IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert N. Mitchell,	:	
Petitioner	:	
	:	No. 1910 C.D. 2011
v.	:	
	:	Submitted: April 27, 2012
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE McCULLOUGH FILED: August 17, 2012

Robert N. Mitchell (Claimant) petitions for review of the September 14, 2011 order of the Unemployment Compensation Board of Review (Board) affirming a referee's decision finding Claimant ineligible for unemployment compensation benefits under section 402(h) of the Unemployment Compensation Law (Law)[1] as of July 10, 2010. For the following reasons, we reverse.

In May 2010, Claimant was dismissed from his employment with Merion Publications after working there full-time for twelve years as a writer and editor. The local service center awarded Claimant benefits. In July 2010, Claimant registered as a freelance writer with Great Valley Publishing (GVP) and entered into

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. 802(h). Section 402(h) provides that an employee shall be ineligible for compensation for any week in which he is engaged in self-employment.

an agreement indicating that he was a freelance, self-employed writer and not an employee of GVP. (Findings of Fact, Nos. 1-3.) Claimant also did freelance work for two other publishing companies and properly reported this extra income to the Department of Labor and Industry (Department).

After Claimant reported the freelance income, the Department conducted an internal review of the case. On March 4, 2011, the Department issued a determination that Claimant was not free from direction and control in the performance of his work for GVP and thus was not self-employed for purposes of section 402(h) of the Act.[2] GVP appealed on the basis that Claimant was never its employee. A referee held a hearing on April 15, 2011.

At the hearing, Mara Honicker testified on behalf of GVP. According to Honicker, Claimant, as a freelance writer, would earn approximately $400 for an assignment. (N.T. at 3-5.) GVP would set a deadline, and Claimant would receive payment once the article was published. (N.T. at 4-5.) Honicker testified that Claimant was not prohibited from writing for any other publishing entity. (N.T. at 5.)

Claimant also testified that he was never an employee at GVP. (N.T. at 9.) Claimant stated that he would receive assignments from GVP with specific deadlines "every once in a while…not on a regular basis." (N.T. at 10-11.) Claimant also testified that, in addition to the freelance work for GVP, he wrote one article for Crane Communications and a few articles for Modern Healthcare, totaling about ten assignments for the three publications between July 2010 and the date of the hearing,

[2] The notice of determination named GVP, rather than Merion Publications, as Claimant's separating employer. As we stated in Silver v. Unemployment Compensation Board of Review, 34 A.3d 893, 896-97 n.7 (Pa. Cmwlth. 2011), we question the practice of identifying any reported source of income as a new separating employer. In doing so, the Department unfairly forced GVP to defend against the Department's declaration that GVP was Claimant's employer, even though both Claimant and GVP both (correctly) agreed that GVP was never Claimant's employer. See, e.g., N.T. at 13.

April 15, 2011. (N.T. at 9-12.). Claimant also testified that he was still seeking full-time employment. (N.T. at 12.)

Merion Publications did not participate in the hearing and the referee made no findings related to Claimant's former employment with Merion Publications.

Based on the testimony, the referee made the following findings:[3]

> 1. For the purposes of this appeal, the claimant was employed by Great Valley Publishing as a freelance writer paid between $200 and $400.00 per article. The claimant provided this work from approximately July 2010 and is still registered with the employer to perform freelance writing.
>
> 2. After being separated from Merion Publications, the claimant decided to go into freelance work to supplement his income.
>
> 3. The claimant signed a freelance writer agreement with the employer indicating he was not an employee but was a freelance, self-employed writer.
>
> 4. The claimant agreed upon a certain amount of wages for articles provided to the employer and after the articles were published the claimant received his payment.
>
> 5. The claimant performed these services at a location of his choosing and had a deadline to complete the work which was established by the employer.
>
> 6. The claimant was not restricted from performing freelance writing for any other entity he chose.
>
> 7. The claimant, in fact, performs freelance writing for employers other than Great Valley Publishing.

[3] We note that although the referee uses the term "employer" throughout these findings, all parties were in agreement that no employer-employee relationship existed between Claimant and GVP.

> 8. The claimant decided to remain in the health publication industry because he had worked in that industry for a number of years and had contacts.
>
> 9. The claimant's work is not supervised in any manner by the employer but is edited and accepted for publication and then the claimant is paid for his work.
>
> 10. The claimant reported his earnings from approximately July 24, 2010 forward.

(Findings of Fact, Nos. 1-10.)

