

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William D. Kuhn,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2364 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: March 11, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: August 23, 2011

William D. Kuhn (Claimant), pro se, petitions for review of the September 13, 2010, Order of the Unemployment Compensation Board of Review (Board), which affirmed the decision of the Unemployment Compensation Referee (Referee), declaring Claimant ineligible for unemployment compensation (UC) benefits for the week ending September 19, 2010, and for the weeks between September 26, 2009, and March 27, 2010, pursuant to Section 402(h) of the Unemployment Compensation

Law (the Law).¹ On appeal, Claimant argues that the Board erred in finding that he was an independent contractor and, thus, ineligible for UC benefits, because the Board relied on inadmissible hearsay evidence in making that determination. For the following reasons, we affirm.

Claimant was laid off from his job with an Iowa trucking company in March, 2009. (Hr’g Tr. at 5, 8, R. Item 9.) He moved to California to work for his brother as a handyman from March 2009 through September 2009. (Referee’s Decision, Findings of Fact (FOF) ¶¶ 2, 8.) During that time, Claimant lived with his brother without paying rent. (FOF ¶ 3.) Claimant also received funds from a firm owned by his brother, BC Rock LLC (Employer). (FOF ¶¶ 4-6.) Upon his return to Pennsylvania, Claimant filed for UC benefits in September 2009. (Claim Record, R. Item 1.) At the request of the UC Service Center (Service Center), Employer submitted an “Employer Questionnaire” on October 15, 2009, in which Employer stated, “Claimant is a general contractor,” and, “The Claimant was hired as an independent contractor.” (Employer Questionnaire ¶¶ 8, 22, R. Item 3 at 1, 2.) Subsequently, Claimant responded to a Claimant Questionnaire on March 30, 2010, indicating that he believed Employer considered him an independent contractor and that he was a handyman. (Claimant Questionnaire ¶¶ 6, 11, R. Item 4 at 1.)

The Service Center found Claimant ineligible for benefits under Section 402(h) of the Law because it determined him to be self-employed. (Notice of Determination, R. Item 5.) Claimant appealed. A hearing was held by telephone on May 18, 2010;

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

Claimant testified, but Employer did not appear. (Hr’g Tr. at 1, R. Item 9.) Admitted into evidence at the hearing were several documents, including Employer’s Questionnaire and Claimant’s Questionnaire. (Hr’g Tr. at 5, R. Item 9.) The Referee asked Claimant whether he objected to any of the documents, and Claimant said that he did not. (Hr’g Tr. at 5, R. Item 9.)² Claimant testified, “I was a general contractor for my brother. . . . I would have to do certain things or whatever he said . . . because he would get up at 6:00 in the morning and . . . I was living with him and he would say I need you to do this, this, and this today.” (Hr’g Tr. at 7-8, R. Item 9.) The Referee found Claimant ineligible under Section 402(h) because he determined that Claimant had worked as a self-employed, independent contractor for Employer after leaving his previous trucking job and, since self-employment income does not count toward a claimant’s base year wages, he had accumulated insufficient funds to receive UC benefits. (Referee’s Decision.)

In determining that Claimant was a self-employed worker while in California, the Referee made the following findings of fact:

1. The claimant had borrowed a considerable amount of money from his brother after becoming unemployed.
2. So that he might pay back his brother, the claimant moved to California temporarily where he performed work on his brother’s house and their grandmother’s house.
3. The claimant lived with his brother during the period of time in California and did not pay rent.
4. The claimant’s brother owned a company named BC Rock LLC.

² Claimant also stated that he did not have these documents on hand, although he had received them. (Hr’g Tr. at 1, 3, R. Item 9.)

