

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles Checkum,	:	
Petitioner	:	
	:	
v.	:	No. 1793 C.D. 2014
	:	Submitted: April 2, 2015
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: May 14, 2015

Charles Checkum (Claimant), representing himself, petitions for review from the order of the Unemployment Compensation Board of Review (Board) that determined he was ineligible for unemployment compensation (UC) benefits pursuant to Sections 404 and 4(l)(2)(B) of the UC Law (Law).¹ In so doing, the Board reversed the referee’s decision. Claimant contends the Board erred in determining he was an independent contractor. He argues the Board did not properly analyze whether he was an employee or an independent contractor, asserting the record supports an employment relationship. Because there is no evidence that Claimant was customarily engaged in an independently established trade, occupation, profession or business, we reverse.

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

I. Background

Centered Riding, Inc., (Employer) is a non-profit corporation engaged in teaching horseback riding. Pursuant to a two-year contract with Employer, Claimant performed office manager functions for Employer and served as the executive assistant to Employer's president. Employer paid Claimant an annual salary of \$38,000, in equal bi-monthly installments of \$1,583.33, for 40 to 45 hours per week. Claimant began working for Employer in 2005 when he replaced the prior office manager. He continued working for Employer under a series of contracts, until September 2013, when Employer terminated the contract.

Claimant applied for UC benefits, which the Department of Labor and Industry denied because he did not have sufficient wages² in the base year to qualify for benefits based on his classification as an independent contractor. Claimant appealed this classification. A referee held a hearing where Claimant, represented by counsel, testified. Employer, also represented by counsel, presented the testimony of its current vice-president, Deborah Moynihan (Employer's Witness).

Claimant testified he worked from home because Employer did not have a physical location. He attested he served as a full-time office manager for 48 hours a week, working for "so many hours" he couldn't do anything else. Ref.'s Hr'g, Notes of Testimony (N.T.), 12/19/13, at 51. He reported directly to the president under the contract. Employer expected him to attend regular teleconference meetings with the president and to submit monthly status reports. In

² Section 4(x) of the Law defines "wages" to generally mean all remuneration paid by an employer to an individual with respect to his employment. 43 P.S. §753(x).

addition, Employer provided all Claimant's equipment and required him to use its forms and communications templates. Claimant was the only paid employee, as others, including the president, served Employer in a volunteer capacity.

Employer's Witness testified she was president of Employer's Board of Trustees (Board) in 2006 and 2007. Of note, Employer's Witness was not president during the relevant contract period when Employer paid Claimant on an annual basis, as opposed to an hourly basis. She acknowledged Claimant "was paid a certain amount regardless of the work that he did." N.T. at 9. She advised she did not receive monthly status reports when she was president. As a Board member, she knew "the office" prepared monthly reports in 2013. Id. at 31. When asked where the office was located, she pointed to Claimant. Then, in response to counsel's inquiry, "Is [Claimant] the office?," she replied "yes." Id.

The referee found Claimant financially eligible for benefits pursuant to Sections 401, 404, and 402(h) of the Law. He reasoned Claimant received specific instructions to perform his duties, and he took no steps to establish self-employment. As an employee, Claimant was entitled to UC benefits corresponding to the compensation Employer paid him in the base year. Employer appealed.

The Board reversed the referee's decision, issuing its own findings and rationale. The Board made the following pertinent findings:

4. [Claimant] and [Employer] entered into annual or bi-annual contracts in which [Claimant] agreed to be employed as an independent contractor.

5. The contract provided that ‘[t]he conduct and control of all work and means of performing the duties outlined below shall be under the sole control of [Claimant]. However, all duties performed by [Claimant] will be done in accordance with the provisions of this agreement and be subject to the continuing right of inspection and approval of the [Board] of [Employer.]’

6. The contract provided for a set salary based on an average of 40-45 hours per week of work.

7. Taxes were not withheld from [Claimant’s] pay and [Employer] provided [Claimant] with Tax Form 1099.

8. The contract enumerated specific duties [Claimant] was expected to perform, some with deadlines, but not how to perform them.

