

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Leonard C. Radziewicz, :  
Petitioner :  
v. : No. 1909 C.D. 2009  
Unemployment Compensation : Submitted: May 7, 2010  
Board of Review, :  
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: August 12, 2010

Leonard C. Radziewicz (Claimant) petitions for review of the August 17, 2009, order of the Unemployment Compensation Board of Review (UCBR), which denied Claimant benefits on grounds that he was an independent contractor and, therefore, ineligible for unemployment compensation under section 402(h) of the Unemployment Compensation Law (Law).<sup>1</sup> Due to the numerous deficiencies in Claimant's briefs, we dismiss Claimant's petition for review.

Claimant worked in sales. In July 2008, Claimant entered into an independent contractor agreement with Encore Enterprises, Inc. d/b/a Creative Safety

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(h). Section 402(h) of the Law provides that a claimant shall be ineligible for compensation for any week in which he is engaged in self-employment.

(Encore), selling advertising for straight commission. Claimant's last day of work with Encore was March 6, 2009.

Claimant subsequently applied for unemployment compensation benefits, in regard to which the local job center issued two determinations. In one determination, the job center found that Claimant was eligible for benefits under section 402(h) of the Law. However, in the other determination, the job center denied Claimant benefits under section 402(b) of the Law,<sup>2</sup> concluding that Claimant voluntarily quit his position with Encore without necessitous and compelling reason. Encore appealed the job center's determination that Claimant was eligible for benefits under section 402(h) of the Law, and Claimant appealed the determination that he was ineligible for benefits under section 402(b) of the Law. A referee considered both appeals at a May 15, 2009, hearing, at which Claimant and representatives of Encore appeared and testified.

Following the hearing, the referee affirmed the job center and determined, by way of two separate decisions, that, although Claimant was not disqualified from receiving benefits under section 402(h), he was not entitled to unemployment benefits under section 402(b).<sup>3</sup> Although aggrieved by only one of

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<sup>2</sup> 43 P.S. §802(b). Section 402(b) of the Law provides that a claimant is ineligible for compensation if his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.

<sup>3</sup> In the 402(h) decision, the referee determined that, while Claimant worked for Encore as an independent contractor and not as an employee, he could not be denied benefits under section 402(h) of the Law because Claimant did not establish a business with respect to the sale of ads and, thus, was not engaged in self-employment. However, the referee explained that his ruling did not assign responsibility to Encore because Claimant's eligibility for benefits under section 402(b) **(Footnote continued on next page...)**

the referee's decisions, Claimant, proceeding *pro se*, appealed to the UCBR from each of the referee's orders.<sup>4</sup> The UCBR then issued a single decision in which it: (1) reversed the referee's determination that Claimant was eligible for benefits under section 402(h); and (2) vacated the referee's decision with respect to section 402(b). In doing so, the UCBR held, based on Encore's credible evidence, that Claimant is an independent contractor in the established profession of salesman and, thus, ineligible for benefits under section 402(h), which rendered section 402(b) inapplicable to Claimant.

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remained at issue. (Referee's 402(h) decision at 2.) Thereafter, in his 402(b) decision, the referee resolved the 402(b) issue in favor of Encore and denied Claimant benefits under that section of the Law. (Referee's 402(b) decision at 2.) Thus, contrary to Claimant's contention, the referee did not issue "inconsistent rulings on the same claim." (Claimant's response to the UCBR's motion to quash Claimant's appeal at 2.)

<sup>4</sup> Notwithstanding his own appeal, Claimant asserts in his reply brief to the UCBR that the referee's decision finding him eligible for benefits under section 402(h) of the Law should stand as final because Encore did not contest that determination, and the UCBR "lacked plenary jurisdiction to *sua sponte* reverse a final decision entered by a Referee." (Claimant's Reply Brief at 6.) However, Claimant failed to preserve this issue in his Petition for Review or in the Statement of Questions Involved portion of his main brief; thus, it is waived. Pa. R.A.P. 2116; *Jimoh v. Unemployment Compensation Board of Review*, 902 A.2d 608 (Pa. Cmwlth. 2006); *Hawrylak v. Unemployment Compensation Board of Review*, 459 A.2d 883 (Pa. Cmwlth. 1983). Regardless, "[i]n connection with the consideration of an appeal to the [UCBR] from the decision of a referee, the [UCBR] may review both the facts and the law pertinent to the issues involved on the basis of the evidence previously submitted...." 34 Pa. Code §101.106.

Claimant has petitioned this court for review of the UCBR's decision.<sup>5</sup> However, before proceeding to the merits of Claimant's case, we consider the UCBR's motion to quash Claimant's briefs and dismiss his appeal.<sup>6</sup> Because we agree that Claimant's brief and reply brief are so defective that they preclude appellate review, we grant the UCBR's motion. Pa. R.A.P. 2101 (stating that, if defects in an appellant's brief are substantial, the appeal may be quashed or dismissed).