5. The claimant was issued a lump sum check by BC Rock, the company owned by the claimant's brother.
6. The claimant received money from BC Rock to compensate him for money in excess of that which he would have earned after repaying the debt to his brother.
7. The claimant's brother assigned the work to the claimant and the claimant pursued the work to the best of his ability with little oversight performed by his brother.
8. The claimant went to California in March 2009 and returned home on September 14, 2009.
9. Upon returning to his home the claimant filed for unemployment compensation benefits and reported being paid by BC Rock.
10. The claimant did not advertise his availability to perform construction work, did not incorporate, and took no steps to establish his own business for other customers.
11. The claimant was provided with a Form 1099.
12. The claimant had no investment in a business and performed the work using tools he had previously owned and the truck he also owned and drove to California.
13. The claimant had insufficient base year funds without the money in payment from his brother.

(FOF ¶¶ 1-13.) Claimant appealed the Referee's decision to the Board. The Board affirmed and adopted the Referee's findings of fact. The Board concluded that Claimant was an independent contractor because "[C]laimant earned over \$9,000.00 completing miscellaneous construction projects for his brother in California [and] was free to perform these services for anyone." (Board Order at 1.) The Board denied benefits pursuant to Sections 402(h) and 4(l)(2)(B) of the Law, 43 P.S. §§

802(h) and 753(l)(2)(B). Claimant, who represented himself throughout the proceedings below, appeals pro se to this Court.³

On appeal, Claimant argues that he was not self-employed as an independent contractor for Employer. (Claimant’s Br. at 8-9, 12.) Claimant further argues that the basis of the finding of self-employment was information provided by his brother on the Employer’s Questionnaire, and that this information was improperly admitted into evidence because it was uncorroborated hearsay. (Claimant’s Br. at 13.)

Section 402(h) of the Law provides that an employee shall be ineligible for compensation for any week in which he is engaged in self-employment. The term “self-employment” is not defined by statute, but “employment” is defined by Section 4(l)(2)(B) of the Law, in relevant part, 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(l)(2)(B). Thus, Section 4(l)(2)(B) of the Law creates a presumption that an individual working for wages is an employee. A putative employer may

³ The scope of our “review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record.” Western and Southern Life Insurance Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

overcome this presumption by demonstrating that: (1) the individual was free from control or direction in the performance of his work; and (2) the individual was customarily engaged in an independently established trade, occupation, profession or business while providing such services. 43 P.S. § 753(l)(2)(B). “[T]he burden is on the employer to establish self-employment. ‘This Court has repeatedly held that before a claimant will be declared to have been self-employed, the employer bears the burden of proving *both* elements of Section 4(l)(2)(B).’” Alstrom v. Unemployment Compensation Board of Review, 481 A.2d 1238, 1241 (Pa. Cmwlth. 1984) (emphasis in original) (quoting Crenshaw v. Unemployment Compensation Board of Review, 412 A.2d 682, 684 (Pa. Cmwlth. 1980)).

Claimant does not argue that, as a handyman, he was not engaged in a customarily independently established trade. Therefore, our focus is on whether Claimant was free from direction or control in the performance of his work. In resolving such questions, this Court considers the totality of the circumstances, including the following factors:

whether there was a fixed rate of remuneration; whether taxes were withheld from the claimant’s pay; whether the employer supplied the tools necessary to carry out the services; whether the employer provided on-the-job training; whether the employer set the time and location for work; whether the employer had the right to monitor the claimant’s work and review performance; and whether the employer held regular meetings that the claimant was expected to attend.

Resource Staffing, Inc. v. Unemployment Compensation Board of Review, 995 A.2d 887, 891 n.6 (Pa. Cmwlth. 2010). In this case, the Board found that Claimant was subject to “little oversight,” (FOF ¶ 7); used his own tools and his own truck to perform the work, (FOF ¶ 12); was responsible for his own taxes, (see FOF ¶ 11

(stating that Claimant “was provided with a Form 1099”); and “was free to perform [his] services for any one [sic] who wished to avail themselves of his services,” (Board Order at 1). The totality of the circumstances presented by these facts indicates that Claimant was, indeed, a self-employed independent contractor.

In his brief, Claimant disputes certain findings of fact made by the Referee and the Board. Claimant asserts, *inter alia*, that he did not own his own tools and truck and that he did not receive a Form 1099. (Claimant’s Br. at 13.) Facts found by the Board will not be upset on appeal if they are supported by substantial evidence. Chapman v. Unemployment Compensation Board of Review, 20 A.3d 603, 607 (Pa. Cmwlth. 2011). “Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Procyson v. Unemployment Compensation Board of Review, 4 A.3d 1124, 1127 n.4 (Pa. Cmwlth. 2010). In reviewing the record for substantial evidence, this Court “must examine the evidence in the light most favorable to the party who prevailed before the Board, and to give that party the benefit of all inferences that can be logically and reasonably drawn” therefrom. Chapman, 20 A.3d at 607. The Board’s finding that Claimant used his own tools and truck is supported by substantial evidence in the record, in the form of Employer’s Questionnaire and Claimant’s Questionnaire. (See Employer’s Questionnaire ¶ 12 (stating that Claimant used his own tools), R. Item 3 at 1; see also Claimant’s Questionnaire ¶¶ 36-37 (stating that Claimant did not have a company vehicle and did have his own tools, which he repaired himself), R. Item 4 at 3.) Likewise, the Board’s finding that Claimant was provided with a Form 1099 is supported by substantial evidence. (Employer’s Questionnaire ¶ 7, R. Item 3 at 1; Claimant’s Questionnaire ¶ 22, R. Item 4 at 2; Hr’g Tr. at 6, 9, R. Item 9.)

Claimant argues that Employer's Questionnaire cannot provide substantial evidence for findings of the Board because it is unobjected to hearsay which is not corroborated by other evidence of record. "Hearsay evidence, [a]dmitted without objection, will be given its natural probative effect and may support a finding of the Board, [i]f it is corroborated by any competent evidence in the record, but a finding of fact based [s]olely on hearsay will not stand." Walker v. Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976). Claimant is correct that, because Employer did not appear at the hearing to support the facts presented in its questionnaire, Employer's Questionnaire is hearsay. As noted above, Claimant did not object to the introduction of Employer's Questionnaire and, in accordance with Walker, Employer's Questionnaire must be corroborated by other evidence in order to support the findings of the Board.

Employer's Questionnaire is corroborated by Claimant's testimony and Claimant's Questionnaire. For example, as noted above, Claimant's Questionnaire and Employer's Questionnaire agree that Claimant used his own tools and that he was provided with a Form 1099. Similarly, there is corroboration either in Claimant's testimony or the Claimant's Questionnaire that: Claimant worked for his brother in California for about six months (compare Claimant's Questionnaire ¶ 4, R. Item 4 at 1, and Referee Hr'g Tr. at 9, R. Item 9, with Employer's Questionnaire ¶ 1, R. Item 3 at 1); received a Form 1099 (compare Claimant's Questionnaire ¶ 22, R. Item 4 at 2 with Employer's Questionnaire ¶ 7, R. Item 3 at 1); and worked without close supervision (compare Claimant's Questionnaire ¶ 16 (stating that he could begin and end work independently) and ¶ 17 (stating "had cert[ain] things I had to do" in response to question "[w]ere you free from control or direction in the performance of

your work?”), R. Item 4 at 1-2, with Employer’s Questionnaire ¶ 9 (stating Claimant’s work was not supervised closely or regularly) and ¶ 10 (stating that Claimant set his own work hours), R. Item 3 at 1). Additionally, Claimant’s Questionnaire indicated that he did not work any regular hours, he received a “set price for [a particular] job no matter [the] amount of hours [spent],” and he paid self-employment Social Security taxes. (Claimant’s Questionnaire ¶¶ 13, 20, 28, R. Item 4 at 1-2.) The Claimant’s Questionnaire and Claimant’s testimony generally corroborate Employer’s Questionnaire. Therefore, to the extent that it was necessary for the Board to rely on Employer’s Questionnaire for substantial evidence, the Board did not err in doing so.

For these reasons, we affirm the Order of the Board.

RENÉE COHN JUBELIRER, Judge

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	:	
Respondent	:	

ORDER

NOW, August 23, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge