

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Larry Frey Drywall, Inc.,	:	
Petitioner	:	
	:	
v.	:	
	:	
Department of Labor and Industry,	:	
Office of Unemployment Compensation	:	
Tax Services,	:	No. 1389 C.D. 2014
Respondent	:	Submitted: March 12, 2015

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY

FILED: April 7, 2015

Larry Frey Drywall, Inc. (LFDI) petitions this Court for review of the Department of Labor and Industry’s (Department) January 28, 2014 Final Decision and Order denying LFDI’s Petition for Reassessment (Petition). The sole issue presented for this Court’s review is whether the Department’s order is supported by substantial evidence. After review, we affirm.

LFDI is a drywall installation business in Lancaster, Pennsylvania. In November 2009, the Office of Unemployment Compensation Tax Services (OUCTS) audited LFDI beginning with tax year 2006. Based on OUCTS’ findings, the audit was expanded to include tax years 2007 through 2009. On November 10, 2010, OUCTS filed a Notice of Assessment against LFDI in the amount of \$36,376.18 for monies paid to individuals for all quarters of 2006 through 2009. The assessment was based on OUCTS’ determination that LFDI failed to establish that 31 workers

(Installers) were independent contractors as opposed to employees during the audited time period.

LFDI filed its Petition on November 24, 2010. On June 8, 2011, an Administrative Law Judge (ALJ) held a hearing. On January 28, 2014, the Department denied LFDI's Petition. On August 11, 2014, LFDI filed an unopposed Petition to Appeal Final Decision and Order of the Department of Labor and Industry *Nunc Pro Tunc* with this Court. By August 20, 2014 order, this Court directed LFDI to file an application seeking leave of Court to file a petition for review *nunc pro tunc* (Application) and, if granted, a petition for review. LFDI complied with the August 20, 2014 order and, on September 5, 2014, this Court granted LFDI's uncontested Application and directed the Chief Clerk to accept LFDI's petition for review.¹

LFDI argues that substantial evidence does not support the Department's conclusion that LFDI "failed to establish that the [Installers] were established in an independent trade or business." LFDI Br. at 7 (quoting Department Final Decision and Order at 12). Specifically, LFDI contends that in light of its evidence that the Installers were free to and did work for other employers, the Department erroneously concluded that the Installers were employees.

In determining whether there is substantial evidence to support the [Department'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. A determination as to whether substantial

¹ 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. Whether an individual is an employee or an independent contractor is a determination of law subject to our review.

Stage Rd. Poultry Catchers v. Dep't of Labor & Indus., 34 A.3d 876, 885 n.6 (Pa. Cmwlth. 2011) (citation omitted).

evidence exists to support a finding of fact can only be made upon examination of the record as a whole. The [Department's] findings of fact are conclusive on appeal only so long as the record, taken as a whole, contains substantial evidence to support them. 'The fact that [a party] may have produced witnesses who gave a different version of the events, or that [the party] might view the testimony differently than the [Department] is not grounds for reversal if substantial evidence supports the [Department's] findings.' *Tapco, Inc. v. Unemployment Comp. Bd. of Review*, . . . 650 A.2d 1106[, 1108-09] ([Pa. Cmwlth.] 1994). Similarly, even if evidence exists in the record that could support a contrary conclusion, it does not follow that the findings of fact are not supported by substantial evidence.

Stage Rd. Poultry Catchers v. Dep't of Labor & Indus., 34 A.3d 876, 885-86 (Pa. Cmwlth. 2011) (citations omitted).

Section 4(1)(2)(B) of the Unemployment Compensation Law (Law)² provides in relevant part:

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 [D]epartment 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.

In the instant case, the Department determined that "LFDI was able to establish that its [I]nstallers were free from control," thus, only Section 4(1)(2)(B)(b) of the Law is at issue. Department Final Decision and Order at 12.

² Act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 753(1)(2)(B).

“A determination regarding the existence of an employer-employee relationship is a question of law that depends on the unique facts of each case.” *Kurbatov v. Dep’t of Labor & Indus., Office of Unemployment Comp., Tax Servs.*, 29 A.3d 66, 70 (Pa. Cmwlth. 2011). “[T]here is a presumption in the [UC] Law that an individual receiving wages is an employee and not . . . engaged in self-employment.” *Training Assocs. Corp. v. Unemployment Comp. Bd. of Review*, 101 A.3d 1225, 1234 (Pa. Cmwlth. 2014) (quoting *Pasour v. Unemployment Comp. Bd. of Review*, 54 A.3d 134, 137 (Pa. Cmwlth. 2012)).

The [UC Law] goes very far, and properly so, and places a very heavy burden on the applicant when it makes payment to anyone who has performed . . . services to excuse or exempt that payment from the unemployment compensation tax. Few indeed are the instances where that burden can be met. . . .

Kurbatov, 29 A.3d at 71 (quoting *Am. Diversified Corp. v. Bureau of Employment Sec., Dep’t of Labor & Indus.*, 275 A.2d 423, 426 (Pa. Cmwlth. 1971)). “This Court . . . emphasized the importance of **an employer supplying evidence** to show that a claimant is engaged in an independent business” *Peidong Jia v. Unemployment Comp. Bd. of Review*, 55 A.3d 545, 549 (Pa. Cmwlth. 2012) (emphasis added).

Here, the Department found as a fact that **during OUCTS’ initial audit**, “OUCTS asked LFDI for invoices to substantiate that [the Installers] were independently engaged in a business or industry, and not employees.” Department Final Decision and Order Finding of Fact (FOF) 8. However, LFDI did not comply with said request, and none were presented at the ALJ hearing. The Department further found that “OUCTS also requested business cards and advertisements.” FOF 8. Similarly, no business cards or advertisements were submitted to the Department or presented at the ALJ hearing. In addition, the Department found that, **during the expanded audit**

[] [OUCTS] also requested supporting documentation from LFDI, namely advertisements, business cards, and contracts, ran [i]nternet searches for businesses, and additionally checked the [UC] tax system to make sure the [Installers] did not have their own businesses or were paying UC taxes. (N.T. 46-49)[.]

[] [OUCTS] could not substantiate that the [Installers] whom [it] classified as employees were engaged in independently[-]established businesses. (N.T. 47-49)[.]

FOF 21, 22.³ **Again**, LFDI never submitted any of the requested documents, nor presented any supporting documentation at the ALJ hearing. Further, LFDI did not present one Installer to testify that he had his own business. Moreover, although LFDI's President Larry Frey testified at the ALJ hearing that "every one of these individuals in question have their own liability insurance, Certificate of Liability Insurance[.]" LFDI did not present one document to support this statement. Reproduced Record at 54a. "The test an employer must satisfy to overcome the presumption of an employment relationship is simply not met here." *Peidong Jia*, 55 A.3d at 549. Viewing the evidence in the light most favorable to OUCTS, as we must, we hold that substantial evidence supports the Department's conclusion that LFDI failed to establish that the Installers were engaged in an independent trade or business.

For all of the above reasons, the Department's January 28, 2014 Final Decision and Order is affirmed.

ANNE E. COVEY, Judge

³ "[OUCTS] researched some of the individuals reported by LFDI as independent contractors through the Department of State, Department of Revenue, and Attorney General's Office, and found some of them to be registered with these agencies; [it] did not consider those individuals to be employees in [its] audit. (N.T. 47)[.]" FOF 20.

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ORDER

AND NOW, this 7th day of April, 2015, the Department of Labor and Industry's January 28, 2014 Final Decision and Order is affirmed.

ANNE E. COVEY, Judge