

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TYRONE S. WORKMAN,)	
)	
Appellant,)	
)	
v.)	C.A. No. N10A-03-002 WCC
)	
DELAWARE DEPARTMENT OF)	
LABOR, DIVISION OF)	
UNEMPLOYMENT INSURANCE)	
APPEAL BOARD,)	
)	
Appellee.)	

Submitted: May 19, 2011
Decided: September 1, 2011

OPINION

Appeal from Unemployment Insurance Appeal Board. AFFIRMED.

Lisa L. Coggins, Esquire; Ferry, Joseph & Pearce, P.A., 824 Market Street, Suite 1000, P.O. Box 1351, Wilmington, DE 19899. Counsel for Appellant.

Thomas H. Ellis, Esquire; Department of Justice, 820 N. French Street, 6th Floor, Wilmington, DE 19801. Counsel for Appellee.

CARPENTER, J.

Tyrone S. Workman (“Workman” or “the Appellant”) appeals the February 12, 2010 decision of the Unemployment Insurance Appeals Board (“the Board”) affirming the denial of unemployment compensation benefits by the Appeals Referee. Workman, who operates an internet retail business and his own law practice on a part-time basis while he continues to search for full-time employment as a lawyer, challenges the Board’s finding that he is ineligible to receive benefits because he is self-employed, contending instead that he is unemployed under the statutory definition. For the reasons set forth below in this opinion, the Court finds that there was substantial evidence to support the Board’s finding that Workman was self-employed rather than unemployed and that the Board did not commit legal error in denying Workman benefits. Accordingly, the Board’s decision is hereby affirmed.

BACKGROUND

A. Facts

Workman has worked intermittently as a contract attorney since his last permanent employment ended in December 2003.¹ He has not been able to find permanent employment since then, despite sending out “hundreds if not thousands of resumes.”² In April 2008, to bring in additional income while he continued to

¹ R. at 27.

² R. at 28.

look for employment, Workman launched an internet retail business located in New Castle, Delaware called “Shop, Buy and Win.”³ In the initial stages of the business, Workman invested time and money into administrative issues associated with starting an internet business, including learning HTML, building a website, and forming relationships with vendors.⁴ The business remained in operation for the rest of 2008, although Workman did not invest significant effort in developing the business because he became occupied with a new law related contract assignment that arose in May and the birth of a second daughter in August.⁵ Workman’s 2008 tax return showed that the internet business operated at a loss of \$5353.⁶ He received three orders from customers for the Internet business in 2008 but only earned a profit on one order, in a nominal amount.⁷

On April 23, 2009, Workman officially opened his own law office in Philadelphia, Pennsylvania.⁸ Workman decided to open a solo practice in the hope that he would be able to develop a client base and thereby become more attractive to prospective employers.⁹ Another law firm did contract with Workman’s office to do some bankruptcy work,¹⁰ but Workman had significant overhead expenses

³ R. at 29.

⁴ *Id.*

⁵ R. at 30.

⁶ R. at 31.

⁷ R. at 32-33.

⁸ R. at 36.

⁹ R. at 55.

¹⁰ R. at 37.

associated with his law practice and did not generate any net income from his law practice in 2009.¹¹

As of July 22, 2009, both of Workman's enterprises were still in operation and he planned to launch significant marketing efforts on behalf of both businesses.¹² Workman estimated that he spent anywhere from zero to twenty hours per week developing the business for each enterprise.¹³ At the hearing before the Appeals Referee, Workman could not specify precisely how he divided his hours between his businesses, noting that he might spend more time on one business than the other in any given week depending on the businesses' needs.¹⁴ Workman further explained at his hearing before the Board that he did not work on his businesses according to any predetermined schedule but "whenever I could put them in trying to establish a business while also trying to find permanent employment."¹⁵

Workman accepted a contract position with a Wilmington law firm in late July 2009, which ended in October 2009.¹⁶ Due to the demanding nature of this contract assignment, Workman suspended operations of his internet business in

¹¹ *Id.*

¹² R. at 35.

¹³ R. at 35.

¹⁴ R. at 35.

¹⁵ R. at 55.

¹⁶ R. at 56.

early August 2009 and took down the store’s website.¹⁷ He continued to do “whatever [he] could do on the side” for his law practice during the contract assignment.¹⁸

B. Procedural History

Workman received unemployment benefits for twenty-two weeks, from December 2008 until May 2009.¹⁹ The Division of Unemployment Insurance discontinued Workman’s unemployment benefits after Workman reported earnings of \$508 from his legal practice. Workman appealed the decision to the Appeals Referee, which held a hearing on July 22, 2009. In a decision issued July 27, 2009, the Referee denied benefits to Workman, finding that Workman is not available for full-time work on account of his businesses and therefore he is not eligible to receive benefits because he is not unemployed.²⁰ Workman then appealed to the Board, which held a hearing on October 14, 2009. In a decision issued February 12, 2010, the Board affirmed the Referee’s decision, finding that Workman is ineligible for benefits because he is self-employed. The Board noted, “Although the Claimant has credibly testified that he has made no money from his

¹⁷ R. at 58-59.

¹⁸ R. at 59.

¹⁹ R. at 2.

²⁰ R. at 10.

legal practice that he operates on the side, he has not established – or even argued – that he devotes no time, and provides no service, to his business.”²¹

STANDARD OF REVIEW

This Court has limited authority to review the decisions of the Board on appeal. The Court must determine whether the Board’s findings and conclusions are free from legal error and supported by substantial evidence in the record.²² Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.²³ The Court does not act as a trier of fact and as such does not weigh evidence, determine questions of credibility, or make its own factual findings and conclusions.²⁴

DISCUSSION

At issue is whether Workman’s start-up enterprises, which have generated no income and at which he spends no more than twenty hours per week, constitute self-employment and thereby render him ineligible for receiving unemployment compensation benefits. Under 19 *Del. C.* §3302(17), unemployment exists

in any week during which the individual performs no services and with respect to which no wages are payable to the individual, or in any week of less than full-time work if the wages payable to the individual with respect to such week are less than the individual’s weekly benefit amount plus

²¹ R. at 48.

²² *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265, 1266 (Del. 1981).

²³ *Oceanport Ind. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

²⁴ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

whichever is the greater of \$10 or 50% of the individual's weekly benefit amount.²⁵

Workman argues that he is unemployed under the first statutory definition because no wages are payable to him with regard to services he performed for his businesses because neither his Internet business nor his law practice has earned a profit. Alternatively, Workman argue that he is unemployed under the second statutory definition because he works fewer than forty hours per week on his businesses and earns no wages, which is obviously less than the weekly unemployment benefit amount. Finally, Workman argues that he is not self-employed because he remains available for other full-time positions, including full-time contract work, and he only started his law practice for the purpose of making himself more attractive for a full-time, permanent position with another employer.

The difficulty with Workman's position is that self-employment acts as a bar to receiving unemployment benefits in Delaware.²⁶ This is because unemployment benefits are intended to support persons who become unemployed through no fault of their own and to promote stable employment and not to support

²⁵ 19 Del. C. §3302(17).

²⁶ *O'Brien v. Unemployment Ins. Appeals Bd.*, 1993 WL 603363, *3 (Del. Super. Oct. 20, 1993); *see also Weeraratne v. Unemployment Ins. Appeals Bd.*, 1995 WL 840722 (Del. Super. Sept. 6, 1995).

the early stages of a new business or self employed individuals whose enterprises have simply not been profitable.²⁷

What constitutes self-employment has not been clearly defined by the General Assembly or by the Delaware courts. The cases addressing the issue suggest that self-employment exists where an individual has made more than *de minimis* efforts on behalf of an operating business that he or she owns, regardless of whether the business is profitable or the individual remains available for other work. For example, in *Miller v. Herschmann, Inc.*,²⁸ the Court upheld the denial of benefits to a claimant who spent twenty to eighty hours per week working on his internet consulting business but who earned no wages from the business. The Court acknowledged that the claimant's situation met the second statutory definition of unemployment because the claimant worked less than full-time hours but obviously earned less than the weekly benefit amount he would receive if he received unemployment compensation. However, the Court concluded that the claimant was self-employed and not entitled to benefits, noting that "unemployment is different from self-employment."²⁹ The Court determined that the claimant in the *Miller* case was self-employed because he had "acknowledged that he operated his own business and described his attempts to make the business

²⁷ *O'Brien*, 1993 WL 603363 at *3.

²⁸ 2007 WL 4577373 (Del. Super. Dec. 12, 2007).

²⁹ *Id.* at *2.

successful.”³⁰ Similarly, this Court previously held in *Jones v. Unemployment Insurance Appeals Board*³¹ that a claimant who spent thirty to fifty hours per week working on a small, as-yet unprofitable business owned by the claimant and his wife and who also spent thirty to fifty hours per week looking for alternate full-time employment was self-employed and therefore not eligible for unemployment compensation benefits. In *Jones*, the Court noted that the claimant “admitted that he devoted himself to his business full-time, and that he received payment for his endeavors” even though he was actively seeking other work and earned no wages from his small business enterprise.³²

This Court’s recent decision in *Bachman v. Bachman & Associates*³³ has no bearing on the ineligibility of self-employed individuals for unemployment compensation benefits. The Court’s decision to award benefits in the *Bachman* case rested on the Court’s finding that Bachman, the owner of a now-defunct custom decorating business, was *unemployed* within the meaning of 19 *Del. C.* §3302(17), even though he continued to devote two to three hours per week to wrapping up the business of the corporation and received no compensation for his efforts. The *Bachman* Court noted that Bachman was “performing minimal

³⁰ *Id.*

³¹ 2001 WL 755379 (Del. Super. Jun. 11, 2001).

³² *Id.* at *2.

³³ 2010 WL 5551332 (Del. Super. May 26, 2010).

services [...] to wrap up an *already closed* business” and that his business had closed due to the recession.³⁴ Furthermore, the *Bachman* Court rejected the Board’s finding that Bachman was self-employed, noting that the record in the case did not show that Bachman’s minimal efforts wrapping up his business would interfere with his availability for work.³⁵

Workman argues that, under the *Bachman* decision, he is eligible to receive unemployment benefits because he meets the statutory definition of unemployment and remains available for full-time employment elsewhere. In so arguing, Workman overlooks a critical distinction between his case and the *Bachman* case: Bachman’s business had *closed* by the time he filed for unemployment compensation benefits. By contrast, Workman actually opened his legal practice while he was receiving unemployment benefits. Thus, Bachman fits more readily into the category of “unemployed” than does Workman, who acknowledged at his hearings that he operated two start-up businesses of his own and described his efforts to make those businesses successful. Workman’s efforts included building a web site for his internet retail business and leasing office space for his law practice and making plans to launch a marketing campaign to attract customers. Furthermore, Workman acknowledged that he received

³⁴ *Id.* at *5.

³⁵ *Id.* at *6.

payments for his efforts in both businesses, even though the payments were not sufficient to cover his expenses related to each business. This satisfies the definition of self-employment. That Workman contends that he only started his own law practice to develop a client base in the hope of making himself more attractive to other law firms does not negate the fact of his self-employment.

Similarly, Workman's characterization of his businesses as "side-line" activities does not render him unemployed rather than self-employed. Delaware courts have never recognized a side-line exception to the self-employment bar, and it does not appear that Workman, who started both businesses in response to his inability to obtain permanent employment, would qualify for such an exception.³⁶ Workman testified that he spent up to twenty hours per week on each business depending on the needs of that business, and it appears that they were not simply a hobby or a supplement to other employment but were the means he was using to attempt to support himself. By any definition, Workman was an unsuccessful self-employed person and not unemployed.

Although the Court sympathizes with Workman's predicament, the law is clear that the Court may not award unemployment benefits to support an

³⁶ See *Dongilli v. Commonwealth*, 484 A.2d 849, 850-51 (noting that under Pennsylvania law, an individual will not be disqualified from receiving unemployment benefits on grounds of self-employment if the individual can satisfy all of the following conditions: "(1) The self-employment activity precedes valid separation from full-time work; (2) it continues without substantial change after separation; (3) the claimant remains available for full-time work after separation; and (4) the self-employment activity is not the primary source of the client's livelihood.")

individual in the early stages of a new business. While this result may be unfair, it is up to the legislature to correct, not the Court. There is substantial evidence in the record to support the Board's finding that Workman is self-employed, rather than unemployed, and the Court can find no legal error in the Board's determination that Workman is not eligible for benefits. Accordingly, the Court affirms the Board's decision.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.