IN THE COMMONWEALTH COURT OF PENNSYLVANIA

May I Help You, Inc., Petitioner	:	
v.	:	No. 1820 C.D. 2009 Submitted: January 29, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: March 16, 2010**

The central issue in this unemployment compensation appeal is whether Lynn A. Wood (Claimant), who performed part-time caregiver services to clients of May I Help You, Inc. (Company), did so as an employee or as an independent contractor. The compensation authorities determined Claimant was an employee. On its appeal, Company asks whether substantial evidence supports several findings of fact and whether the record as a whole supports the conclusion that Claimant was an employee. We reverse.

I. Background

Believing she had been terminated because of Company's failure to continue seeking her services for its clients, Claimant applied for unemployment compensation. When compensation was granted, Company appealed, asserting Claimant was an independent contractor because of a written agreement titled

"Independent Contractor Agreement" and because of the manner of the relationship. A hearing was held, and a referee affirmed the grant of benefits.

Upon further appeal to the Unemployment Compensation Board of Review (Board), a remand hearing was scheduled before a referee acting as a hearing officer for the Board. Both parties appeared with counsel and offered evidence.

After the remand hearing, the Board rendered its own findings and conclusions, and it affirmed the grant of benefits pursuant to Sections 402(e) (relating to willful misconduct) and 402(h) (relating to self-employment) of the Unemployment Compensation Law (Law).[1] In particular, the Board found as follows:

> 1. For the purposes of this appeal, the claimant last worked as a part-time caregiver for May I Help You, Inc. (MIHY) from September 20, 2008 until her last day worked of January 17, 2009 at a rate of pay of $10.00 an hour.
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> 2. The claimant was not reimbursed for travel expenses or her cell phone.
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> 3. The client calls the employer.
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> 4. The client specifies the hours need[ed] for caregiving.
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> 5. The employer calls the claimant and tells the claimant the hours.

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

6. The employer also sends the claimant to a client that she thinks is a good fit in terms of the personal care that is needed and the personalities of the caregiver.

7. On or about January 20, 2009, the employer asked the claimant if the claimant would transport a client in her personal vehicle.

8. The claimant said no because she did not want to be legally responsible if there was an accident and she was transporting a person for business purposes.

9. The employer then called someone else who agreed to transport the client.

10. The claimant would complete a time card at the end of the week and mail it to the employer.

11. The employer would then mail the claimant a check and another time card for the next week.

12. The claimant was terminated and was taken off the schedule when she refused to transport a client in her personal vehicle.

13. The claimant has not been called for any assignments since on or about January 20, 2009.

14. The claimant had to pass a background check prior to being hired.

15. The claimant does not provide diapers for the clients.

16. The claimant does not provide the medicines for the clients.

17. The claimant was required to complete a log book.

18. The claimant was required to sign a non-compete agreement.

> 19. The claimant had to report to the employer when she was going on vacation.
>
> 20. The employer did not withhold taxes from the claimant's pay.

Reproduced Record (R.R.) at 147a-48a. The Board concluded the Claimant was subject to the control and direction of Company, the Claimant was not engaged in an independent business of caregiver, and the Claimant was an employee of Company. Id. at 149a. The Board also determined Company did not prove Claimant was guilty of willful misconduct. Id. A request for reconsideration was thereafter denied.

II. Contentions

On its subsequent appeal to this Court,[2] Company raises several contentions related to Claimant's status. First and foremost, Company asserts that because of the Independent Contractor Agreement and testimony describing the relationship, the Board erred in concluding Claimant was an employee. Second, Company challenges Findings 15, 16, 17, 18 and 19, and it contends the Board ignored other facts that were supported by the evidence. In sum, Company contends that all of the facts, examined in totality, compel a determination that Claimant was not an employee; therefore, she was not entitled to unemployment compensation.

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[2] Our review is limited to determining whether necessary findings were supported by substantial evidence, whether the Board committed an error of law, or whether the petitioner's constitutional rights were violated. Victor v. Dep't of Labor & Indus., 647 A.2d 289 (Pa. Cmwlth. 1994).

