

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Samuel L. Cararini, :  
Petitioner :  
 :  
v. : No. 50 C.D. 2010  
 : SUBMITTED: July 30, 2010  
Unemployment Compensation :  
Board of Review, :  
Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: September 28, 2010**

Samuel L. Cararini petitions for review of the order of the Unemployment Compensation Board of Review (Board), affirming the order of the referee denying him unemployment compensation benefits on the ground that he was ineligible due to self-employment. We reverse.

Cararini was employed as an installer by D & R Equipment, Inc., (Employer) from 2004 to 2008. While working for Employer, Cararini established a business of his own, Delmont Window and Door Company (Delmont), “[d]ue to lack of hours and the possibility of [Employer] going to all subcontractors.” Transcript of Testimony, September 29, 2009, at 8. While working for Employer, Cararini filed documents with the Commonwealth incorporating Delmont, but took

no further action to develop the business. Cararini was laid off in November of 2008, and applied for benefits in January of 2009. In early 2009, Cararini filed registration documents for Delmont with the Attorney General's office and purchased an insurance policy for the business. In the summer of 2009, he contacted several suppliers of remodeling materials. From the record, it does not appear that Delmont ever advertised, acquired any clients, secured any suppliers or inventory or generated any revenue.

In general, a claimant is ineligible for unemployment benefits in any week “[i]n which he is engaged in self-employment.” Section 402(h) of the Unemployment Compensation Law,<sup>1</sup> 43 P.S. § 802(h). However, under what is commonly referred to as the “sideline business exception:”

an employe who is able and available for full-time work shall be deemed not engaged in self-employment by reason of continued participation without substantial change during a period of unemployment in any activity including farming operations undertaken while customarily employed by an employer in full-time work whether or not such work is in “employment” as defined in this act and continued subsequent to separation from such work when such activity is not engaged in as a primary source of livelihood.

*Id.* Interpreting that provision of the Law, this court has found claimants engaged in self-employment ineligible for benefits, unless:

- 1) the self-employment began prior to the termination of the employee's full-time employment;
- 2) the self-employment continued without substantial change after the termination;
- 3) the employee remained available for

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

full-time employment; and 4) the self-employment was not the primary source of the employee's livelihood.

*O'Hara v. Unemployment Comp. Bd. of Review*, 648 A.2d 1311, 1313 (Pa. Cmwlth. 1994). *See also LaChance v. Unemployment Comp. Bd. of Review*, 987 A.2d 167 (Pa. Cmwlth. 2009). The claimant has the burden of proving all the elements of this exception. *O'Hara*, 648 A.2d 1311.

Based upon the testimony of Cararini and Richard Wroblewski, Jr., who testified for Employer, the referee found that Cararini was engaged in self-employment and that he had not proven the second element of the sideline business exception and, therefore, was ineligible for benefits. In examining the second element, the referee stated that, “[j]ust based on the claimant’s inquiries into additional actions, the claimant has spent more time over the past months than he did the entire time he worked with [Employer] and had the sideline business.” Referee’s decision and order at 2 (mailed September 29, 2009). Accordingly, the referee concluded that Cararini’s self-employment had undergone substantial change. On appeal, the Board adopted the referee’s findings and conclusions, and an appeal to this court followed.

Cararini makes two arguments before this court: first, that some of the Board’s findings of fact are not supported by substantial evidence; and second, that the Board erred as a matter of law in finding that there was a substantial change in his self-employment after separation.

The Board, in addition to adopting the referee’s findings and conclusions, stated that Cararini was attempting to set up a company “that would be in competition with his employer” and that Cararini “solicited work which apparently his employer could have performed.” Board’s opinion and order (mailed Dec. 15, 2009). Cararini challenges these statements as unsupported by

the record. We decline to address this contention, however, because the statements at issue are *dicta*. Whether Cararini’s business could potentially compete with Employer is irrelevant and has no bearing on whether Cararini’s business endeavors fall under the sideline business exception.<sup>2</sup>

Cararini next argues that the Board erred in adopting the referee’s conclusion that he did not meet the second element of the sideline business exception, which requires the self-employment to continue without substantial change after employment ends. Cases examining this requirement “have focused primarily on whether a claimant is working in the activity for significantly more hours than he did prior to separation.” *Dausch v. Unemployment Comp. Bd. of Review*, 725 A.2d 230, 232 n.7 (Pa. Cmwlth. 1999) [citing *Quinn v. Unemployment Comp. Bd. of Review*, 446 A.2d 714 (Pa. Cmwlth. 1982) (substantial change found where claimant worked 30 hours weekly prior to lay-off and 60 hours weekly after lay-off); *Higgins v. Unemployment Comp. Bd. of Review*, 405 A.2d 1024 (Pa. Cmwlth. 1979) (substantial change found where claimant worked ten hours every third week prior to separation from employment and 40-45 hours weekly post-separation); *Parente v. Unemployment Comp. Bd. of Review*, 366 A.2d 629 (Pa. Cmwlth. 1976)]. Whether a claimant’s post-separation activity constitutes a substantial change is a question of law over which this court exercises plenary review. *Dausch*, 725 A.2d at 231 n.5.

In *Dausch*, this court found no substantial change in self-employment, when the claimant, an attorney and accountant, made preparations to expand his

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<sup>2</sup> It should be noted, however, that the Board does appear to misstate the record in one aspect. The Board’s statement that Cararini “solicited work” appears to be in error. The record reflects that Cararini contacted suppliers of remodeling materials, but not that he ever contacted potential remodeling clients.

sideline business while receiving benefits. In that case, the claimant leased office space, painted its walls and furnished it; during the period at issue, however, the claimant did not engage in the sideline activity itself. This court found that these activities, because they did not result in a significant increase in the amount of time devoted to the business, and were merely preparatory to expanding the business and not the actual provision of services, did not constitute a substantial change in the sideline business. However, this court has found that a substantial change in activity occurred where the claimant put significantly more hours than he did prior to separation into the sideline business itself, even if the business generated no income. *LaChance*, 987 A.2d 167 (finding substantial change when the claimant's activity increased from zero to twenty hours per week, and claimant actively solicited potential customers). Thus, even when a claimant is generating no income from his self-employment, a substantial change to the business activities, evidenced by the claimant devoting significantly more hours to the core of the business, makes a claimant ineligible for benefits. *LaChance*; *Dausch*.

In this case, the facts found by the referee and Board cannot support the legal conclusion that Cararini's sideline activity underwent substantial change. In the ten months between Cararini's separation and the hearing before the referee, Cararini spoke to an employee at the Attorney General's office, filed registration forms for his business with the Attorney General, purchased insurance for his business, and contacted several potential suppliers of remodeling materials. There is no evidence that Cararini ever advertised his business or in any way solicited business or customers. Thus, the findings support the conclusion that his activities were merely preparatory in nature, rather than demonstrating that a substantial change in business activity had occurred. Nor could it be said that the time

invested substantially increased, as the activities that Cararini engaged in required only a minimal investment of time over the ten months between separation and the referee's hearing. *See LaChance; Dausch; Quinn; Higgins.*

Accordingly, as the credited evidence demonstrates that Cararini's sideline business continued without substantial change, and Employer concedes in its brief that the other three elements of the sideline business exception are met, we reverse.

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**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 REVERSED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge