efficient. I consolidated operations in Calgary from Quebec City. I just [sic] down the Quebec store. Raise money, improve manufacturing efficiencies. . . . And, we built sales from around 600,000 to over 2 million in the last year. So, there was a lot to do. A lot of restructuring, keeping this company running with very little money.

Original Record (O.R.), Item 9 at 5-6. “[T]he Board’s findings here, based on information supplied by Claimant, show that . . . Claimant exercised substantial . . . control over [Botaneco]. Accordingly, Claimant falls squarely within the definition . . . of a ‘businessman and not an employee.’” *Dunkelberger v. Unemployment Comp. Bd. of Review*, 37 A.3d 34, 38 (Pa. Cmwlth. 2012).

Claimant also contends in his brief, that during the last 8 months of his employment, his “responsibilities and authority had been significantly reduced and transitioned to the [Board]” Claimant’s Br. at 8. Thus, according to Claimant, the UCBR erred when it failed to consider the degree of his control *at the time of the termination of his employment*, as required by *Geever*. Claimant’s argument has no merit.

Here, Claimant presented no evidence to the Referee demonstrating that his control in Botaneco had been diminished at the time of his employment

termination. Moreover, Claimant first raised this issue in his appeal from the Referee's decision, attaching several corporate documents purportedly demonstrating such. It is well established that the UCBR cannot consider evidence that was not submitted to the Referee. 34 Pa. Code § 101.106; *see also Lock Haven Univ. of Pa. of State Sys. of Higher Educ. v. Unemployment Comp. Bd. of Review*, 559 A.2d 1015 (Pa. Cmwlth. 1989); *Perrelli v. Unemployment Comp. Bd. of Review*, 426 A.2d 1272 (Pa. Cmwlth. 1981). Thus, we conclude that the UCBR did not err when it found that Claimant exercised substantial control over Botaneco's operations and that, as a result, Claimant was a self-employed businessman ineligible for benefits under Section 402(h) of the Law.

For all of the above reasons, the UCBR's order is affirmed.

ANNE E. COVEY, Judge

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ORDER

AND NOW, this 23rd day of January, 2013, the Unemployment Compensation Board of Review's May 31, 2012 order is affirmed.

ANNE E. COVEY, Judge