

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vien Van Nguyen and	:	
Vien's Auto Repairs,	:	
Petitioners	:	
	:	
v.	:	No. 2250 C.D. 2009
	:	Submitted: September 10, 2010
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	
	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FLAHERTY

FILED: November 16, 2010

Vien Van Nguyen and Vien's Auto Repairs (collectively, Employer) appeal from a decision of the Unemployment Compensation Board of Review (Board) affirming a Referee's determination denying a request for relief from charges. We affirm.

Bang M. Le (Claimant) was terminated from his employment. He applied for unemployment compensation benefits. Benefits were denied on December 17, 2008. Claimant appealed. His appeal was assigned Appeal No. 08-09-E-8307. A hearing was held on January 21, 2009 and testimony was taken at that time. Ultimately, the Referee found Claimant eligible for benefits.

Employer appealed to the Board.<sup>1</sup> On March 31, 2009, the Board affirmed the Referee's determination finding Claimant eligible for benefits. The Board explained, however, that the record contained evidence showing Claimant opened his own business on January 1, 2009. It indicated that the Department of Labor and Industry (Department) should issue a determination as to Claimant's eligibility for benefits consistent with Section 402(h) of the Pennsylvania Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2837, as amended, 43 P.S. §802(h).<sup>2</sup> Employer did not appeal the Board's order to this Court.<sup>3</sup> The March 31, 2009 order became final and binding on April 30, 2009.<sup>4</sup>

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<sup>1</sup> On appeal to the Board, Appeal No. 08-09-E-8307 was modified to B-08-09-E-8307.

<sup>2</sup> Section 402(h) of the Law provides:

An employe shall be ineligible for compensation for any week—

...

(h) In which he is engaged in self-employment...

43 P.S. §802(h).

<sup>3</sup> There is no indication that the Board's March 31, 2009 Order was meant to be interlocutory and nonappealable.

<sup>4</sup> The Pennsylvania Rules of Appellate Practice provide, in pertinent part:

(a) Appeals authorized by law. Except as otherwise prescribed by Subdivision (b) of this rule:

(1) A petition for review of a quasijudicial order, or an order appealable under *42 Pa.C.S. § 763(b)* (awards of arbitrators) or under any other provision of law, shall be

On April 6, 2009, acting on the Board's instructions, the Department issued a determination denying benefits to Claimant under Section 402(h) of the Law for claim weeks ending January 3, 2009, through February 21, 2009. No appeal was taken from this determination.

In the interim, Employer filed a request for relief from charges. The Bureau of Unemployment Compensation and Allowances (Bureau), noting that all appeal periods had expired as they related to Appeal No. B-08-09-E-8307 and that Claimant was considered eligible for benefits, denied Employer's request for relief from charges. The Bureau's determination explained that its decision was not a determination of the Claimant's eligibility for benefits. Employer filed an appeal that was assigned Appeal No. FR-09-9-R-0843. The Referee, on July 23, 2009, affirmed relying on Section 302(a) of the Law, 43 P.S. §782(a).<sup>5</sup> She specifically stated that

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filed with the prothonotary of the appellate court within 30 days after the entry of the order.

Pa. R.A.P. 1512.

<sup>5</sup> Section 302(a) provides, in relevant part:

The department shall establish and maintain for each employer a separate employer's reserve account in the following manner:

(a) (1) Such account shall be credited with all contributions paid by such employer for periods subsequent to June thirtieth, one thousand nine hundred forty-eight... Subsequent to January 1, 1984, such account shall be charged with all compensation, including dependents' allowances, paid to each individual who received from such employer wage credits constituting the base of such compensation, in the proportion that such wage credits with such employer bears to the total wage credits received by

once the Board's March 31, 2009 determination became final, that order was not subject to collateral attack.

Employer appealed this determination to the Board. It requested remand for the presentation of after-acquired evidence. Employer sought remand to present a witness who would testify that Claimant was running a business during the time period he was claiming eligibility for unemployment compensation. Specifically, Employer contended that Claimant started his own business on December 10, 2008.