9. The contract permitted [Claimant] to hire employees or subcontractors to perform the work.

10. The contract provided that [Employer] would provide an office expense account and debit card to pay for reasonable and necessary expenses incurred by [Claimant] in furtherance of his duties. [Employer] also agreed to reimburse [Claimant] for required maintenance and necessary repairs on all equipment he utilized.

11. The contract required [Claimant] to generate monthly office expense reports, monthly mileage reports, and income reports.

12. The contract provided that [Claimant] was allowed to work for other employers so long as the other work did not interfere with normal operations of its office.

13. [Claimant] has an outside business, Lady Bags.

14. In 2005, the outgoing office manager showed [Claimant] general procedures.

* * * * *

18. [Employer] provided [Claimant] with a computer and computer software, printer, filing cabinets, forms, a telephone line, and an e-mail address.

Bd. Op., 8/11/14, Findings of Fact (F.F.) Nos. 4-14, 18. The Board also found Claimant worked from home without a specific work schedule. F.F. Nos. 16-17.

Ultimately, the Board determined Claimant was financially ineligible for UC benefits because he was an independent contractor. The Board reasoned Claimant's services did not qualify as employment because he worked on his own schedule and he subcontracted some of his contract assignments to his wife. The Board also noted Claimant was capable of performing office work for others. Claimant requested reconsideration, which the Board deemed denied for its neglect to timely act. Claimant now petitions for review.

On appeal,³ Claimant asserts the Board erred in determining he was an independent contractor rather than an employee. Specifically, Claimant argues Employer did not submit any evidence to prove he engaged in an independent business. Thus, Employer did not meet its burden.

II. Discussion

Section 401(a) of the Law, 43 P.S. §801(a), provides that an employee who becomes unemployed shall be eligible to receive compensation when he has been paid wages as required by Section 404(c) of the Law. The Board determined

³ 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. Quality Care Options v. Unemployment Comp. Bd. of Review, 57 A.3d 655 (Pa. Cmwlth. 2012).

Claimant did not accumulate sufficient wages pursuant to Section 404 of the Law because he worked for Employer as an independent contractor. In reaching its conclusion, the Board applied Section 4(l)(2)(B) of the Law.

Section 4(l)(2)(B) provides a two-prong test for determining whether an individual is an independent contractor or an employee. Kurbatov v. Dep't of Labor & Indus., 29 A.3d 66 (Pa. Cmwlth. 2011). 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) (emphasis added). The purpose of this section “is to exclude independent contractors from coverage.” Beacon Flag Car Co., Inc. v. Unemployment Comp. Bd. of Review, 910 A.2d 103, 107 (Pa. Cmwlth. 2006). Whether a claimant is an employee or an independent contractor under Section 4(l)(2)(B) is a question of law subject to our review. Stauffer v. Unemployment Comp. Bd. of Review, 74 A.3d 398 (Pa. Cmwlth. 2013).

An individual receiving wages for his services is presumed to be an employee. Thomas Edison State Coll. v. Unemployment Comp. Bd. of Review, 980 A.2d 736 (Pa. Cmwlth. 2009). Employer alone bears the heavy burden of overcoming the presumption of employment. Kurbatov.

To overcome this presumption, “an employer must show that the individual performed the work free from the employer’s control and direction, and that the work was done for others, not just the employer,” as part of an independent trade. Jia v. Unemployment Comp. Bd. of Review, 55 A.3d 545, 548 (Pa. Cmwlth. 2012) (quoting Sharp Equip. Co. v. Unemployment Comp. Bd. of Review, 808 A.2d 1019, 1023 (Pa. Cmwlth. 2006)). “[U]nless the employer can show that the employee [is] [(1)] not subject to his control and direction and [is] [(2)] engaged in an independent trade, occupation or profession, then [the worker is an employee].” Id. (quoting C.A. Wright Plumbing Co. v. Unemployment Comp. Bd. of Review, 293 A.2d 126, 129 (Pa. Cmwlth. 1972) (en banc)); see also Sharp. The statute is clear that both prongs must be met. Jia.

We disagree with the Board’s conclusion that Employer satisfied both prongs of this test. Although there may be some debate as to whether Employer met the control prong, we need not address that issue because the record lacks evidence to support the second prong as to engagement in an independent business. Id.

In analyzing the second prong, “our Supreme Court approved this court’s consideration of three factors: (1) whether the individuals are able to work for more than one entity; (2) whether the individuals depended on the existence of the presumed employer for ongoing work; and (3) whether the individuals were hired on a job-to-job basis and could refuse any assignment.” Gill v. Dep’t of Labor & Indus., Office of Unemployment Comp. Tax Servs., 26 A.3d 567, 570 (Pa. Cmwlth. 2011). Moreover, the Board must find that a claimant was customarily engaged in the type of business at issue. Minelli v. Unemployment Comp. Bd. of Review, 39 A.3d 593 (Pa. Cmwlth 2012) (en banc).

That Claimant signed a contract that indicated he was an independent contractor is not dispositive of the issue. Hartman v. Unemployment Comp. Bd. of Review, 39 A.3d 507 (Pa. Cmwlth. 2012) (intent and title of parties' agreement is less influential than the relationship in fact); Kurbatov. However, "the existence and terms of an independent contractor agreement is an important factor in determining whether an individual is an independent contractor." Pasour v. Unemployment Comp. Bd. of Review, 54 A.3d 134, 139 (Pa. Cmwlth. 2012).

Here, the Board reasoned Employer established the second prong because "[Claimant] was capable of performing office work for anyone who wished to avail himself of such services and was not required to look solely to [Employer] for continuation of such services." Bd. Op. at 5. The Board also noted Claimant took advantage of his ability to hire subcontractors under the contract by having his wife perform several of his contracted duties. Id.

Significantly, the Board made no findings regarding whether Claimant was engaged in a business customarily engaged in as an independent contractor. Without record evidence to show Claimant's engagement in an independent business, Employer did not meet its burden to prove the second prong.

Our recent decision in Jia informs our rationale. There, we reversed the Board's determination that the claimant was an independent contractor. We held that despite an independent contractor agreement and the claimant's receipt of a 1099 form for taxes, the record evidence did not satisfy the second prong of the test. Moreover, that the contract allowed the claimant to work for others did not

establish that he in fact worked for others. This Court emphasized the lack of any evidence that the claimant held himself out as an independent contractor for the software consulting services he performed under the contract.

Critically, as in Jia, there is no record evidence that Claimant ever held himself out to perform office manager services. Staffmore, LLC v. Unemployment Comp. Bd. of Review, 92 A.3d 844 (Pa. Cmwlth. 2014). The contract language providing that Claimant *could* work for others does not establish that he engaged in an independent business, and did work for others. Minelli. The record is clear that Claimant did not take any steps to operate an independent business, such as advertising he performed office manager services. N.T. at 64.

The Board found Claimant was engaged in an outside business performing other tasks unrelated to those performed for Employer. See F.F. No. 13. However, that finding does not satisfy the second prong for determination of status as an independent contractor. Id. That finding establishes that Claimant had a non-disqualifying sideline activity. See Kress v. Unemployment Comp. Bd. of Review, 23 A.3d 632 (Pa. Cmwlth. 2011) (recognizing a sideline activity exception to the general disqualification for self-employment in Section 402(h) of the Law, 43 P.S. §802(h)); cf. Frimet v. Unemployment Comp. Bd. of Review, 78 A.3d 21, 28 (Pa. Cmwlth. 2013) (involving claimant receiving self-employment assistance).

The statutory phrase “as to such services,” emphasized in the quote above, demonstrates that the services of an independent trade must be of the same type as under the contract. 43 P.S. §753(l)(2)(B); Beacon Flag; Krum v.