Based on these findings, the referee concluded that, because of his freelance work, Claimant was self-employed under section 402(h) of the Law beginning July 10, 2010. The referee reasoned as follows:

> [Claimant has] established himself in an independent occupation because he can perform these services for any publisher he wishes. The claimant is not restricted by the employer from performing these services for any other entity. Further, the record reflects the claimant was free from the direction or control over the performance of such services under his contract because the claimant could perform the services at any time and at any location he chose to do so. The record reflects the claimant never performed these services in the employer's work location but used his own equipment to write the articles. Since the claimant appears to agree that he was not an employee of the employer and he agrees his work is freelance work, the [r]eferee is compelled to find that the claimant is self-employed under Section 402(h) and benefits must be denied.

(Referee's decision at 2).

Accordingly, the referee reversed the local service center's determination and held that Claimant was ineligible for unemployment compensation. The Board affirmed, adopting the referee's findings and conclusions as its own.

On appeal to this Court,[4] Claimant argues that the Board erred in declaring him ineligible for unemployment compensation benefits under section 402(h) of the Law because accepting a few freelance writing assignments is de minimis and does not make him self-employed.

In an unemployment compensation benefits proceeding, the determination of whether claimant is or is not self-employed is a question of law subject to review by Commonwealth Court. Melnychuk v. Unemployment Compensation Board of Review, 520 A.2d 89 (Pa. Cmwlth. 1987). Because section 402(h) of the Law does not define the term "self-employment," our courts look to section 4(*l*)(2)(B) of the Law, which defines "employment" as:

> 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(*1*)(2)(B).

This Court has repeatedly held that for a claimant to be declared to be self-employed, both elements of section 4(*l*)(2)(B) must be satisfied. Silver v. Unemployment Compensation Board of Review, 34 A.3d 893 (Pa. Cmwlth. 2011). Typically, the employer has the burden of proving that a claimant is self-employed, but where, as here, the bureau commences proceedings that culminate in a suspension of benefits due to self-employment, the bureau carries the burden. Id.

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

Here, the parties agree that the first prong of the self-employment test has been satisfied. At issue is whether Claimant's various freelance assignments are sufficient to establish that Claimant is "customarily engaged in an independently established trade, occupation, profession or business" under section 4(*1*)(2)(B) of the Law.

In Silver, the claimant was receiving unemployment compensation benefits following the termination of her employment and began to provide telephone consultations on an intermittent, as-needed basis for another company. This Court stated that "an unemployed individual can accept occasional assignments for remuneration without being 'customarily engaged in an independently established trade, occupation, profession or business,'" id. at 896, and ultimately held that the four consultations the claimant provided at an hourly rate of $375 were insufficient to "reflect positive steps in embarking on an independent trade or business venture." Id. at 898.

In Buchanan v. Unemployment Compensation Board of Review, 581 A.2d 1005 (Pa. Cmwlth. 1990), we held that setting up a booth at a flea market to sell homemade jewelry did not constitute customary engagement in an independently established trade, occupation, profession or business even where the claimant had invested $2,028.00 to buy tools and spools of gold chain for the project. More recently, this Court held that evidence that the claimant was performing limited work as a consultant on an as-needed basis and performed only a total of twenty-two hours of work over a three day basis was "simply not enough to demonstrate that Claimant is customarily engaged in an independently established trade, occupation, profession, or trade." Minelli v. Unemployment Compensation Board of Review, 39 A.3d 593, 598 (Pa. Cmwlth. 2012) (internal quotations omitted).

In the present case, Claimant was found eligible for and was receiving benefits after the loss of his previous employment, and he properly reported his

minimal earnings to the Department. Like the claimants in Minelli and Silver, Claimant has performed a small amount of work on an as-needed, de minimus basis. There is no evidence indicating that Claimant intended to establish his own business, and, pursuant to Minelli and Silver, we conclude that writing ten articles while actively seeking full-time employment does not amount to becoming "customarily engaged in an independently established trade, occupation, or business," under section 4(*l*)(2)(B), rendering Claimant ineligible for benefits under section 402(h) of the Law.[5]

Accordingly, the Board's order is reversed.

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PATRICIA A. McCULLOUGH, Judge

[5]As we noted in Minelli, 39 A.3d at 598:

> we are not departing from the three part test described by our Supreme Court in [Danielle Viktor, Ltd. v. Department of Labor and Industry, Bureau of Employer Tax Operations, 586 Pa. 196, 222–23, 892 A.2d 781, 797–98 (2006)], to determine whether one is engaged in an 'independently established trade, occupation, profession or business.' Rather, we are simply recognizing that the Law requires an additional element, that the claimant be customarily engaged in such trade or business in order to be considered self-employed. This element was not discussed in Viktor, or other cases which followed, because the persons found to be independent contractors in those cases were clearly engaged in ongoing business activities rather than an isolated or sporadic job(s).

Minelli, 39 A.3d at 598.

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ORDER

AND NOW, this 17th day of August, 2012, the September 14, 2011 order of the Unemployment Compensation Board of Review is hereby reversed.

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PATRICIA A. McCULLOUGH, Judge