On October 27, 2009, the Board affirmed the Referee's determination and denied Employer's request for relief from charges. It

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*such individual from all employers: Provided, That if the department finds that such individual was separated from his most recent work for such employer due to being discharged for willful misconduct connected with such work, or due to his leaving such work without good cause attributable to his employment, or due to his being separated from such work under conditions which would result in disqualification for benefits under the provisions of section 3 or section 402(e.1), thereafter no compensation paid to such individual with respect to any week of unemployment occurring subsequent to such separation... shall be charged to such employer's account under the provisions of this subsection (a)...*

(3) The findings and determinations of the department under this subsection (a) shall be subject to appeal in the manner provided in this act for appeals from determinations of compensation: *Provided, That where the individual's eligibility for compensation has been finally determined under the provisions of Article V of this act, such determination shall not be subject to attack in proceedings under this section....*

43 P.S. §782. (Emphasis added).

further denied Employer's request to remand the matter for additional testimony. The Board declined to consider any evidence not included in the record in adjudicating Employer's appeal. Employer requested reconsideration. That request was denied.<sup>6</sup>

Employer initially filed a "Notice of Appeal" with this Court. The proper document to commence an appeal would be a "Petition for Review." By order dated November 23, 2009, we instructed Employer to file a petition for review within thirty days of entry of that order. On December 22, 2009, Employer filed its Petition for Review. That document reads as follows:

DETERMINATION SOUGHT TO BE  
REVIEWED

6. Petitioners seek review of the Unemployment Compensation Board of Review's determination of October 27, 2009, whereby, *in affirming the referee's decision granting Bang M. Le unemployment compensation benefits*, it denied the petitioner's (sic) request to remand the record for additional testimony concerning after-discovered evidence regarding Bang M. Le's self-employment during the relevant benefits period.

OBJECTIONS TO THE DETERMINATION

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<sup>6</sup> This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or necessary findings of fact are not supported by substantial evidence. Lee Hosp. v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

11. Respondent erred in affirming the referee in that Petitioners, (sic) after-discovered evidence as detailed in paragraph ten, goes to a material false statement of the claimant that was made in order to obtain benefits. *If petitioners were permitted a rehearing to introduce said after (sic) discovered evidence the resultant body of testimony would be insufficient to support the referee's decision to grant benefits and the claimant's credibility would be so destroyed as to cast considerable doubt upon his entire application for benefits and the incredible reasons he offered for discontinuing work, when in fact he left work merely to operate his own business.*

Petition for Review, pp. 2-4. (Emphasis added).

In support of its argument, Employer relies on 34 Pa. Code §101.104. That provision read, in part:

(a) The Board may allow or disallow any application for a further appeal without hearing, solely on the basis of the application and the record.

...

(c) If the further appeal is allowed by the Board, or if the Board removes an appeal from the referee to the Board and on its own motion assumes jurisdiction of the appeal, notification shall be mailed to the last known post office address of each interested party. The Board will review the previously established record and determine whether there is a need for an additional hearing. Under section 504 of the Unemployment Compensation Law (*43 P. S. § 824*), the Board may affirm, modify or reverse the decision of the referee on the basis of the evidence previously submitted in the case, or the Board may direct the taking of additional evidence, if in the opinion of the Board, the previously established record is not sufficiently complete and adequate to enable the

Board to render an appropriate decision. The further appeal shall be allowed and additional evidence required in any of the following circumstances:

- (1) Whenever the further appeal involves a material point on which the record below is silent or incomplete or appears to be erroneous.
- (2) It appears that there may have been a denial of a fair hearing under the rules...

34 Pa. Code §101.104.

Employer contends, relying on Section 412(h) of the Law, that a claimant is ineligible for benefits for any week he is engaged in self-employment. Based on 34 Pa. Code §101.104, it asserts that the Board erred in failing to remand the matter to the Referee for presentation of newfound evidence that was material to the case. Employer adds that “the after-discovered evidence, if introduce (sic) and allowed into evidence, would reveal that the Claimant was engaged in a completely independent line of business, his own body shop during the period for which he sought benefits, *thereby disqualifying him from receiving benefits.*” Petitioner’s Brief, p. 8. (Emphasis added).

The Board counters that the only issue before it on Appeal No. B-FR-09-09-R-0843 was Employer’s entitlement to relief from charges. It asserts that while evidence concerning the nature of Claimant’s separation from employment would normally be material in determining Employer’s entitlement to such relief, those issues were previously adjudicated in Appeal No. B-08-09-E-8307 and became conclusive by as a matter of law pursuant to Section 302(a)(3) of the Law. According to the Board, Employer is merely attempting to relitigate those issues. It adds that to the

extent that Employer argues its evidence would reflect on Claimant's eligibility under Section 402(h) of the Law, the issue concerning Claimant's eligibility for unemployment compensation in terms of his self-employment has already been decided.

Pursuant to Section 302(a)(1) of the Law, a separate reserve account is maintained for each employer which is charged with compensation paid to each individual who received base year wages from that employer in the proportion that such wages bear to the individual's total wages from all of his base year employers. Department of Labor & Industry v. Unemployment Compensation Board of Review, 501 A.2d 297 (Pa. Cmwlth. 1985). An employer seeking relief from charges is requesting a tax exemption. Id. at 299. Strict construction is required. Id. The filing of an appeal from an eligibility determination is separate and distinct from the filing of a request for relief from charges. First Nat'l Bank of Bath v. Unemployment Compensation Board of Review, 619 A.2d 801 (Pa. Cmwlth. 1992).

Upon review, we affirm the Board's October 27, 2009 Order. The Board deemed Claimant eligible for compensation benefits pursuant to a determination dated March 31, 2009. No appeal was taken from that order to this Court. In the Board's March 31, 2009 adjudication, it acknowledged that evidence was presented showing Claimant opened his own business following separation from Employer. It instructed the Department to issue a determination as to whether Claimant was ineligible for compensation during any week he was self-employed consistent with Section 402(h) of the Law. The Department, on April 6, 2009, issued a determination denying



benefits to Claimant under Section 402(h) of the Law for claim weeks ending January 3, 2009, through February 21, 2009 based on his self-employment. No appeal was taken from this determination. As no further appeals were taken from either the March 31, 2009 or April 6, 2009 determinations, the findings that Claimant was eligible for compensation for the period prior to January 3, 2009 became final.

Employer, in requesting relief from charges, cannot contest the Claimant's underlying eligibility for unemployment compensation. Section 302(a) of the Law specifically states that where the individual's eligibility for compensation has been finally determined under the provisions of Article V of the Law, no award of benefits is subject to collateral attack under the guise of a request for relief from charges. The original orders were issued under Article V.<sup>7</sup> We reiterate that the filing of an appeal from an eligibility determination is separate and distinct from the filing of a request for relief from charges. First Nat'l Bank of Bath.

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<sup>7</sup> Section 509 of the Law, 43 P.S. §829, contained in Article V, provides in pertinent part:

Any decision made by the department or any referee or the board shall not be subject to collateral attack as to any application claim or claims covered thereby or otherwise be disturbed, unless appealed from.

Subject to appeal proceedings and judicial review, any right, fact or matter in issue which was directly passed upon or necessarily involved in any decision of a referee or the board or the Court and which has become final shall be conclusive for all purposes of this act and shall not be subject to collateral attack as among all affected parties who had notice of such decision...

Employer, as evidenced in its Petition for Review and brief, is directly challenging Claimant's eligibility for unemployment compensation. Yet, the Board's October 27, 2009 Order, the order subject to the instant appeal, was limited to the issue of whether Employer was entitled to relief from charges. Employer is only entitled to this relief if Claimant's discharge was due to willful misconduct, if Claimant left work without good cause attributable to his employment, or if Claimant left work for some other reason that would result in a disqualification of benefits. 43 P.S. §782(a)(1). Claimant, however, was found eligible for compensation with the exception of a period of self-employment. This finding is binding in light of the failure to appeal previous rulings. 43 P.S. §829.

Employer cannot now attempt to expand the amount of weeks that Claimant is ineligible for benefits due to his self-employment in this proceeding begun as a request for relief from charges. The Board did not err in declining to remand this matter to the Referee for additional evidence that would be irrelevant in the instant proceeding. Moreover, it did not err when it refused to consider evidence not of record. Accordingly, the order of the Board dated October 27, 2009, is affirmed.

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JIM FLAHERTY, Senior Judge

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**ORDER**

AND NOW, this 16<sup>th</sup> day of November, 2010, the order of the Unemployment Compensation Board of Review is AFFIRMED.

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JIM FLAHERTY, Senior Judge