

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brushwood Mobile Home Park, LLC,	:	
Petitioner	:	
	:	
v.	:	No. 2256 C.D. 2011
	:	Submitted: June 15, 2012
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: July 25, 2012

Brushwood Mobile Home Park, LLC (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) that affirmed a referee's decision to grant Cynthia A. Partridge (Claimant) benefits under Sections 402(h) and 4(l)(2)(B) of the Unemployment Compensation Law (Law) (relating to self-employment).¹ Employer contends the Board erred in determining Claimant was an employee rather than an independent contractor. Upon review, we affirm.

Beginning in January 2006, Claimant worked for Employer as a rental manager in Employer's mobile home park. During this time, Claimant's job duties included collecting rent payments, collecting applications and interviewing

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §§ 802(h), 753(l)(2)(B).

prospective tenants, originating leases, cleaning vacant rental units, and evicting tenants. In May 2011, Claimant's employment ended. Subsequently, she filed for benefits, which were initially denied on the ground that she was self-employed. Thereafter, Claimant appealed, and a hearing ensued before a referee.

Before the referee, both parties proceeded without legal counsel. During the hearing, Employer presented the testimonies of Anthony Pagnozzi, one of its owners (Owner), and Frank Pagnozzi, Employer's President's son and Claimant's former fiancé (Owner's Son). In opposition, Claimant testified on her own behalf. A tax agent from the Department of Labor and Industry also testified. After the hearing, the referee determined Claimant was not self-employed and granted benefits. Employer appealed.

On appeal, the Board affirmed. Specifically, the Board found:

1. [C]laimant last worked for [Employer] as a rental manager. ...
2. [C]laimant worked from five to twenty-two hours per week.
3. [C]laimant was paid a salary of \$475 per week regardless of how many hours she worked.
4. Taxes were not deducted from [C]laimant's pay and [E]mployer gave [C]laimant a tax Form 1099 at the end of each year.
5. [C]laimant's job duties entailed collecting rent from the tenants, including tracking down "stragglers;" collecting applications and

interviewing prospective tenants; originating leases; cleaning the homes; and, if necessary, evicting a tenant.

6. [E]mployer decided if a “straggler” would be charged a fee or if eviction proceedings should be brought against a tenant.
7. [E]mployer provided a meeting room with a telephone in which [C]laimant could collect the rent and meet with prospective tenants.
8. [E]mployer reimbursed [C]laimant for cleaning items.
9. [C]laimant performed some of her job duties in her home office with her own computer and telephone.
10. Approximately once a month, [C]laimant turned the rent in to [O]wner at his house. She also gave him prospective tenant applications for his review.
11. [C]laimant would inform [O]wner of needed repairs, and he would make the arrangements for the repairs. [C]laimant could not perform the repairs or authorize the repairs on her own.

Bd. Op., 11/7/11, Findings of Fact (F.F.) 1-11.

Ultimately, based on the evidence presented, the Board determined Employer retained the right to control Claimant’s work. Although Owner testified he could not drive to the mobile home park, and therefore, did not physically oversee Claimant’s work, it was evident Employer had the right to control Claimant’s work. Furthermore, the Board determined Employer offered no evidence to show Claimant engaged in an independently established trade or

business. Therefore, the Board affirmed the referee's order granting benefits. Employer petitions for review.²

On appeal, now represented, Employer asks whether the Board erred in determining Claimant was an employee rather than an independent contractor.

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 legislature did not define the term self-employment in Section 402 of the Law. Thus, we utilize the language of Section 4(l)(2)(B) of the Law to fill the gap. Beacon Flag Car Co. v. Unemployment Comp. Bd. of Review, 910 A.2d 103 (Pa. Cmwlth. 2006) (the clear purpose of Section 402(h) of the Law is to exclude independent contractors from coverage). Section 4(l)(2)(B) of the Law provides a two-prong test for determining whether a worker is an independent contractor or an employee stating 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.

² 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. Oliver v. Unemployment Comp. Bd. of Review, 5 A.3d 432 (Pa. Cmwlth. 2010) (en banc).

43 P.S. § 753(l)(2)(B).

Both prongs of Section 4(l)(2)(B) of the Law must be satisfied before an individual is deemed an independent contractor. Venango Newspapers v. Unemployment Comp. Bd. of Review, 631 A.2d 1384 (Pa. Cmwlth. 1993). In employment 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. Sharp Equip. Co. v. Unemployment Comp. Bd. of Review, 808 A.2d 1019 (Pa. Cmwlth. 2002).

Our analysis of the first element requires a consideration of the actual working relationship between the claimant and the employer. Hammermill Paper Co. v. Rust Eng'g Co., 430 Pa. 365, 243 A.2d 389 (1968). Because our inquiry is fact-specific, we do not impose black-line rules to define the particular relationship. Id. However, generally, the key factor is whether the putative employer had the right to control the work the claimant performed. Biter v. Dep't of Labor & Indus., 395 A.2d 669 (Pa. Cmwlth. 1978). “Actual exercise of control [is not necessary] in order to be considered an employer; rather, the mere right or authority to exercise control or interfere with work creates an employment relationship.” Id. at 670. Additionally, certain factors provide useful guidelines for our analysis, including:

responsibility for results only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one employed is engaged in a distinct occupation or business; which party supplies the tools; whether payment is by the time or by the job; whether work is part of the regular business of

employer, and also the right to terminate employment at any time.

Hammermill, 430 Pa. at 370, 243 A.2d at 392; CE Credits Online v. Unemployment Comp. Bd. of Review, 946 A.2d 1162 (Pa. Cmwlth. 2008). These factors must be viewed in the totality of circumstances presented by a work relationship. Osborne Assoc., Inc. v. Unemployment Comp. Bd. of Review, 3 A.3d 722 (Pa. Cmwlth. 2010).

Here, although Employer gave Claimant a great deal of discretion in the manner in which she collected rent and performed her other job responsibilities, Employer retained the right to control Claimant's manner of work. See Biter. Under the facts presented, Claimant worked independently because: Employer required Claimant to do a limited amount of work; Owner was physically unable to go to the mobile home park; and, the parties had a unique, familial relationship; but, not because Employer lacked the right to control her work.

Specifically, Owner testified the main reason he hired Claimant and did not directly oversee her was because he was physically unable to drive to the mobile home park. Reproduced Record (R.R.) at 21a. Owner further testified "I used to do [Claimant's job] myself ... [until I] ... got ill in [2006] and [was] unable to drive." Id. Additionally, Owner explained: Employer had no previous employees; Employer was a relatively small operation; and, the parties did not put their "independent contractor agreement" in writing because Claimant was, at that time, in a 10-year long relationship with Owner's Son and engaged to be married

to him. Id. See 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). As such, although the absence of direct daily supervision supports a finding of self-employment, based on this case's particular facts, it is not dispositive here.

In essence, Claimant performed on-sight management at the mobile home park, and Owner oversaw operations from home. While Employer did not hold monthly meetings, Claimant routinely went to Owner's house to drop off rental payments and meet with him. F.F. Nos. 10-11. Additionally, Claimant testified she spoke to Owner on the telephone "[a]lmost daily." R.R. at 33a. Furthermore, Owner decided whether tenants would be evicted, prospective tenants would be approved, and repairs would be made. R.R. at 33a; F.F. Nos. 6, 11. In sum, Employer maintained the right to exercise control over the employment relationship, but, in part due to Owner's physical limitations, declined to do so on a day-to-day basis.

Moreover, Employer provided Claimant with a location to perform work. Although Employer provided Claimant with very little office equipment, and Claimant often used her home phone and computer for business, it was equally clear Claimant did not need much equipment to perform her work, and Employer provided sufficient tools for her job. F.F. Nos. 7, 9. Additionally, Employer reimbursed Claimant for the cost of any cleaning supplies she used. F.F. No. 8.

Furthermore, Employer paid Claimant a weekly salary rather than per job or at the end of a contract term. F.F. Nos. 2-3. See Glatfelter Barber Shop v. Unemployment Comp. Bd. of Review, 958 A.2d 786 (Pa. Cmwlth. 2008). As such, Employer did not pay Claimant for the results of her work, but for her ongoing operations in maintaining the mobile home park. R.R. at 27a-28a. See Hartman (employee-employer relationship found where an employer paid a fixed rate regardless of how much work the claimant performed). Additionally, Owner testified the parties were free to end their business relationship at any time. R.R. at 21a. In light of the totality of the circumstances, the fact that Claimant filed 1099 tax forms each year, which is evidence of self-employment, does not outweigh the evidence supporting employment. See Glatfelter Barber Shop (worker was an employee despite filing a 1099 tax form). Thus, based on the parties' actual working relationship, the record weighs in favor of finding Claimant worked subject to Employer's control.

Next, we address whether Claimant engaged in an independently established trade or business. In considering the second prong of the test under Section 4(l)(2)(B) of the Law, we examine whether (1) Claimant was capable of performing the activities in question for anyone who wished to avail themselves of her services; and, (2) the nature of the business compelled Claimant to look to only a single employer for the continuation of work. See Venango Newspapers.

Here, Employer contends Claimant was capable of managing other properties because of the minimal amount of time her job duties consumed. Additionally, Owner testified he believed Claimant previously managed income

properties and was an independent contractor for the Avon Corporation. R.R. at 21a. However, Claimant testified she did not own any income properties or ever work as an independent contractor. R.R. 38a.

As the Board stated, Employer offered little to no evidence that Claimant engaged in an independently established business. Rather, the record tends to show Claimant worked for Employer as part of ongoing employment rather than on a job-to-job basis. Furthermore, Claimant did not have specialized skills or tools and did not operate as an independent entity. See Danielle Viktor, Ltd. v. Dep't of Labor & Indus., 586 Pa. 196, 892 A.2d 781 (Pa. Cmwlth. 2006). Therefore, as Employer maintained the right to control the employer relationship, and Claimant did not engage in an independent business, the Board did not err in determining Claimant worked for Employer as an employee rather than an independent contractor.

Accordingly, we affirm.

ROBERT SIMPSON, Judge