Preliminarily, we note that the Statement of Questions Involved portion of Claimant's brief contains four issues: (1) whether the UCBR erred in its findings of fact; (2) whether substantial evidence supports the requisite findings of fact; (3) whether the UCBR erred in its application of law; and (4) whether Employer has standing to oppose Claimant's unemployment compensation claim.<sup>7</sup> However, in contravention of Pa. R.A.P. 2119(a), the argument portion of Claimant's brief is divided into one less part than there are questions to be argued; moreover, neither the headings for these parts nor the discussions that follow the headings correspond to the questions raised.<sup>8</sup>

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<sup>5</sup> Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

<sup>6</sup> By order dated January 27, 2010, this court refused to accept Claimant's initial brief and directed Claimant to file an amended brief; Claimant filed the amended brief on February 5, 2010.

<sup>7</sup> Pa. R.A.P. 2116(a) provides: "No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby."

<sup>8</sup> Pa. R.A.P. 2119(a) requires that the argument section of a brief "shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part ... the **(Footnote continued on next page...)**

In addition, to the extent that Claimant argues that the UCBR erred in determining he was ineligible for benefits under section 402(h), that argument only appears in the Summary of Argument portion of Claimant's brief and is not included in the Argument section itself, as required by Pa. R.A.P. 2118.<sup>9</sup> This court has stated that arguments raised in the summary of argument but not in the argument section of a brief are waived. *Saad v. Sacred Heart Hospital*, 700 A.2d 604 (Pa. Cmwlth. 1997). Therefore, we will not consider Claimant's argument with respect to section 402(h).<sup>10</sup> By extension, there is no need to consider Claimant's arguments with

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particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent." The headings for the arguments in Claimant's brief are as follows: "UCBR Ineligibility Decision Based On *Hearsay*"; "Petitioner Testimony Capriciously Disregarded"; and "No 'Standing' To Challenge Eligibility." (Claimant's brief at 8-10) (emphasis in original). Neither of the first two arguments was raised in Claimant's Statement of Questions Involved, and Claimant fails to cite any legal authority in support of either argument; accordingly, they are waived. Pa. R.A.P. 2116(a); Pa. R.A.P. 2119(a). As discussed *infra*, the final issue was waived because it was not contained in Claimant's Petition for Review. *See* Pa. R.A.P. 1513(d) (relating to the contents of a petition for review).

<sup>9</sup> Pa. R.A.P. 2118 states, in relevant part, that the summary of argument "should be a succinct, although accurate and clear picture of the argument actually made in the brief concerning the questions." To the degree that Claimant mentions section 402(h) in the Argument portion of his brief, he fails to develop any meaningful argument in that regard and, therefore, also results in a waiver of the issue. *Rapid Pallet v. Unemployment Compensation Board of Review*, 707 A.2d 636 (Pa. Cmwlth. 1998) (stating that issues inadequately developed in a brief are deemed waived and will not be considered.)

<sup>10</sup> Moreover, even were we to consider it, Claimant's argument, couched as it is in generalities and bald statements that the underlying determinations are correct while the UCBR's decision is not, is undeveloped at best, further precluding appellate review. *Ruiz v. Unemployment Compensation Board of Review*, 911 A.2d 600 (Pa. Cmwlth. 2006).

regard to section 402(b) as the UCBR's determination that he is ineligible under section 402(h) stands.

Claimant also argues that Encore had no standing to challenge Claimant's eligibility determination. However, this argument was not contained in Claimant's petition for review, and, therefore, it also is waived. Pa. R.A.P. 1513(d); *Jimoh v. Unemployment Compensation Board of Review*, 902 A.2d 608 (Pa. Cmwlth. 2006).

It is not this court's function to act as Claimant's counsel and, when Claimant's brief is inadequate to present specific issues for our review, we will not consider the merits of the case.<sup>11</sup> *Rapid Pallet v. Unemployment Compensation Board of Review*, 707 A.2d 636 (Pa. Cmwlth. 1998). Accordingly, we grant the UCBR's motion to quash Claimant's briefs and dismiss his petition for review.

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ROCHELLE S. FRIEDMAN, Senior Judge

Judge Simpson concurs in the result only.

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<sup>11</sup> Any attempt by Claimant to remedy the inadequacy of his main brief through his reply brief must fail. Pa. R.A.P. 2113(a); *Park v. Chronister*, 617 A.2d 863 (Pa. Cmwlth. 1992) (stating that it is not the purpose of a reply brief to remedy discussions of issues presented so poorly in appellant's brief as to preclude meaningful appellate review).







from control and direction in the performance of his work; and (b) in the performance of his services, the individual was customarily engaged in an independently established business or occupation. *Resource Staffing, Inc. v. Unemployment Compensation Board of Review*, 961 A.2d 261 (Pa. Cmwlth. 2008). Here, the evidence showed that Claimant was a salesman, which is an independently established business or occupation, and that he testified that he was an independent contractor rather than an employee, signed an independent contractor agreement, had complete control over his location and hours of work, had complete control over how much he charged for the ads he sold, worked solely on commission, had no payroll taxes withheld from his commissions, had the ability to hire workers to assist him, was free to accept or reject any assignment, and was free to barter ads for services rather than money. While any one of these factors may not be enough to establish that Claimant was an independent contractor, the totality of them clearly was more than sufficient to show that he was.

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DAN PELLEGRINI, JUDGE