

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Roman Verbytskyy,	:	
Petitioner	:	
	:	
v.	:	No. 1979 C.D. 2009
	:	SUBMITTED: May 21, 2010
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: September 28, 2010

Petitioner, Roman Verbytskyy, appeals from the order of the Unemployment Compensation Board of Review (Board) denying him unemployment compensation benefits pursuant to Section 404 of the Unemployment Compensation Law (Law),¹ 43 P.S. § 804. After review, we affirm.

Petitioner was employed by Nationwide EIFS Plastering, Inc. (Nationwide) as a stucco installer from October 2007 through October 2008.

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

Petitioner filed for unemployment compensation benefits on November 17, 2008. The Unemployment Compensation Service Center (UC Center) issued a notice of financial determination, which showed that Petitioner earned a total of \$12,709 in wages from the third quarter of 2007 through the second quarter of 2008 while employed by BUH Construction.² The Department issued a determination that Petitioner was financially ineligible to receive benefits because he had insufficient wages.

Petitioner appealed the determination of the UC Service Center. A referee held two hearings at which both Petitioner and Tim Pinkevich, president of Nationwide, testified. Tom Shannon, a representative of the Unemployment Compensation Tax Office, also testified by telephone. The referee issued an order and opinion reversing the determination of the UC Center and directing the payment of unemployment compensation benefits to Petitioner pursuant to Section 404 of the Law. The referee found that the relationship between Petitioner and Nationwide to be that of employee and employer rather than independent contractor and general contractor. Therefore, any compensation paid to Petitioner by Nationwide should have been included in the base year wages in determining eligibility for benefits.

Nationwide appealed the referee's decision to the Board. The Board reversed the decision and order of the referee. The Board found that Petitioner was ineligible to receive benefits pursuant to Section 404 of the Law because Petitioner was an independent contractor rather than an employee of Nationwide. Petitioner then filed an appeal with this court.

² Prior to his employment with Nationwide, Petitioner was employed by BUH Construction. Petitioner's relationship with BUH Construction was that of employer and employee.

Petitioner asserts that the Board erred as a matter of law in determining that he was an independent contractor rather than an employee of Nationwide. The Board made the following findings of fact, which are not challenged by Petitioner:

4. The claimant also performed services for Nationwide EIFS Plastering Inc. (Nationwide) doing stone and stucco work.
5. Nationwide brought the claimant to work as a subcontractor.
6. The claimant was free to accept or refuse jobs offered by Nationwide.
7. The claimant worked within certain timeframes determined by the needs and desires of the customers.
8. Nationwide provided scaffolding and material.
9. The claimant was compensated hourly, by contract rate, or by the foot, depending on the job.
10. The claimant brought other workers on occasion to help complete the projects.
11. The claimant was offered jobs as Nationwide needed subcontractors.
12. The president of Nationwide checked on the progress of the work on a weekly or twice weekly basis.
13. Taxes were not withheld from the claimant's compensation.
14. Nationwide did not provide workers' compensation insurance to the claimant.

15. The claimant was free to work for other entities.

See Board Decision at 1-2 (mailed September 16, 2009).

As this court has noted: “In unemployment compensation cases, the Board is the ultimate finder of fact. *Griffith Chevrolet-Olds, Inc. v. Unemployment Comp. Bd. of Review*, 597 A.2d 215 (Pa. Cmwlth. 1991). If a petitioner fails to challenge the Board’s factual findings, they are conclusive on appeal.” *Gibson v. Unemployment Comp. Bd. of Review*, 760 A.2d 492, 494 (Pa. Cmwlth. 2000). The Board determined that Nationwide did not exert sufficient control over Petitioner to render him an employee because Nationwide exercised minimal direction and control over Petitioner’s manner of doing the work, he was free to reject offered work, his work hours were based upon the customers’ needs, rather than Nationwide’s, his compensation varied from project to project and Nationwide did not exercise day-to-day supervision over his work. Board Decision at 3. The Board also determined that Petitioner was not required to look to Nationwide as his sole source of employment and that he was free to work for other entities. *Id.* The Board concluded that Petitioner worked for Nationwide as an independent contractor and consequently, the compensation Petitioner earned did not constitute wages earned in covered employment eligible to be included in his base year wages. *Id.* Thus, Petitioner was ineligible for benefits pursuant to Section 404 of the Law.

