IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael L. Gearhart,	:	
	:	
Petitioner	:	
v.	:	No. 589 C.D. 2010
	:	Submitted: November 12, 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 SENIOR JUDGE FLAHERTY FILED: December 23, 2010

Michael L. Gearhart (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's decision denying benefits pursuant to Section 402(h) of the Unemployment Compensation Law (Law) and determining that Claimant has a non-fault overpayment which is subject to recoupment pursuant to Section 804(b) of the Law.[1] We affirm.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §§802(h) and 874(b). Pursuant to Section 402(h) of the Law: "[a]n employe shall be ineligible for compensation for any week…in which he is engaged in self-employment…." Section 804(b)(1) of the Law provides that:

> (b)(1) Any person who other than by reason of his fault has received with respect to a benefit year any sum as

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Claimant began receiving unemployment benefits by and through his former employer on or about March 1, 2009. On September 1, 2009, Claimant began working as a barber. On November 2, 2009, Claimant received a "Notice of Determination" from the Unemployment Compensation Service Center (Service Center) which denied benefits pursuant to Section 402(h) of the Law and determined that Claimant had received $1,126.00 in unemployment benefits for the claim weeks ending September 5, 2009 and September 12, 2009 and that a non-fault overpayment had been established. Claimant appealed to the referee.

The referee determined that Claimant was customarily engaged in an independent trade, business or profession and must be considered an independent contractor and, therefore, self-employed within the meaning of Section 4(*l*)(2)(B) of the Law, 43 P.S. §753(*l*)(2)(B), and Section 402(h) of the Law and was thus, ineligible for benefits.[2] Further, the referee

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> compensation under this act to which he was not entitled shall not be liable to repay such sum but shall be liable to have such sum deducted from any future compensation payable to him with respect to such benefit year, or the three-year period immediately following such benefit year….

[2] Section 4(*l*)(2)(B) provides in pertinent part as follows:

> (*l*)(2) The term "Employment" shall include an individual's entire service performed within or both within and without this Commonwealth, if –
>
> ***
>
> (B) … 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

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determined that, pursuant to Section 804(b) of the Law, a non-fault overpayment was established which was recoupable under the Law. Claimant appealed to the Board. The facts as found by the Board are as follows:

> 1. The claimant began working as a barber on September 1, 2009.
>
> 2. The claimant practices his profession as a barber at M.A.M.A. Barber Shop wherein the claimant pays $50 per week for use of the facilities, to include a barber chair and utilities.
>
> 3. The claimant is the "sole practitioner" at M.A.M.A. Barber Shop.
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> 4. The claimant is free from direction and control in the performance of his job.
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> 5. The claimant is at risk of sustaining a profit or a loss.
>
> 6. The claimant has established his own hours of work.
>
> 7. The claimant utilizes his own "Barber" tools.
>
> 8. The claimant paid for advertizing for his business.

> 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.

> 9. The claimant initiated the business in an attempt to build a business to "get off of Unemployment Compensation."
>
> 10. The claimant established the charge for haircuts and is free to charge or not charge as he deems fit.
>
> 11. The claimant is engaged in an independently established trade, occupation, profession or business.

Board's Decision, February 24, 2010, Findings of Fact Nos. 1-11, at 1-2.

The Board found in pertinent part as follows:

> Here the claimant, through his documentation and testimony, has carried the "employer's-owner's" weight and the Board agrees with the application of the Law by the Referee.
>
> ***
>
> As demonstrated in the above findings, the claimant had a financial investment in his activities and duties as a barber at M.A.M.A. Barber Shop, practiced alone, established his own hours, established his rate of pay, and had a financial investment in the business. As such, the claimant was free from direction and control in the performance of his job. As such, the claimant was customarily engaged in an independent trade, business, or profession. Therefore, the claimant must be considered to have been an independent contractor and, consequently, self-employed within the meaning of Sections 4(*l*)(2)(B) and 402(h) of the…Law.
>
> In the opinion of the Board, the claimant leases the location where he conducts his business as a barber for a prescribed fee in the hope of making a profit from the charges levied, and is at risk of sustaining a loss. Accordingly, the claimant

> must be found ineligible for…[b]enefits under the aforementioned Sections of [the] Law.
>
> Section 804(b) of the Law provides in pertinent part that any person who other than by reason of his fault has received with respect to a benefit year any sum as compensation under this act to which he was not entitled shall not be liable to repay such sum but shall be liable to have such sum deducted from any future compensation payable to him with respect to such benefit year, or the three-year period immediately following such benefit year. Since the facts in the instant case fall within the provisions of Section 804(b) of the Law, recoupment of the overpayment shall be made in accordance with this Section of the Law.

Board's Decision at 2-3. The Board affirmed the referee, denied benefits and found that Claimant has a non-fault overpayment which is subject to recoupment. Claimant now petitions this court for review.[3]

Claimant contends that the Board erred in finding that Claimant was free from direction and control in performance of his job as a barber and that Claimant was customarily engaged in an independently established trade, occupation, profession, or business.