In reply, the Board reminds us that under the Law wages are presumed to be from employment, and a putative employer bears the burden of overcoming the presumption. As to the conclusion that Claimant was an employee, the Board asserts the record supports conclusions that Company had a right to direct and control Claimant in the performance of her services and that Claimant was not engaged in the independent business of a caregiver. Regarding the challenged findings, the Board contends they are supported by substantial evidence.

III. Discussion

A. Challenge to Findings

We first address the challenge to Findings of Fact 15 through 19. These findings are supported by testimony of Company's witness;[3] therefore, we reject the challenge.

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[3] Company's assistant manager testified in relevant part as follows:

CL For care. If, a client, can a client call a caregiver directly and ask them …
EW1 No, they're scheduled through May I Help You.

CL With respect to, some of your clients require diaper care, am I correct?
EW1 Yes.

CL Who provides the diapers for your clients?
EW1 The nursing homes if they're in a facility of that sort. If they're in a private home, normally their family members.

CL Okay. And do, does the caregiver provide the diapers and that kind of stuff?
EW1 No.

(Footnote continued on next page…)

With regard to the finding that Claimant signed a non-compete agreement, Company argues that such an agreement is not dispositive for a

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(continued…)

CL	Isn't it true that when a caregiver arrives at a client's site, there is a book which states what medicines the client might need to take or what diaper changes, that kind of thing.
EW1	Medicines are usually in a box that are already filled up with the, by the family for the week. Usually it's a medicine box that occurs on Monday through Sunday. That's usually already there and ready to go for the week. As far as the medication finders.
CL	Okay. And do caregivers fill out a log book themselves? Are they responsible for writing down what they did when they are with the client?
EW1	Not so much what they did, but notes on the client for the day if there is a following caregiver coming, like a following relief shift just so that there's a, a note of the different events and activities that happened that day.
CL	Okay. And do you review those log books?
EW1	No.
CL	If a caregiver's scheduled for a 12-hour shift, is that caregiver expected to work the entire 12-hour shift?
EW1	Yes.
CL	Is the caregiver expected to report to you when he or she is going on vacation?
EW1	Well, report to me, they, they would, well not so much report to me but they would need to tell me that they were not available for a period of time.
CL	Is it, isn't it true that Ms. Wood signed a non-compete agreement? Is that correct?
EW1	Yes.

R.R. at 94a.

determination of an employer-employee relationship, and it cites Beacon Flag Car Co., Inc. (Doris Weyant) v. Unemployment Compensation Board of Review, 910 A.2d 103 (Pa. Cmwlth. 2006) (court rejected contention that mere existence of non-compete clause renders party agreeing to it an employee of other party). Whether or not such an agreement is dispositive, there is no serious contest here that Claimant signed an "Independent Contractor Agreement" that contained a non-compete clause. As a result, the finding of its existence is supported by substantial evidence, although the terms of the agreement will be discussed more fully below.

B. Challenge to Conclusion of Status as Employee

1. Two-Pronged Test

We next address the conclusion that Claimant was an employee of Company and therefore not disqualified as a self-employed person. In this regard, we note that 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 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). The burden to overcome the "strong presumption" that a worker is an employee rests with the employer. See Sharp Equip. Co. v. Unemployment Comp. Bd. of Review, 808 A.2d 1019, 1024 (Pa. Cmwlth. 2002). To prevail, an employer must prove: (i) the worker performed his job free from the

employer's control and direction, and (ii) the worker, operating as an independent tradesman, professional or businessman, did or could perform the work for others, not just the employer. Venango Newspapers v. Unemployment Comp. Bd. of Review, 631 A.2d 1384 (Pa. Cmwlth. 1993). "[T]his two-pronged test is conjunctive and both prongs must be satisfied in order for persons rendering services for wages to be considered independent contractors." Electrolux Corp. v. Dep't of Labor & Indus., Bureau of Employer Tax Operations, 705 A.2d 1357, 1360 (Pa. Cmwlth. 1998). Thus, "unless the employer can show that the employees are not subject to his control and direction and are engaged in an independent trade, occupation or profession, then he cannot come within the exemption …." C.A. Wright Plumbing Co. v. Unemployment Comp. Bd. of Review, 293 A.2d 126, 129 (Pa. Cmwlth. 1972).

A determination regarding the existence of an employer/employee relationship is a question of law that depends on the unique facts of each case. Resource Staffing, Inc. v. Unemployment Comp. Bd. of Review, 961 A.2d 261 (Pa. Cmwlth. 2008). As to questions of law, our scope of review is plenary, and our standard of review is *de novo*. Pocono Manor Investors, LP v. Pennsylvania Gaming Control Bd., 592 Pa. 625, 927 A.2d 209 (2007); Commonwealth, Dep't of Transp. v. McCafferty, 563 Pa. 146, 758 A.2d 1155 (2000).

2. First Element

Regarding the first element, findings related to the actual working relationship between worker and employer determine whether this element is satisfied. To that end, our Supreme Court instructs:

> While no hard and fast rule exists to determine whether a particular relationship is that of employer-employee or owner-independent contractor, certain guidelines have been established and certain factors are required to be taken into consideration:
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> 'Control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one employed is engaged in a distinct occupation or business; which party supplies the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer, and also the right to terminate the employment at any time.'

Hammermill Paper Co. v. Rust Eng'g Co., 430 Pa. 365, 370, 243 A.2d 389, 392 (1968) (citations omitted). "Because each case is fact specific, all of these factors need not be present to determine the type of relationship which exists." York Newspaper Co. v. Unemployment Comp. Bd. of Review, 635 A.2d 251, 253 (Pa. Cmwlth. 1993).

Turning to the facts of this case as they pertain to whether the worker performed the job free from the employer's control and direction, we recognize the following:

- no taxes were withheld from Claimant's pay (Finding of Fact (F.F.) No. 20);
- Claimant was paid $10.00 an hour (F.F. No. 1);
- Claimant is not reimbursed expenses for travel or cell phone (F.F. No. 2);
- the client specifies the hours needed of a caregiver (F.F. No. 3);

- the Company calls Claimant and tells Claimant the hours (F.F. No. 4);
- duties of the caregiver are specified and designated by the client at the time of acceptance of Claimant by the client ("Independent Contractor Agreement," R.R. at 14a);[4]
- the Claimant had to pass a background check (F.F. No. 14);
- neither the Claimant nor the Company supplies diapers; rather, they are supplied by the client (F.F. No. 15; R.R. at 94a);
- neither Claimant nor the Company supplies medicines, rather, they are supplied by the client (F.F. No. 16; R.R. at 94a);
- Claimant was required to fill out a log book, for use by the next caregiver (F.F. No. 17; R.R. at 94a);
- Claimant had to report when she was going on vacation (F.F. No. 19).

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[4] Paragraph 3 of the Independent Contractor Agreement provides in full, with emphasis added:

> 3. Duties. In the event that a Client, the Company and the Contractor agree that the contractor shall provide services on a project to a Client, the Contractor shall faithfully and to the Contractor's [sic] best of the Contractor's ability to perform and complete such duties as shall be specified and designated by the Client at the time of acceptance of the Contractor by the Client. Notwithstanding anything to the contrary herein, neither the Company nor any Client has [an] obligation to utilize the services of the Contractor for any purpose. Further, the Contractor is not obligated thereunder to accept work on any specific project for any Client.

R.R. at 14a.

Considering all of the foregoing, we conclude the Board erred when it determined Company failed to prove Claimant performed services free from Company's control or direction. There is no dispute that it is the client, not the Company, who controls the time, place and manner of services as well as the identity of the person selected to perform them. Also, no evidence was presented that Claimant was supervised by the Company; instead, Company offered direct evidence that it did not supervise Claimant. R.R. at 34a.

The existence of the "Independent Contractor Agreement" is not, by itself, dispositive. There are a few cases which hold a person to be an employee despite a written agreement designating the person as an independent contractor. See Glatfelter Barber Shop v. Unemployment Comp. Bd. of Review, 957 A.2d 786 (Pa. Cmwlth.), appeal denied, 599 Pa. 712, 962 A.2d 1198 (2008); Sharp Equipment Co. Nevertheless, the terms of agreement between the parties should be considered. Hammermill Paper Co.; Beacon Flag Car. Here, the agreement describes the client as the person who controls the work to be done. The Board erred when it concluded otherwise.

Indeed, this case is similar to the situation in Erie Independence House, Inc. v. Unemployment Compensation Board of Review, 559 A.2d 994 (Pa. Cmwlth. 1989). There, the Court rejected as unsupported in the record a determination that a home health care worker was subject to control of the agency that placed the claimant in a disabled person's home. Accordingly, the Board's order was reversed in part. The same result is appropriate here.

3. Second Element

As to the second element, two important factors are considered. More particularly, we look to "whether the individual was capable of performing the activities in question for anyone who wished to avail themselves of the services and whether the nature of the business compelled the individual to look to only a single employer for the continuation of such services." Venango, 631 A.2d at 1388.

As to whether the worker was engaged in an independent trade, our Supreme Court analyzed this element in Danielle Viktor, Ltd. v. Department of Labor & Industry, 586 Pa. 196, 892 A.2d 781 (2006). The Court considered whether limousine drivers were independent contractors or employees. Concluding the drivers were independent contractors, the Supreme Court affirmed this Court and explained:

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

Id. at 223, 892 A.2d at 797-98.

The facts with regard to whether Claimant was engaged in an independent trade are as follows:

- Claimant worked part-time (F.F. No. 1);

- Claimant was paid $10.00 an hour (<u>Id</u>.);
- Claimant signed an "Independent Contractor Agreement" with a non-compete clause, which prohibits Claimant from competing with Company for the client or starting a competing business, but which does not prohibit Claimant from providing caregiver services through another agency (F.F. No. 18; R.R. at 15a);[5]

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[5] Paragraph 5 of the "Independent Contractor Agreement" provides, with emphasis added:

> 5. Non-competition. The Company and the Contractor agree that the Contractor, by virtue of the Company's services under this Agreement, will have exposure to, and personal contact with the Company's Clients. Further, Contractor will be able to establish a relationship with those Clients, both during and after the term of this Agreement, which could enable the Contractor to become employed by a Client without utilizing the Company's services and hereby harming the business of the Company. Therefore, except as provided in this Agreement, <u>the Contractor agrees not to directly or indirectly provide services for any Client to which the Contractor is or has been referred by the Company pursuant to this Agreement</u>, either as an employee, consultant or in any other capacity, from the date of this Agreement through that date three (3) years after the expiration of the term hereof.
>
> The Contractor also agrees not to enlist the services of other Contractors associated with May I Help You, Inc., either for their own Corporation or business use.
>
> <u>The Contractor shall refrain from incorporating, or in initiating a competitive business</u> for a period of three (3) years from the date of written termination of this contract.

R.R. at 15a.

- Neither the Company nor the client has any obligation to utilize Claimant's services for any purpose (Paragraph 3 of "Independent Contractor Agreement;" R.R. at 14a); and
- Claimant is not obligated to accept work on any specific project for any client (Id.).

Also, Company's assistant manager testified that caregivers are told at their initial interview that there is no guarantee of work, that "it is a supplemental income," and that "[i]t is not a main income." R.R. 42a. As discussed in a note above, the Board relied on testimony of this witness in making the disputed findings; accordingly, the Board found this witness credible where not contradicted by Claimant. This testimony was not addressed by the Claimant. R.R. at 43a-47a.

As to the part-time nature of Claimant's work, after the initial hearing the referee found that "[t]he claimant told the [Company's] assistant manager the number of hours that the claimant could not exceed because the claimant was collecting unemployment benefits." Referee's Dec., F.F. No. 2, R.R. at 51a. At the remand hearing, the same testimony was offered again through Company's assistant manager. R.R. at 33a-34a. This testimony was not addressed by the Claimant. R.R. at 43a-47a.

For several reasons we conclude the Board erred when it determined Company failed to prove Claimant was engaged in an independent trade. First, there is no basis in the record to determine that Claimant was precluded from providing caregiver services through another agency. Second, Claimant could refuse any assignment from Company, and she did so.

Third, the record supports a conclusion that Claimant was not dependent on the income received from Company. It is undisputed she worked part-time and at an hourly compensation rate that would not allow for full support. Indeed, she was told when retained that income from caregiver services through Company was not a main income.

For all the foregoing reasons, we conclude the Board committed an error of law by determining that Claimant was an employee of Company. Accordingly, we reverse.

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ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.	:	No. 1820 C.D. 2009
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 16th day of March, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is **REVERSED**.

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ROBERT SIMPSON, Judge