Section 401(a) of the Law, 43 P.S. § 801(a), provides that an employee who becomes unemployed shall be eligible to receive compensation when he has been paid wages as required by Section 404(c)³ of the Law. The Board

³ Section 404(c) provides in relevant part:

Compensation shall be paid to each eligible employe in accordance with the following provisions of this section

(Footnote continued on next page...)

determined that Petitioner had not accumulated sufficient wages pursuant to Section 404 of the Law because Petitioner provided his services to Nationwide as an independent contractor. In reaching this decision, the Board relied upon Section 4(1)(2)(B) of the Law, which 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(1)(2)(B). The burden to overcome this strong presumption falls squarely on the employer. In order to prevail, an employer must prove both elements.

We first examine whether Nationwide controlled and directed Petitioner in the performance of his job. Factors to be considered in this analysis

(continued...)

(c) Any otherwise eligible employe who has base year wages in an amount equal to, or in excess, of the amount of qualifying wages appearing in Part C of the table specified for the Determination of Rate and Amount of Benefits on the line on which in Part B there appears his weekly benefit rate, as determined under subsection (a) of this section, shall be entitled during his benefit year to the amount appearing in Part D on said line: Provided he had eighteen (18) or more “credit weeks” during his base year or Part E provided he had sixteen (16) or seventeen (17) “credit weeks” during his base year. Notwithstanding any other provision of this act, any employe with less than sixteen (16) “credit weeks” during the employe’s base year shall be ineligible to receive any amount of compensation.

43 P.S. § 804(c).

include: whether a fixed rate of pay exists; whether the employer withholds taxes from the claimant's pay; whether the employer provides necessary tools; whether the employer offers on-the-job training; and whether the claimant is expected to attend regular meetings held by the employer. *C E Credits OnLine v. Unemployment Comp. Bd. of Review*, 946 A.2d 1162 (Pa. Cmwlth. 2008). "No one factor is dispositive of the ultimate question of whether the putative employer 'controls' the work to be done and the manner in which it is done." *Id* at 1168.

Our independent review of the record and the Board's findings of fact fully support the Board's conclusion that Petitioner was not under the control of Nationwide. Nationwide did not compensate Petitioner at a fixed rate of pay. Petitioner's compensation varied by job, as he was paid hourly wages on some jobs and by the foot on other jobs. Nationwide did not withhold taxes from Petitioner's compensation. Although Nationwide provided Petitioner with the stucco material, Petitioner provided his own tools. Nationwide did not provide Petitioner with any training; rather Petitioner already possessed the necessary skills to work in his trade. Petitioner was not under the daily supervision of Nationwide even though he communicated with Pinkevich by telephone on a daily basis as Pinkevich visited the job site only weekly to check on progress. Petitioner's hours were determined by the convenience of the property owner. Although the record reveals that Petitioner and Pinkevich provided conflicting testimony regarding Petitioner's compensation and the level of supervision Pinkevich exerted, the Board credited Pinkevich's testimony over Petitioner's and we are unable to disturb this determination. *Duquesne Light Co. v. Unemployment Comp. Bd. of Review*, 648 A.2d 1318, 1320 (Pa. Cmwlth. 1994).

The second prong of Section 4(1)(2)(b) requires an employer to prove that the services provided by an individual are considered an independently established trade. Two important factors in this analysis are: “(1) whether the individual was capable of performing the activities in question for anyone who wished to avail themselves [sic] of the 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.” *Beacon Flag Car Co., Inc. v. Unemployment Comp. Bd. of Review*, 910 A.2d 103, 108-09 (Pa. Cmwlth. 2006).

As noted above, Nationwide did not provide Petitioner with training in the application of stucco. Rather, Petitioner already possessed the requisite skills of the trade when his relationship with Nationwide began. Moreover, he is capable of providing his services to anyone who wishes to utilize his skills. The Board also found that Petitioner was free to accept or reject jobs offered by Nationwide. In addition, Petitioner was free to accept other jobs. It is immaterial that Petitioner never refused a job offered by Nationwide and did not accept jobs from companies other than Nationwide. We discern no error in the Board’s conclusion that Petitioner, in this instance, engaged in stucco application as an independent trade.

Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 28th day of September, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge