IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark K. Isett,	:	
Petitioner	:	
	:	
v.	:	No. 1026 C.D. 2014
	:	SUBMITTED: November 21, 2014
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE LEADBETTER **FILED: March 18, 2015**

Mark K. Isett (Claimant) petitions this court for review of the order of the Unemployment Compensation Board of Review (Board) which affirmed the determination of the referee that Claimant was self-employed and thus ineligible for benefits under Section 402(h) of the Unemployment Compensation Law (Law)[1] and that a non-fault overpayment of $6128 under Section 804(b) of the Law[2] had been established. After review, we reverse.

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

[2] 43 P.S. § 874(b).

While employed full-time by Tray-Pak Corporation, Claimant was on a six-month disability leave from Tray-Pak when he had knee replacement surgery on March 8, 2013. When his disability leave ended, Claimant was laid off by Tray-Pak on or about March 28, 2013. Claimant filed for unemployment compensation benefits with the Allentown UC Service Center in May 2013, and received benefits for compensable weeks ending May 25, 2013, through September 28, 2013.

Claimant lived next door to Tiny Treasures Nursery School (Tiny Treasures), and prior to his layoff, he often gratuitously mowed a portion of its lawn, raked leaves from its property and shoveled snow from the back of the property in a shared alleyway. After being laid-off from Tray-Pak, Claimant approached Tiny Treasures and offered to perform landscaping and maintenance services for them such as lawn mowing, pulling weeds, shoveling snow, and raking leaves, for $10 an hour. The parties negotiated terms of $100 per lawn cut and $15.00 per hour for all other work. Tiny Treasures asked Claimant whether he had insurance and Claimant assured it that he did.

Once Claimant received medical clearance from his physician, he began performing landscaping and other services for Tiny Treasures on or about May 13, 2013. Claimant used a mower, weed whacker and leaf blower that Tiny Treasures purchased at his recommendation, which were stored in a shed on its property. Tiny Treasures required only that Claimant mow the lawn weekly, keep the property looking "nice," and that he not interrupt its daily operations. Claimant submitted informal invoices to Tiny Treasures, who reimbursed him for work performed and expenses incurred. No taxes were withheld from these payments.

Claimant reported the wages he received from Tiny Treasures to the UC Service Center.

Claimant continued to provide services to Tiny Treasures until the end of September 2013, when the UC Service Center initiated a wage investigation and contacted both Claimant and Tiny Treasures. Tiny Treasures again asked Claimant for evidence that he had liability insurance. Claimant then made inquiries of insurance companies to obtain quotes, but after learning how much it would cost, he told Tiny Treasures that he could no longer provide it with landscaping and maintenance services, due to the prohibitively high cost of liability insurance. Claimant earned a total of $2955 from Tiny Treasures from May through October 2013.

In its separation information, Tiny Treasures, the putative employer, indicated that Claimant was an independent contractor, not an employee, and that it would be providing Claimant with a 1099 tax form at the end of the year.[3] The UC Service Center issued two Notices of Determination on November 20, 2013, denying Claimant benefits based on its determination that he was self-employed under Section 402(h) of the Law and also establishing a non-fault overpayment of $6128 under Section 804(b) of the Law.[4] Claimant appealed, and a hearing was held before the referee at which both Claimant and representatives of Tiny

[3] Original Record (O.R.), Item 4 (Employer's Separation Information).

[4] This section provides in pertinent part:

> 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, in accordance with the provisions of this paragraph.

Treasures testified. After the referee issued a decision and order affirming the UC Service Center's determinations, Claimant appealed to the Board. The Board concluded that Claimant was ineligible for benefits because he was self-employed, as he was free from Tiny Treasures' control or direction in performing his work and he was customarily engaged in an independently established business. The Board also concluded that Claimant received $6128 in benefits to which he was not entitled but that the record lacked evidence that Claimant was at fault for receiving such benefits. Accordingly, the Board determined that Claimant had a non-fault overpayment of $6128 which was subject to recoupment under Section 804(b) of the Law. Claimant has now appealed to this court.

The sole issue presented on appeal is whether the Board erred in determining that Claimant was customarily engaged in a business that rendered him ineligible for benefits and requiring a recoupment of benefits paid.

Where the Bureau initiates proceedings that result in a suspension of benefits based on self-employment, as is the case herein, it is the Bureau, and not the putative employer, who carries the burden of proof. *Silver v. Unemployment Comp. Bd. of Review*, 34 A.3d 893, 896 n.7 (Pa. Cmwlth. 2011); *Teets v. Unemployment Comp. Bd. of Review*, 615 A.2d 987, 989 (Pa. Cmwlth. 1992). In such proceedings, where the claimant is already receiving unemployment compensation benefits, the question is not whether the work at issue would entitle the claimant to benefits, but whether the work at issue *disqualifies* the claimant from further receipt of benefits he is already receiving. *Minelli v. Unemployment Comp. Bd. of Review*, 39 A.3d 593, 598 n.7 (Pa. Cmwlth. 2012) (emphasis added).

Pursuant to Section 402(h), a claimant is ineligible for unemployment benefits in any week "[i]n which he is engaged in self-employment." While the

term "self-employment" is not defined in the Law, we look to Section 4(l)(2)(B) of the Law, which defines "employment," in pertinent 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). This court has consistently held that before a claimant will be declared to be self-employed, both elements of section 4(l)(2)(B) must be satisfied. *Buchanan v. Unemployment Comp. Bd. of Review*, 581 A.2d 1005, 1007 (Pa. Cmwlth. 1990).

In the matter *sub judice*, Claimant argues that under the facts as established, it is clear that he was not customarily engaged in an independently established trade, occupation or business.[5] Claimant avers that he had cut part of Tiny Treasures' lawn for years as a neighbor and that he approached them to cut the lawn in order to rehabilitate his knee. Claimant testified: He "was kind of feeling guilty to even get paid for [his services] but [he] was trying to get a little bit

[5] The Board argues that because Claimant failed to challenge any of its specific factual findings, they are binding on appeal. *See Campbell v. Unemployment Comp. Bd. of Review*, 694 A.2d 1167, 1169 (Pa. Cmwlth. 1997). The determination of self-employment is not a factual finding, but rather a conclusion of law; as such, the issue as raised by Claimant is whether the Board's factual findings support its legal conclusion that Claimant is self-employed. *Frimet v. Unemployment Comp. Bd. of Review*, 78 A.3d 21, 25 (Pa. Cmwlth 2013). This raises a question of law, which is subject to our plenary review. *Id.* Further, we note that Claimant has not challenged the Board's finding that he was free from control or direction in the performance of his services, and thus, we need not address it.

of therapy for [his] knee . . . And [he] thought by [performing the services], this is what [the Bureau] would want . . . ." Hearing of January 16, 2014, Notes of Testimony (N.T.) at 19. Claimant did not buy any equipment, gas or supplies, and used tools he acquired over the years from being in the construction business when needed. Claimant testified that he never looked for other mowing or landscaping jobs, never invested any money, did not advertise or put out fliers, and did not try to solicit customers by word-of-mouth. He testified: "My intention wasn't to go into business, my intention was to get [himself] a little bit in better physical shape and help [Tiny Treasures] out a little bit." *Id.* at 21. Claimant testified that he was available for full-time employment and continued to look for work while he performed services for Tiny Treasures and that the fact that he made an inquiry to obtain a quote for liability insurance, in and of itself, is insufficient as a matter of law to support the finding that he was customarily engaged in an independent trade, occupation, profession or business. We agree.

The facts in *Buchanan v. Unemployment Compensation Board of Review*, 581 A.2d 1005 (Pa. Cmwlth. 1990), are analogous. There, the claimant was receiving unemployment compensation benefits after being terminated from his position at an automotive dealer. The claimant then invested approximately $2038 for supplies and to rent a booth at a weekly flea market at which he intended to sell homemade jewelry. The Bureau determined that the claimant was self-employed and thus ineligible for benefits. This court disagreed, noting that the claimant had not formed a corporation, had not advertised or obtained insurance, and that he testified that he did not intend to make selling jewelry at the flea market a permanent business. We held that "the act of setting up a booth at a weekly flea market" to sell homemade jewelry did not constitute "customary

engagement in an independently established trade, occupation, profession or business under Section 4(l)(2)(B) of the Law." *Id.* at 1009.

Here, the evidence shows that Claimant did not advertise in any way, did not seek other customers, did not invest any money nor purchase any equipment or supplies. Claimant dutifully reported the sums he received from Tiny Treasures to the Bureau, consistent with the Bureau's own instructions in the regulations. Moreover, even where an activity which generates a limited amount of income was not undertaken while the claimant was still employed, such activity does not automatically make it disqualifying self-employment. *Teets v. Unemployment Comp. Bd. of Review,* 615 A.2d 987, 989 (Pa. Cmwlth. 1992). Claimant testified that the money he received for mowing Tiny Treasures' lawn was not enough to either support himself or cover the cost of insurance, and that it was never his intention to go into business for himself and that he continued to look for full time employment. Tiny Treasures' partner testified that in fact, Claimant was free to mow the lawn in the evenings or on the weekends so he could search for employment.

Furthermore, with respect to Claimant's inquiry about liability insurance, we disagree that this act evidenced Claimant's intent to engage in an independently established business and thus was sufficient as a matter of law to demonstrate that he was self-employed. In *Parmelee, Miller, Welsh & Kratz, P.C. v. Unemployment Compensation Board of Review,* 405 A.2d 1052, 1053 (Pa. Cmwlth. 1979), we held that a claimant's placement of a magazine advertisement was only evidence of an intention to practice which intention he shortly changed and that it did not represent the establishment of a professional enterprise. As Claimant points out, he made the inquiry about obtaining liability insurance when

pressed to do so by Tiny Treasures, and the fact that he did not obtain liability insurance *before* beginning to mow Tiny Treasures' lawn is consistent with his testimony that he did not intend to start a landscaping business at all, and only did so to help rehab his knee while also helping his neighbor.[6]

We believe that on this record, the evidence establishes only that Claimant's work for Tiny Treasures was on the side[7] to make extra money and not that of an individual customarily engaged in a trade, occupation, profession or business. We have long recognized the ability of an individual to accept occasional assignments of work. Thus, "the fact that an unemployed person agrees to accept, and thereafter does accept, an occasional offer of work is simply not enough to demonstrate that said individual is customarily engaged in an independently established trade, occupation, profession or business" that would

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[6] For example, in *Kirk v. Unemployment Compensation Board of Review*, 425 A.2d 1188, 1190 (Pa. Cmwlth. 1981), we concluded that by submitting a bid to perform subcontracting services, negotiating a business loan and purchasing equipment for use in the business, the claimants performed the necessary positive acts of establishing an independent business. Similarly, in *Logut v. Unemployment Compensation Board of Review,* 411 A.2d 881, 882 (Pa. Cmwlth. 1980), we concluded that advertising in conjunction with active bidding on projects amounted to positive steps in establishing an independent business.

[7] Indeed, Claimant's work for Tiny Treasures could well fall within the "sideline business exception" under Section 402(h) of the Unemployment Compensation Law,[7] 43 P.S. § 802(h), which provides:

> 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.

However, Claimant has not raised the applicability of this exception, so we will not address it here.

disqualify him from receiving unemployment benefits. *Silver v. Unemployment Comp. Bd. of Review*, 34 A.3d 893, 898 (Pa. Cmwlth. 2011). In *Minelli v. Unemployment Comp. Bd. of Review*, 39 A.3d 593, 597-98 (Pa. Cmwlth. 2012), the claimant performed consulting services for DK Harris on an "as needed" basis but contended that her activities were insufficient to demonstrate that she was customarily engaged in an independently established trade, occupation or business. Relying on *Silver*, this court agreed, concluding that "this occasional offer of a limited amount of work over such a short period of time is 'simply not enough to demonstrate that [claimant] is customarily engaged in an independently established trade, occupation, profession or business.'" *Id.* at 598 [quoting *Silver*, 34 A.3d 893, 898 (Pa. Cmwlth. 2011)].

Although Claimant's services for Tiny Treasures were more regular than those at issue in *Silver* and *Minelli*, we do not believe they establish that Claimant was *customarily* engaged in an independently established trade, occupation, or business, particularly since he had performed many of the same services as a volunteer while working full time for Tray-Pak. Therefore, we conclude that he is not disqualified under Section 402(h) of the Law from continuing to receive the benefits to which he was entitled as a result of his layoff from Tray-Pak.

Accordingly, we reverse the Board's order.

BONNIE BRIGANCE LEADBETTER,
Judge

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Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 18th day of March, 2015, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby REVERSED.

BONNIE BRIGANCE LEADBETTER,
Judge