

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nathaniel Taylor, :
 : No. 2008 C.D. 2012
 Petitioner : Submitted: March 22, 2013
 :
 v. :
 :
 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 SENIOR JUDGE FRIEDMAN

FILED: May 13, 2013

Nathaniel Taylor (Claimant) petitions for review, *pro se*, of the August 31, 2012, order of the Unemployment Compensation Board of Review (UCBR) affirming the referee's decision to deny Claimant unemployment compensation (UC) benefits. The UCBR determined that Claimant was ineligible for benefits under section 402(h) of the Unemployment Compensation Law (Law)¹ because Claimant was self-employed and not engaged in a sideline activity. We affirm.

Claimant worked at Superior Technical Resources (Employer) from December 9, 2010, through June 9, 2011. (UCBR's Findings of Fact, No. 2.)

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

Claimant maintained that he started a business in February 2007 at which he works an average of five hours per week. (UCBR's Findings of Fact, No. 3.) Claimant registered his business in Pennsylvania as "Hendo Computers" effective March 14, 2012. (UCBR's Findings of Fact, No. 5.) Claimant's gross earnings from self-employment in 2011 totaled \$400 with net earnings of \$40. (UCBR's Findings of Fact, No. 7.)

On May 15, 2012, the local service center denied Claimant's application for UC benefits, finding Claimant ineligible under section 402(h) of the Law, 43 P.S. §802(h), because he was self-employed and issued a notice of determination that Claimant had a fault overpayment of \$1180 under section 804(a) of the Law, 43 P.S. §874(a). Claimant appealed to a referee, who held a hearing on June 14, 2012.

On June 15, 2012, the referee affirmed the decision of the local service center. The referee found that Claimant became self-employed after his departure from Employer and was not, as Claimant stated, continuously self-employed. (UCBR's Findings of Fact, Nos. 3, 10.) The referee found that Claimant did not have a sideline business. (UCBR's Findings of Fact, No. 14.)

Claimant appealed to the UCBR, which affirmed the referee's decision on August 31, 2012. The UCBR adopted the referee's factual findings and legal conclusions, specifically noting that it "discredits the claimant's testimony that he

was self-employed prior to taking his job with the employer.” (UCBR’s Decision at 1.) Claimant petitioned this court for review.²

The crux of Claimant’s appeal is a challenge to Finding of Fact Number 14, which states: “Claimant is self-employed and not in a sideline business.” Claimant argues that the UCBR erred by finding that Claimant was not engaged in a sideline business under section 402(h) of the Law, 43 P.S. §802(h). We disagree.

Section 402(h) of the Law excludes the self-employed from receiving benefits, stating: “[a]n employe shall be ineligible for compensation for any week . . . [i]n which he is engaged in self-employment.” 43 P.S. §802(h). However, the sideline activity exception grants an exemption to the self-employment exclusion:

[A]n 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.

43 P.S. §802(h) (emphasis added).

Our [c]ourts have interpreted this statutory language and held that the sideline activity exception is applicable when the following conditions are met: “(1) that the self-employment activity precedes valid separation from full-

² Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether the findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

time work; (2) that it continues without substantial change after separation; (3) that the claimant remains available for full-time work after separation; and (4) that the self-employment activity is not the primary source of the claimant's livelihood.”

LaChance v. Unemployment Compensation Board of Review, 987 A.2d 167, 171 (Pa. Cmwlth. 2009) (citation omitted).

In *Lello v. Unemployment Compensation Board of Review*, 59 A.3d 1153, 1159 (Pa. Cmwlth. 2013), this court found the sideline exception applicable. In *Lello*, the claimant spent several hours each week submitting unpaid freelance writing assignments to other companies while working for his employer. *Id.* at 1155. This court held that the claimant continued self-employment without substantial change despite the fact that he submitted writing assignments without receiving compensation before leaving the employer and received compensation for the articles only after leaving the employer. *Id.* at 1158. This court noted that the primary focus in determining whether a substantial change has occurred in a sideline business is on “whether a claimant is working in the activity for significantly more hours than he did prior to his separation.” *Id.* at 1159.

Here, the UCBR found that Claimant's self-employment ended in December 2010, when he started working for Employer, and then started again when he registered his business with the Commonwealth on March 14, 2012, after his separation from Employer. (UCBR's Findings of Fact, Nos. 12, 13.) The UCBR found that, unlike the employee in *Lello*, Claimant was not self-employed while working for Employer. Although Claimant presented evidence indicating that he had been self-employed *prior to* December 2010, and *after* leaving Employer on June 9,

2011, the UCBR did not credit Claimant's testimony that he was self-employed *while* working for Employer.

Accordingly, Claimant became self-employed only after leaving Employer when he began working four hours per week and registered his business. Because the burden fell on Claimant to prove that he met all of the requirements of the sideline exception and he failed to meet this burden, the UCBR properly determined that he was not in a sideline business. *See LaChance*, 987 A.2d at 171.

Claimant also asserts that Findings of Fact Numbers 4, 7, 11, 12, and 13 are not supported by substantial evidence.³ We disagree.

Finding of Fact Number 4 states: "Claimant's employer prior to his last full-time Employer was Adelphia Communications/Time Warner, where Claimant worked 40 hours per week as a full-time help desk person from May 2005, to February 5, 2007, earning \$11.19 per hour." (UCBR's Findings of Fact, No. 4.) The record includes several job applications, listing Claimant's prior work experience, which provide substantial evidence corroborating this finding of fact. However, even if Claimant held other jobs after leaving Adelphia Communications and before being hired by Employer, Claimant's penultimate job has no relevance as to whether Claimant's self-employment persisted while he was working for Employer. *See Sargent v. Unemployment Compensation Board of Review*, 630 A.2d 534, 536 (Pa.

³ "'Substantial evidence' is that which a reasonable mind, without weighing the evidence or substituting its judgment for that of the fact finder, might accept as adequate to support the conclusion reached." *Collier Stone Company v. Unemployment Compensation Board of Review*, 876 A.2d 481, 484 (Pa. Cmwlth. 2005).

Cmwlth. 1993) (demonstrating that an unsupported finding of fact that is not necessary to support the UCBR's determination will not prevent this court from affirming).

Claimant also challenges Findings of Fact Numbers 7 and 11.⁴ However, these findings are not relevant as to whether or not Claimant continued working his side job during the period from December 9, 2010, to June 9, 2011, when he worked for Employer. *See Sargent*, 630 A.2d at 536.

Claimant challenges Finding of Fact Number 12, which states: "Claimant's entry on the job application also indicates that his self-employment was from February 2007, to December [] 2010." (UCBR's Findings of Fact, No. 12.) The job application that Claimant himself completed and submitted into evidence dates his self-employment from February 2007 to December 2010. Therefore, the UCBR had substantial evidence to make this finding.

⁴ These findings state:

7. Claimant's gross earnings in 2011 totaled \$400 with net earnings of \$40.

* * *

11. Claimant's only evidence of self-employment in 2007 is on an unsigned application for employment entered on Page 34 of 35 faxed pages (see Claimant's Exhibit #1) for the Seneca Highlands Intermediate Unit, dated June 27, 2011.

(UCBR's Findings of Fact, Nos. 7, 11.)

Claimant also challenges Finding of Fact Number 13, which states: “Claimant’s base year employment ended June 30, 2011, and Claimant did not declare self-employment until he requested a fictitious name filed March 14, 2012, and issued March 14, 2012.” (UCBR’s Findings of Fact, No. 13.) Claimant’s own testimony that he did not report his self-employment until April 2012 substantially supports this finding. (N.T. at 8.)

Finally, Claimant argues that the referee erred by refusing to subpoena three witnesses, the Pennsylvania Department of Labor and Industry, and the New York State Department of Labor in order to retrieve Claimant’s employment records. We disagree.

A referee has discretion to refuse to issue a subpoena. *Juniata County Childcare & Development Services, Inc. v. Unemployment Compensation Board of Review*, 6 A.3d 1037, 1046 (Pa. Cmwlth. 2010). Claimant requested four witnesses to testify regarding his self-employment from 2007. The referee granted the subpoena for only one of the witnesses because the extra witnesses would provide cumulative testimony. *See Zukoski v. Unemployment Compensation Board of Review*, 525 A.2d 1279, 1280 (Pa. Cmwlth. 1987) (holding that subpoenas providing merely cumulative testimony need not be issued). The referee also denied the request to subpoena the departments of labor in the interest of efficiency because alternate means existed to prove Claimant’s self-employment. Thus, the referee did not commit an error of law or abuse his discretion by refusing to issue the subpoenas.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

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ORDER

AND NOW, this 13th day of May, 2013, we hereby affirm the August 31, 2012, order of the Unemployment Compensation Board of Review.

ROCHELLE S. FRIEDMAN, Senior Judge