

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Leslie Spero,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 791 C.D. 2011
	:	Submitted: September 9, 2011
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON

FILED: October 28, 2011

Petitioner Leslie Spero (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the Referee's decision and denied Claimant unemployment compensation benefits pursuant to Section 402(h) of the Unemployment Compensation Law (Law).¹ For the reasons set forth below, we affirm.

Claimant was a former Chief Executive Officer (CEO) and President of Digital Business Processes, Incorporated. (Certified Record (C.R.), Item No. 4.) Claimant was subsequently discharged from his position and released of all responsibilities as of July 23, 2010. (C.R., Item No. 2.) Claimant thereafter applied for unemployment compensation benefits and the Altoona UC Service

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

Center (Service Center) found Claimant ineligible for benefits under Section 402(h) of the Law and based on our Supreme Court's decision in *Starinieri v. Unemployment Compensation Board of Review*, 447 Pa. 256, 289 A.2d 726 (1972). (C.R., Item No. 5.) Claimant appealed.

Following a hearing where Claimant was the only party present and the only witness to testify, the Referee affirmed the Service Center's determination, finding Claimant ineligible for unemployment compensation benefits under Section 402(h) of the Law. (C.R., Item No. 10.) The Referee noted Claimant's contention that as of August 2009, Claimant was fired from his position as CEO and, although keeping a job title, was stripped of all responsibilities as it pertained to Employer's entity. (*Id.*) The Referee also noted, however, that Claimant filed an Internet Initial Claim form, in which he responded to multiple questions in the affirmative as to whether he was serving as a corporate officer at the time of separation, had the right to hire and fire employees, was responsible for making policy decisions, had financial responsibility, and oversaw daily operations. (*Id.*) The Referee explained that because of the discrepancies between Claimant's initial responses and his testimony at the hearing, the Referee rejected Claimant's testimony as self-serving and not credible. (*Id.*) Claimant appealed to the Board, which affirmed the Referee's determination and denied Claimant unemployment compensation benefits. (C.R., Item No. 12.)

On appeal, the Board adopted the Referee's findings of fact, which included the following:

1. The claimant filed an application for unemployment compensation benefits effective July 25, 2010.
2. For purposes of this appeal, the claimant was the chairman/CEO of Digital Business Processes, Inc.,

which was created November 2, 2002 according to the Department of State Business Entity filing history.

3. The claimant's job duties included running the company.
4. The claimant was as [sic] a corporate officer at the time he was separated from his employment, had the right to hire and fire employees, and was also responsible for making policy decisions.
5. The claimant also had financial responsibility as it pertained to the company, and oversaw the daily operations.
6. The claimant received unemployment benefits in the amount of \$3885.

(*Id.*) The Board also adopted the Referee's conclusions of law. (*Id.*) Therefore, although Claimant testified at the hearing that he was not the CEO and did not oversee daily operations, the Board found to the contrary. The Board found that, based on Claimant's claim form responses, he exercised a substantial degree of control over the organization at the time he was separated from Employer, rendering Claimant an unemployed business person as defined in our Supreme Court's decision in *Starinieri*. (*Id.*) Accordingly, the Board found Claimant ineligible for benefits under Section 402(h) of the Law.² (*Id.*) Claimant now petitions for review with this Court.

² Section 402(h) of the Law provides that an employee shall be ineligible for compensation for any week he is engaged in self-employment. A self-employed person who becomes an "unemployed businessman," therefore, is ineligible to receive unemployment compensation benefits. *Starinieri*, 447 Pa. at 256, 289 A.2d at 727 (citing *Freas v. Unemployment Comp. Bd. of Review*, 191 A.2d 740 (Pa. Super. 1963)).

On appeal,³ Claimant argues that substantial evidence of record does not exist to support the Board's findings that Claimant, at the time of his termination, was a corporate officer of Employer with responsibilities associated with running the company. Claimant also argues that the Board erred in concluding that he exercised substantial control over the corporation to qualify him as being self-employed under Section 402(h) of the Law. Substantial evidence is defined as relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp. Bd. of Review*, 502 A.2d 738, 740 (Pa. Cmwlth. 1986). In determining whether there is substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn from the evidence. *Id.* A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record as a whole. *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The Board's findings of fact are conclusive on appeal only so long as the record taken as a whole contains substantial evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 286, 485 A.2d 359, 365 (1984).

As noted above, Claimant filed an Internet Initial Claim form following his termination, in which he indicated that he was the "Chairman" of the company and his job duties included "[r]unning the company." (C.R., Item No. 2.)

³ This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704. Review for capricious disregard of material and competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court. *Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002).

At the hearing, however, Claimant testified that he was mistaken in how he filled out the claim form because he was unaware that the information should have been based on his employment at the time of termination. (C.R., Item No. 9, p. 5.) Claimant also introduced an e-mail from Digital Business Processes, Inc., confirming Claimant's contention that he was not an officer of the corporation at the time of his termination and had no authority to act as such. (*Id.* at Exhibit C-1.) Employer was not present at the hearing, and Claimant was the only witness who testified.⁴ (C.R., Item No. 9.) Claimant's position is that because he made a mistake in filling out his claim form and testified that he had no responsibilities for the business when he was terminated, sufficient evidence does not exist to support the Board's findings that Claimant was CEO with responsibilities such as running the company and overseeing daily operations.

In an unemployment case, it is well settled that the Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 270, 501 A.2d 1383, 1386 (1985). The Board is also empowered to resolve conflicts in evidence. *DeRiggi v. Unemployment Comp. Bd. of Review*, 856 A.2d 253, 255 (Pa. Cmwlth. 2004). The mere fact that a party presents sufficient evidence as a matter of law does not guarantee his success; the evidence, must, in addition, be believed, meaning, found credible by the fact finder. *Kirkwood v. Unemployment Comp. Bd. of Review*, 525 A.2d 841, 844 (Pa.

⁴ Claimant also argues that his constitutional rights were violated because he was unable to "cross examine" witnesses and "confront" his accuser. This argument, however, is without merit. First, the Referee did not err in holding the hearing without Employer. 34 Pa. Code §101.51. Second, Employer is not Claimant's "accuser," and, therefore, he was not deprived of any constitutional right to question Employer. Third, Claimant was not deprived of any right to cross-examine witnesses because, other than himself, there were no witnesses to cross-examine.

Cmwlth. 1987). Where the burdened party was the only party to present evidence and did not prevail before the agency, the Court must assess whether his failure to prevail was due to legal insufficiency of evidence or lack of credibility. *Id.* Questions of credibility and the resolution of evidentiary conflicts are within the sound discretion of the Board and *are not subject to re-evaluation on judicial review.* *Peak*, 509 Pa. at 277, 501 A.2d at 1388 (emphasis added). Moreover, the Board is entitled to disregard uncontradicted evidence when that evidence is not credible. *See Russo v. Unemployment Comp. Bd. of Review*, 13 A.3d 1000, 1003 (Pa. Cmwlth. 2010) (citing *Daniels v. Unemployment Comp. Bd. of Review*, 755 A.2d 729 (Pa. Cmwlth. 2000)); *Blackwell v. Unemployment Comp. Bd. of Review*, 555 A.2d 279, 281 (Pa. Cmwlth. 1989).

Claimant is essentially asking this Court to find his testimony to be credible and to overrule the fact finder. This we cannot do. *See Kirkwood*, 525 A.2d at 844. It is within the Board's discretion to determine whether Claimant's testimony is credible, and, here, the Board decided it was not. The discrepancies between Claimant's responses in his Internet Initial Claim form and his hearing testimony required the Board to weigh the evidence presented and to make a credibility determination regarding Claimant's testimony. The Board determined that Claimant's testimony may have been an attempt to change his prior written responses in order to receive unemployment compensation. Although Claimant testified that he made a mistake in filling out his claim form, the Board acted well within its discretion finding that testimony not credible.⁵

⁵ It should also be noted that the Board did not "capriciously disregard" Claimant's testimony or the evidence presented. By adopting the Referee's decision, the Board implicitly recognized Claimant's testimony, in which he attempts to refute his prior responses in the Initial Claim form. (C.R., Item 10.) Therefore, it cannot be said that the Board capriciously disregarded competent evidence, but rather, it found that evidence to be not credible, a

Next, we will address whether the Board erred in concluding that Claimant was not eligible for benefits pursuant to Section 402(h) of the Law. As noted above, Section 402(h) of the Law provides that an employee is ineligible for compensation for any week in which he is engaged in “self-employment.” We begin by noting that the Law was not enacted to compensate individuals who fail in their business ventures and become unemployed businessmen. *Starinieri*, 447 Pa. at 258, 289 A.2d at 727 (citing *Dawkins Unemployment Comp. Case*, 358 Pa. 224, 56 A.2d 254 (1948)). The proper test to determine whether an individual is a businessman or employee is “whether the employee ‘exercises a substantial degree of control over the corporation.’” *Id.* If so, the individual is a businessman as opposed to an employee. *Id.* Stated differently, a self-employed businessman is described as one who, through ownership of stock⁶ and his position in the corporation, exercises a substantial degree of control over its operation. *Gelb v. Unemployment Comp. Bd. of Review*, 486 A.2d 559, 560 (Pa. Cmwlth. 1984). Numerous cases have found that substantial control exists where it is shown that claimants have exercised some significant degree of control over the management or policies of the corporation. *George v. Unemployment Comp. Bd. of Review*, 426 A.2d 1248, 1249 (Pa. Cmwlth. 1981) (citing *Rolland v. Unemployment Comp. Bd. of Review*, 418 A.2d 808 (Pa. Cmwlth. 1980)). We note, however, that each case involving self-employment should be determined on its own facts. *Geever v. Unemployment Comp. Bd. of Review*, 442 A.2d 1227, 1229 (Pa. Cmwlth. 1982).

determination which is within its discretion as the fact finder. *See Peak*, 509 Pa. at 277, 501 A.2d at 1388.

⁶ We note that Claimant testified to owning 2% of the corporation common stock. (C.R., Item No. 9, p. 8.)

As discussed above, the Board found Claimant’s testimony regarding his mistake in filing his claim form to be self-serving and not credible. As a result, this Court must base the determination of whether Claimant was self-employed on the Board’s findings. As *Starinieri* indicates, the proper test to determine whether an individual is a businessman is whether the employee exercises a substantial degree of control over the corporation. *Starinieri*, 447 Pa. at 260, 289 A.2d at 728. The Board found that Claimant was the chairman/CEO of Digital Business Processes. (C.R., Item No. 12.) The Board also found that Claimant was responsible for running the daily operations of the company, hiring and firing employees, and making policy decisions. (*Id.*) Finally, the Board found that Claimant had financial responsibilities as it pertained to the company. (*Id.*) All of the summarized findings indicate that Claimant exercised substantial control over the corporation. It is evident from the Board’s findings that Claimant had significant responsibilities with Digital Business Processes, Inc. and his control and decision making ultimately determined the manner in which the company operated. These facts establish “substantial control,” which qualifies Claimant as “self-employed” under Section 402(h) of the Law. In accordance with established precedent, the Board did not err in concluding that Claimant exercised a substantial degree of control over the corporation, which included managing daily business operations. The Board, therefore, properly concluded that Claimant was self-employed pursuant to Section 402(h) of the Law.

Accordingly, the order of the Board is affirmed.

P. KEVIN BROBSON, Judge

