

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Connect America LLC,	:	
Petitioner	:	
	:	
v.	:	No. 1473 C.D. 2012
	:	Submitted: February 1, 2013
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: March 19, 2013**

Connect America LLC (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) that held Michael Boyd (Claimant) eligible for unemployment compensation (UC) benefits pursuant to Sections 404(e) and 4(l)(2)(B) of the Unemployment Compensation Law (Law).<sup>1</sup> Employer asserts Claimant is ineligible because he is an independent contractor. Employer also contends the referee precluded it from impeaching Claimant and developing a complete record. Upon review, we affirm.

Claimant sold medical alert systems for Employer on a commission basis until his separation from employment. Then, Claimant filed for UC benefits. The Department of Labor and Industry (Department) found him financially eligible.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §§804(e) (regarding compensation amount), 753(l)(2)(B) (regarding self-employment).

Employer appealed the ruling on eligibility, stating it “does not agree that [Claimant] is eligible for benefits because he is an independent contractor.” Certified Record, Item #3, Petition for Appeal, 2/8/12. A hearing ensued before a referee at which Claimant and Employer’s human resources representative testified. The referee did not accept evidence regarding the grounds for separation.

The referee made the following pertinent findings regarding the employment relationship. Claimant had fixed hours and was required to report to the office. Ref. Dec., 5/16/12, Finding of Fact (F.F.) No. 3. Claimant’s supervisor supervised his work and set his schedule. F.F. Nos. 4, 6. Claimant did not sign an independent contractor agreement, and he does not have a business or advertise as an independent contractor. F.F. Nos. 5, 11. Employer issued Claimant a Form 1099 and did not withhold taxes from his pay. F.F. No. 8. Employer did not provide rules or regulations to Claimant, and permitted him to work for a competitor. F.F. Nos. 9, 10. Pursuant to Section 4(l)(2)(B) of the Law, 43 P.S. §753(l)(2)(B), the referee held Claimant was not an independent contractor.<sup>2</sup> Employer appealed.

The Board affirmed the referee, concluding Claimant worked under Employer’s direction and control. Adopting the referee’s findings and conclusions, the Board held “claimant did not have his own independent business.” Bd. Op.,

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<sup>2</sup> With regard to wages, Claimant earned \$16,830 in his base year, from January 1, 2010, to December 31, 2010. In the first and second quarters of 2010, Claimant earned zero wages. In the third quarter, Claimant earned \$8,940 over 13 credit weeks. In the fourth quarter, Claimant earned \$7,890 over 13 credit weeks. Pursuant to Section 404(e) of the Law, 43 P.S. §804(e), the referee found Claimant eligible for a weekly benefit rate of \$360.

7/3/12, at 1. The Board further noted “the Department should issue a determination concerning [Claimant’s] separation.” Id. Employer petitions for review.<sup>3</sup>

The only issue before this Court is Claimant’s financial eligibility for UC benefits. Employer does not contest the Board’s adopted findings; rather, Employer claims the Board did not allow it to create a sufficient record to establish Claimant was an independent contractor. Specifically, Employer argues the exclusion of testimony undermining Claimant’s credibility constitutes reversible error.

We first consider Employer’s challenge to the referee’s evidentiary rulings. Employer attempted to develop a record including testimony regarding Claimant’s conviction for a crime of dishonesty, and its alleged impact on other employees. Specifically, Employer contested the referee’s following rulings.

First, the referee excluded testimony from Keith Minear who would have testified about Claimant’s deceptive criminal conduct, which related to his conduct in the office, and not to the employment relationship. Next, the referee did not permit Employer to ask its human resources representative about the circumstances of Claimant’s separation. Lastly, the referee did not permit Employer to cross-examine Claimant about his crime of dishonesty.

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<sup>3</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. Spence v. Unemployment Comp. Bd. of Review, 29 A.3d 117 (Pa. Cmwlth. 2011).

Pursuant to 34 Pa. Code §101.87, only an issue properly before the referee shall be ruled on at the hearing before the referee; it states:

When an appeal is taken from a decision of the Department, the Department shall be deemed to have ruled upon all matters and questions pertaining to the claim. In hearing the appeal the tribunal shall consider the issues expressly ruled upon in the decision from which the appeal was filed. However, any issue in the case may, with the approval of the parties, be heard, if the speedy administration of justice, without prejudice to any party, will be substantially served thereby.

Id. (emphasis added). We interpret this provision as requiring that “the evidence adduced and determination made at the referee’s hearing be limited to the legal issue ruled on” by the Department. Anthony v. Unemployment Comp. Bd. of Review, 506 A.2d 501, 503 (Pa. Cmwlth. 1986) (quoting Corressel v. Unemployment Comp. Bd. of Review, 385 A.2d 615, 616 (Pa. Cmwlth. 1978)).

Here, the Department ruled Claimant was financially eligible for UC benefits. Employer appealed, raising the sole issue that Claimant was not an employee, but rather was an independent contractor. The referee informed the parties that she would receive evidence on that issue, and only that issue.<sup>4</sup>

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<sup>4</sup> At the outset of the hearing, the referee explained the issues before her as follows:

Section 404 of the Law deals with whether a person is financially eligible for benefits. The burden of proof is on the Claimant to show that he should be financially eligible for benefits. However, in this case, we have an issue of whether Mr. Boyd was an independent contractor. The burden of proof would be on the Employer in this case, or purported Employer, to establish that the individual operated free from their [sic] direction and control, and that [the] [sic] individual was engaged in an independently-established trade,

**(Footnote continued on next page...)**

Further, the Department made no determination as to the circumstances surrounding Claimant's separation from employment. As the Board indicated in its decision, the Department needs to make a determination regarding separation.

The evidence must relate to the issue appealed. Minear did not supervise Claimant, and he did not have any information about the employment relationship. His testimony would have pertained to Claimant's conduct while employed, not the fact of his employment. Likewise, the testimony of the human resources representative would have raised the issue of Claimant's conduct and crime of dishonesty in the office. These issues pertain to potential misconduct; they are not germane to Claimant's eligibility as it relates to whether Claimant is an independent contractor or employee. Thus, the referee acted properly in refusing to hear evidence pertaining to the separation issue which was not before her. Id.

However, on appeal to this Court, Employer claimed its intention in pursuing this line of questioning with Claimant was to impeach his credibility.

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**(continued...)**

occupation, or business. To that end, I'm going to take the Employer's testimony first, and I'll do that in part under the direction of [Employer's counsel]."

Referee's Hearing, Notes of Testimony, 5/3/12, at 2. Employer's counsel repeatedly opposed the referee's attempts to constrain the testimony to the only issue Employer challenged on appeal from the Department's Notice of Determination, Claimant's alleged independent contractor status. Employer's counsel repeatedly attempted to submit testimony as to the grounds for separation. Id. at 3-4, 23.

Employer argues evidence of a crime of dishonesty is always relevant to a witness' credibility.

Evidence of conviction of crimes involving dishonesty that occurred within ten years of the trial date are *per se* admissible. Commonwealth v. Randall, 515 Pa. 410, 528 A.2d 1326 (1987); Commonwealth v. Vitale, 664 A.2d 999, 1002 (Pa. Super. 1995). Here, by Claimant's own admission during the hearing, he was convicted of an unspecified crime. Reproduced Record (R.R.) at 31a. Accordingly, evidence relating to Claimant's *crimen falsi* would have been properly received for impeachment purposes.<sup>5</sup> Thus, a decision to exclude such evidence would constitute error. We cannot say, however, that receipt of evidence of a *crimen falsi* conviction would have altered the result.

Employer alone bears the heavy burden of overcoming the presumption of employment. Kurbatov v. Dep't of Labor & Indus., 29 A.3d 66 (Pa. Cmwlth. 2011). Employer attempted to meet its burden with testimony of its human resources representative. Employer did not prevail.

Further, issues of credibility are for the Board, which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Peak v. Unemployment Comp. Bd. of Review, 509 Pa. 267, 501 A.2d 1383 (1985); see also County of Dauphin v. Unemployment Comp. Bd. of Review, 637 A.2d 699 (Pa. Cmwlth. 1994) (holding employer's challenge to testimony of

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<sup>5</sup> Because counsel for Employer did not make an offer of proof, there is no reason to believe the referee was aware of Employer's legal theory for admissibility and relevance.

inmate witness serving time for *crimen falsi* crimes implicated Board's credibility determination and thus was beyond this Court's purview; citing Peak). Here, in its appeal to the Board Employer made an offer of proof about Claimant's *crimen falsi* conviction. R.R. at 82a. Thus, the Board was aware of Employer's proof. Still, the Board determined that Employer failed to carry its burden. Under these circumstances, there is no reason to believe that a remand to receive evidence of Claimant's *crimen falsi* conviction would alter the result. Accordingly, to the extent the referee committed any error, that error is harmless. See Horton v. Unemployment Comp. Bd. of Review, 953 A.2d 851 (Pa. Cmwlth. 2008).