Unemployment Comp. Bd. of Review, 689 A.2d 330, 333 (Pa. Cmwlth. 1997) (reasoning second prong considers performance of “particular activities in question”). Thus, Claimant’s outside business, Lady Bags, does not render him self-employed or engaged in an independent business to meet the second prong. Frimet (explaining Minelli holds such sideline activities are insufficient to establish customary engagement in independently established trade or business).

There is simply no evidence here that Claimant was customarily engaged in an independent business or held himself out as available to perform office manager services for anyone but Employer. The fact that Claimant was salaried reflects that Employer paid Claimant for his ongoing operations as office manager, not for the results of his work. Hartman (employer-employee relationship found where an employer paid a fixed rate regardless of how much work the claimant performed). During the relevant timeframe, Claimant did not track his hours or submit invoices for payment. Rather, he was paid on an annual basis, in bi-monthly payments direct deposited into his personal account.

We also conclude the nature of the business, serving as a full-time office manager, compelled Claimant to look to one employer for the continuation of such services. Beacon Flag. This is underscored by the fact that the contract required Claimant to work upwards of 45 hours a week. See Glatfelter Barber Shop v. Unemployment Comp. Bd. of Review, 957 A.2d 786 (Pa. Cmwlth. 2008); Abrams Bed, LLC v. Unemployment Comp. Bd. of Review (Pa. Cmwlth., No. 1829 C.D. 2013, filed July 30, 2014) (unreported), slip op. at 7, 2014 WL 3756239, *4 (“Clearly, if Claimant was working over 45 hours a week for Abrams,

he had little or no time to work elsewhere.”); Haines v. Unemployment Comp. Bd. of Review (Pa. Cmwlth., No. 2522 C.D. 2011, filed Dec. 5, 2012) (unreported), 2012 WL 8705092 (holding employer did not establish second prong; working 34 hours per week did not allow claimant time to contract with other agencies). Given his commitment to Employer to work 40-45 hours, Claimant did not have the ability to simultaneously contract for office manager services with other employers.

Further, the Board did not make a finding that Claimant could accept or reject any assignment. Cf. Pasour (explaining worker’s ability to decline assignments shows independence). “The claimant’s freedom to accept or reject assignments is an important factor with respect to both prongs of Section 4(l)(2)(B)’s test for whether an employer-employee relationship exists.” Stauffer, 74 A.3d at 405. Here, there is no indication on the record that Claimant had the ability to refuse any assignment, or that he ever refused Employer’s directions.

In sum, the record reflects Claimant worked in the exclusive employ of Employer for eight years as its full-time office manager. Office manager work is not the type of business typical of an independent contractor. Claimant depended on Employer for his continuous employment, and indeed, worked for no one other than Employer during that eight-year period.

Accordingly, the Board erred when it concluded Claimant was an independent contractor. Because Claimant was an employee, his earnings for Employer⁴ constitute wages from which his UC benefits should be calculated.

III. Conclusion

Based on the foregoing, we conclude the Board erred in determining Claimant was an independent contractor under Section 4(1)(2)(B) of the Law such that Claimant's earnings from Employer were not includable in his base year. Therefore, we reverse and this matter is remanded to the Board to make a finding based on the current record regarding wages earned in the base year, and to direct the payment of UC benefits in accordance with Section 404 of the Law.

ROBERT SIMPSON, Judge

⁴ There is no dispute that Claimant received the earnings Employer agreed to pay by contract, and that Employer paid the contractual amount to Claimant. N.T. at 73. Thus, the Board is able to determine the amount of benefits to be paid based on the current record.

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v.	:	No. 1793 C.D. 2014
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 14th day of May, 2015, the order of the Unemployment Compensation Board of Review is **REVERSED** and this matter is **REMANDED** consistent with the foregoing opinion.

Jurisdiction is relinquished.

ROBERT SIMPSON, Judge