

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Marti Evans,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 616 C.D. 2011
	:	Submitted: September 16, 2011
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: October 14, 2011**

Marti Evans (Claimant), representing herself, petitions for review of an order of the Unemployment Compensation Board of Review (Board) that denied her benefits under Section 402(h) of the Unemployment Compensation Law (Law) (self-employment)<sup>1</sup> as applied in Starinieri v. Unemployment Compensation Board of Review, 447 Pa. 256, 289 A.2d 726 (1972). Claimant contends one of the Board's findings is not supported by substantial evidence, and, she was not self-employed as a matter of law. Upon review, we affirm.

Claimant owned and worked as a broker for Custom Real Estate (Agency) from 1998 until October 30, 2010. Claimant owned 100 percent of the

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

stock and made all business decisions for Agency's day to day operations. In addition to owning all of Agency's equity, Claimant also drew a salary.

After several years, Claimant's business took a downturn coinciding with the real estate market collapse. In an attempt to keep Agency afloat, Claimant financed a line of credit on her home. However, Claimant was unable to turn around the business, and she made the decision to close Agency. Thereafter, Claimant filed for unemployment benefits, which were initially denied. Claimant appealed.

After a hearing, a referee denied Claimant benefits under Section 402(h) of the Law. The referee determined Claimant exercised substantial control over Agency's business; therefore, she was self-employed and ineligible for benefits. Claimant appealed.

On appeal, the Board adopted and incorporated the referee's findings and conclusions, and it affirmed the referee's decision. Claimant petitions for review.<sup>2</sup>

In her brief, Claimant raises two issues. First, Claimant argues the Board's legal determination that she exercised a substantial degree of control over

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<sup>2</sup> Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Oliver v. Unemployment Comp. Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010) (en banc).

the business was in error. Second, she claims the adopted Board Finding of Fact No. 6 is not supported by the record.

First, we address whether the challenged Board finding is supported by the record. In an unemployment compensation case, the Board's factual findings are conclusive on appeal so long as the record taken as a whole contains substantial evidence to support those findings. Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 827 A.2d 422 (2003).

Finding of Fact No. 6 states: “[w]hen [C]laimant’s debts exceeded \$25,000.00, [C]laimant made a business decision to close Agency and file for [unemployment compensation] benefits on the rationale that her having been a listed employee on who’s [sic] salary [unemployment compensation] tax had been paid, that she would be eligible for benefits.” Referee’s Decision, 10/20/2010, at 1. To the contrary, Claimant contends she closed the business due to external forces beyond her control, and therefore, the business closed through no fault of her own.

At the referee hearing, Claimant testified she was the sole owner of Agency, was in total control of Agency’s operations, and made the decision to close Agency because of growing debt. Notes of Testimony, 11/17/10, at 8. Claimant also testified she believed she was an employee of Agency and was entitled to unemployment compensation. Id. at 7. In light of these admissions, substantial evidence supports Finding of Fact No. 6. Thus, Claimant’s argument

fails. See Tapco, Inc. v. Unemployment Comp. Bd. of Review, 650 A.2d 1106 (Pa. Cmwlth. 2004).

Next, we address whether the Board correctly determined Claimant was self-employed. Section 402(h) of the Law provides, “an employee shall be ineligible for compensation for any week in which ... (h) he is engaged in self-employment.” 43 P.S. § 802(h). The determination of whether one is self-employed is a question of law. O’Brian v. Unemployment Comp. Bd. of Review, 370 A.2d 805 (Pa. Cmwlth. 1977).

In Starinieri, our Supreme Court held the test to determine if an individual is self-employed is whether the employee exercises a “substantial degree of control over the [company].” Starinieri, 447 Pa. at 260, 286 A.2d at 728. The Starinieri test requires a consideration of all factors that could indicate control; as such, no one factor, such as stock ownership, or executive office is determinative. Geever v. Unemployment Comp. Bd. of Review, 442 A.2d 1127 (Pa. Cmwlth. 1982). Where an individual exercises a substantial degree of control over the company and that company fails, the individual is an out of work businessperson, rather than an unemployed worker, and thus, is ineligible for benefits under the Law. Baer v. Unemployment Comp. Bd. of Review, 739 A.2d 216 (Pa. Cmwlth. 1999).

Here, Claimant does not dispute that she was the exclusive owner of Agency’s stock, or that she was responsible for Agency’s routine operations and its final decision to close. However, Claimant contends she lacked control over the external factors that led to her decision to close Agency, namely, the downturn of

the real estate market and her salespersons resignations. Claimant therefore asserts she is unemployed through no fault of her own and is entitled to benefits.

Claimant's argument lacks merit. Our inquiry into self-employment is focused on whether Claimant enjoyed substantial control over the company's internal business operations, not the market as a whole. It would be truly extraordinary to find a scenario in which a business owner exercised significant control over outside market forces. See Starinieri; Baer; Greever. Consequently, here, where Claimant owned 100 percent of Agency's stock, managed its daily operations, and personally dissolved the company, it is clear Claimant exercised substantial control over Agency. Therefore, Claimant was self-employed, and she is ineligible for benefits under the Law.<sup>3</sup> See id. Accordingly, Claimant's argument is rejected as meritless.

For the above stated reasons, we affirm.

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ROBERT SIMPSON, Judge

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<sup>3</sup> In her brief, Claimant also states Section 402.4 of the Law, added by Act of July 21, 1983, P.L. 68, as amended 43 P.S. § 802.4, should apply here because she worked hard to avoid bankruptcy; therefore, it would be inequitable to deny her benefits. Section 402.4 of the Law permits a self-employed corporate officer to collect unemployment compensation benefits in the limited circumstances where the officer becomes unemployed as a result of the corporation entering involuntary bankruptcy proceedings under Chapter 7, Title 11 of the United States Code. Gaetani v. Unemployment Comp. Bd. of Review, 507 A.2d 930 (Pa. Cmwlth. 1986). To the extent Claimant now raises an argument under Section 402.4 of the Law, that claim is waived as it was not presented to the referee or Board. Shaal v. Unemployment Comp. Bd. of Review, 870 A.2d 952 (Pa. Cmwlth. 2005). Moreover, upon review, we discern no evidence that Agency ever entered into involuntary bankruptcy under Chapter 7, Title 11 of the United States Code. See Gaetani. Therefore, Claimant's contention is rejected as meritless.

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 Unemployment Compensation :  
 Board of Review, :  
 Respondent :

**ORDER**

**AND NOW**, this 14<sup>th</sup> day of October, 2011, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

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ROBERT SIMPSON, Judge