Employer next contends that, contrary to the Board's determination, Claimant is an independent contractor. This Court assesses the employment relationship as a matter of law. Tracy v. Unemployment Comp. Bd. of Review, 23 A.3d 612 (Pa. Cmwlth. 2011).

Section 402(h) of the Law provides an employee "shall be ineligible for compensation for any week ... in which he is engaged in self-employment." 43 P.S. §802(h). The term "self-employment" is not defined in the Law. Beacon Flag Car Co. v. Unemployment Comp. Bd. of Review, 910 A.2d 103 (Pa. Cmwlth. 2006). In assessing self-employment, we apply the language of Section 4(l)(2)(B) of the Law to fill the gap. Kurbatov.

Section 4(l)(2)(B) provides a two-prong test for determining whether a worker is an independent contractor or an employee. Id. It states in pertinent 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 department that -- (a) such individual has been and will continue to be free from control and 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).

In unemployment cases, an individual receiving wages for his services is presumed to be an employee, and the employer bears a heavy burden to overcome that presumption. Thomas Edison State Coll. v. Unemployment Comp. Bd. of Review, 980 A.2d 736 (Pa. Cmwlth. 2009). To overcome this statutory presumption of employment, the employer must show the individual performed the work free from the employer's control and direction, and the work was done for others, not just the employer, as part of an independent trade. Sharp Equip. Co. v. Unemployment Comp. Bd. of Review, 808 A.2d 1019 (Pa. Cmwlth. 2006). “[U]nless the employer can show that the employee [is] not subject to his control and direction and [is] engaged in an independent trade, occupation or profession, then [the worker is an employee].” C.A. Wright Plumbing Co. v. Unemployment Comp. Bd. of Review, 293 A.2d 126, 129 (Pa. Cmwlth. 1972) (en banc) (emphasis added); see also Sharp; Venango Newspapers v. Unemployment Comp. Bd. of Review, 631 A.2d 1384 (Pa. Cmwlth. 1993).

Further, “an employment relationship is suggested when an employer controls the worker’s work hours.” Kurbatov, 29 A.3d at 71 (citing Sharp). Employer here dictated the time, place and manner for performance of Claimant’s work.



The Board's findings reveal that Employer did not satisfy its burden of proving Claimant performed his work free from Employer's direction and control. To that end, there is no dispute that Employer provided Claimant with sales leads, as well as a sales script to use during sales calls. R.R. at 42a, 45a-47a. The record evidence established that Claimant reported to his supervisor, who controlled his schedule. F.F. Nos. 3-4; R.R. at 41a, 47a. The record also established that Claimant's supervisor monitored and critiqued his sales calls. R.R. at 47a, 49a, 54a; see also F.F. No. 6. Employer concedes it did not have a written independent contractor agreement. R.R. at 38a; see also F.F. No. 5.

Employer also did not dispute any of the findings the Board adopted. Unchallenged findings are conclusive on appeal. Campbell v. Unemployment Comp. Bd. of Review, 694 A.2d 1167 (Pa. Cmwlth. 2007).

We hold that Employer did not overcome the strong presumption of Claimant's status as an employee. Substantial evidence supports the Board's determination that Employer directed and controlled Claimant's activities.

For the foregoing reasons, we affirm the Board.<sup>6</sup>

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ROBERT SIMPSON, Judge

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<sup>6</sup> Because we hold the evidence is insufficient to establish the first prong, we need not analyze the second prong: whether (1) the claimant was capable of performing the activities in question for anyone who wished to avail themselves of his services; and, (2) the nature of the business compelled the claimant to look to only a single employer for continuation of work. Venango Newspapers v. Unemployment Comp. Bd. of Review, 631 A.2d 1384 (Pa. Cmwlth. 1993).

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**ORDER**

**AND NOW**, this 19<sup>th</sup> day of March, 2013, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

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ROBERT SIMPSON, Judge