Pursuant to Section 402(h) of the Law, an employee is ineligible for unemployment benefits for any week in which he is engaged in self-employment. Section 402(h) further provides that:

> an employe who is able and available for full-time work shall be deemed not engaged in self-employment by reason of continued participation

[3] Our review is limited to a determination of whether constitutional rights have been violated, whether an error of law has been committed and whether all necessary findings of fact are supported by substantial evidence. Kirkwood v. Unemployment Compensation Board of Review, 525 A.2d 841 (Pa. Cmwlth. 1987).

> 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….

Additionally, "even where an employee has a proprietary interest in a sideline business, he may still receive benefits if he proves that he meets the conditions contained in the proviso" of Section 402(h) of the Law. Conrad v. Unemployment Compensation Board of Review, 478 A.2d 542, 544 (Pa. Cmwlth. 1984). Claimant, however, was not engaged as a barber prior to his separation from his full-time work. Thus, he does not meet the criteria in Section 402(h) of the Law.

Now we must determine whether Claimant was self-employed pursuant to Section 4(*l*)(2)(B) of the Law. As stated previously, Section 4(*l*)(2)(B) of the Law creates a two-prong test to determine whether a person is an employee or not. The first prong is whether the person was free from control and direction in the performance of the work, and the second is whether the business was one which is customarily engaged in as an independent trade or business. Venango Newspapers v. Unemployment Compensation Board of Review, 631 A.2d 1384 (Pa. Cmwlth. 1993).

It is presumed that an individual is an employee rather than a self-employed, independent contractor, but such presumption can be overcome "if the putative employer sustains its burden of showing that the claimant was free from control and direction in the performance of his service, and that, as to such service, was customarily engaged in an independent trade or business." Glatfelter Barber Shop v. Unemployment

Compensation Board of Review, 957 A.2d 786, 789 (Pa. Cmwlth), petition for allowance of appeal denied, 599 Pa. 712, 962 A.2d 1198 (2008)(citation omitted). As to whether an individual is free from direction and control not only with regard to the work done, but also with regard to the manner of performing it, we must look at the factors considered by the courts. Pavalonis v. Unemployment Compensation Board of Review, 426 A.2d 215 (Pa. Cmwlth. 1981). Control is premised upon an actual showing of control with regard to the work to be done and the manner in performing it. Glatfelter, 957 A.2d at 789.

Our Supreme Court has indicated that we must examine the unique facts of each case in order to resolve the question of whether a person is an employee or an independent contractor. Danielle Viktor, Ltd. v. Department of Labor and Industry, Bureau of Employer Tax Operations, 586 Pa. 196, 892 A.2d 781 (2006). In Viktor, the Supreme Court concluded that the limousine drivers were not under the control of their employers in the performance of their work, and, thus, were independent contractors rather than employees. The Court noted that the limousine drivers did not complete an application and were not interviewed for the job, they were not required to complete training for the job, they were hired on a job-to-job basis, they could refuse any assignment, they were not required to attend meetings and they were not given a handbook or uniform. Additionally, the Court noted that the limousine drivers were engaged in an independent trade as they were free to work for more than one company at a time, including competitors, with no adverse consequences; the operation of their businesses and their ability to perform work did not depend on the existence of any one

of the employers; and the fact that the limousine drivers bring all necessary prerequisites of providing driving services to limousine companies, even though they do not own the limousines or bear all of the financial risk. Viktor, 586 Pa. at 213, 892 A.2d at 791.

In Glatfelter, this court concluded that a commissioned barber was an employee rather than an independent contractor. The barber had entered into an independent contractor agreement, leased a chair from employer, submitted all proceeds from services to the employer's cash register, received a set percentage of total payments on a weekly basis, was bound by employer's set prices for services, was forbidden from distributing business cards, was required to work the hours set by employer, used employer provided equipment and supplies and was required to attend meetings.

In the present controversy, Claimant was the only barber working at M.A.M.A. Barber Shop, which Claimant did not own. Claimant paid $50.00 per week for use of the shop which included a barber chair and his utilities. Claimant established his own hours of work, utilized his own sheers, combs and clippers, paid for his own advertizing, established the charges for haircuts and was free to charge or not charge each customer as he deemed fit. The Board did not err in determining that Claimant was free from control or direction over the performance of such services.

As to the second prong, we must look at "whether the individual was capable of performing activities in question for anyone who wished to avail themselves of the services and whether the nature of the business compelled the individual to look to only a single employer for the

continuation of such services." Venango, 631 A.2d at 1388. In Viktor our Supreme Court stated in pertinent part as follows:

> The Commonwealth Court did not rest its determinations solely on the fact that [the] [d]rivers were free to work for more than one company. The court considered the facts that [the] [d]rivers were hired on a job-to-job basis, could refuse any assignment, and were not dependent on [the limousine companies] for ongoing employment…. Further, the court also specifically determined that [the] [d]rivers suffered a risk of loss if expenses exceeded income….

Id. at 223, 892 A.2d at 797-798.

In the present controversy, Claimant was not dependent upon M.A.M.A. Barber Shop for ongoing employment, Claimant was at risk of sustaining a profit or a loss, and was capable of serving any client he wished or to not serve such client. Again, the Board did not err in determining that Claimant is customarily engaged in an independently established trade, occupation, profession or business.

Accordingly, we must affirm the decision of the Board.

JIM FLAHERTY, Senior Judge

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	:	
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	:	

O R D E R

AND NOW, this 23rd day of December, 2010 the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge