



IN THE SUPREME COURT OF THE STATE OF DELAWARE

SPAR MARKETING SERVICES, INC.)
)
Employer Below,)
Appellant)
) No. 143,2012
v.)
)
UNEMPLOYMENT INSURANCE APPEAL)
BOARD)
)
Appellee,) On Appeal From:
) Superior Court
And) in and for Kent County
) K11A-03-003 WLW
TAMMY BARR,)
)
Claimant Below)
Appellee.)

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents	i
Table of Authorities	iii
Nature of Proceedings	1
Summary of Argument	2
Statement of Facts	4
Argument	15
I. Questions Presented.....	15
II. Scope of Review.....	15
III. Merits of Argument	17
A. The Superior Court Erred By Affirming The Board's Conclusion That Ms. Barr Was Not Free From SMS' Direction and Control In Connection With Her Performance Of Merchandising Services.....	17
1. The Superior Court relied on irrelevant facts unrelated to the performance of services when it erroneously held that Ms. Barr was not free from SMS' direction and control.....	17
2. The record evidence establishes that Ms. Barr was free from SMS' direction and control in connection with the performance of her services..	20
3. The facts relied on by the Superior Court create an illogical result that forces Delaware businesses into an impermissible catch-22.....	23
B. The Board Erroneously Concluded That Ms. Barr Did Not Perform Her Services Outside All Of SMS' Places Of Business.....	26
C. The Board's Conclusion That Ms. Barr Was Not Engaged In An Independently Established Trade Is Not Supported By Substantial Evidence And Is Erroneous	31

CONCLUSION 35

TABLE OF AUTHORITIES

Cases	Pages
<i>Athol Daily News v. Bd. Of Review of the Div. of Employment & Training,</i> 786 N.E.2d 365 (Mass. 2003)	18; 30; 33
<i>Beacon Flag Car Co., Inc. v. Unemployment Compensation Bd. Of Review,</i> 910 A.2d 103 (Pa. Cmwlth. 2006)	33
<i>C E Credits OnLine v. Unemployment Compensation Bd. Of Review,</i> 946 A.2d 1162 (Pa. Cmwlth. 2008)	26
<i>Chase Alexa, LLC v. Kent Cnty. Levy Court,</i> 991 A.2d 1148 (Del. 2010)	29
<i>Comm’r of the Div. of Unemployment Assistance v. Town Taxi of Cape Cod, Inc.,</i> 862 N.E.2d 430 (Mass. App. Ct. 2007)	22,33
<i>Contract Mgmt. Services, Inc. v. Dep’t of Labor,</i> 745 So.2d 194 (La. Ct. App. 2000)	30
<i>Danielle Viktor, Ltd. v. Dep’t of Labor,</i> 892 A.2d 781 (Pa. 2006)	18
<i>Dep’t of Labor v. Med. Placement Services, Inc.,</i> 457 A.2d 382 (Del. Super. 1982)	Passim
<i>Excell Constr., Inc. v. Dep’t of Labor,</i> 116 P.3d 18 (Idaho 2005)	18; 23; 24
<i>Grimes v. Alteon, Inc.,</i> 804 A.2d 256 (Del. 2002)	29
<i>Johnson v. Chrysler Corp.,</i> 213 A.2d 64 (Del. 1965)	16
<i>Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.,</i> 636 A.2d 892 (Del. 1994)	15
<i>Richardson Park United Methodist Church v. Del. Fire Prevention Comm’n,</i> 2006 WL 1933699 (Del. Super. July 11, 2006)	26

<i>Rodney Square Investors, L.P. v. Bd. Of Assessment Review of New Castle Cnty.,</i> 448 A.2d 237 (Del. Super. 1982)	29
<i>Sarah Coventry, Inc. v. Caldwell,</i> 254 S.E.2d 375 (Ga. 1979)	18; 23
<i>Sky King 101, LLC v. Thurmond,</i> 2012 WL 604038 (Ga. Ct. App. Feb. 27, 2012)	22
<i>Skyhawk Tech. LLC v. Unemployment Compensation Bd. Of Review,</i> 27 A.3d 1050 (Pa. Cmwlth. 2008)	21; 23; 25; 33
<i>Spar Marketing Services, Inc. v. Unemployment Ins. Appeal Bd.,</i> 2012 WL 1414097 (Del. Super. Feb. 28, 2012)	16; 24
<i>Smith v. Ariz. Dep't of Econ. Sec.,</i> 623 P.2d 810 (Ariz. 1980)	18
<i>Tobey-Kard Sales Agency v. Dep't of Labor,</i> 34 A.3d 899, (Pa. Cmwlth. 2011)	22
<i>Twin States Pub. Co., Inc. v. Indiana Unemployment Ins. Bd.,</i> 678 N.E.2d 110 (Ind. Ct. App. 1997)	34
<i>UIAB v. Duncan,</i> 337 A.2d 308 (Del. 1975)	15
<i>Wilmington v. Graham,</i> 2008 WL 2582986 (Del. Super. June 18, 2008)	16
<i>Zimmer-Jackson Assoc., Inc. v. Dep't of Labor and Indus.,</i> 752 P.2d 1095 (Mont. 1988)	33

STATUTES

19 Del. C. § 3302 (10)(K)(iii)	<i>Passim</i>
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NATURE OF PROCEEDINGS

Appellant, employer-below Spar Marketing Services, Inc. ("SMS") appeals from the February 28, 2012 Order of the Superior Court affirming a decision from the Unemployment Insurance Appeal Board (the "Board"). The Board found that appellee, employee-below Tammy Barr was SMS' employee under the three-part test codified at 10 Del. C. § 3302 (10)(k)(i)-(iii) (the "ABC test"), and that SMS, for the first time, was required to pay unemployment insurance tax. The Superior Court Order considered only prong "A" of the ABC test.¹

Ms. Barr filed a claim for unemployment benefits on September 19, 2010 with the Delaware Department of Labor (the "DOL"). On October 12, 2010, the DOL informed SMS that it was "recognized as a new employer" and required SMS to pay taxes to the Division of Unemployment Insurance in the amount of 2.3%. SMS timely appealed this new tax status. Since this matter concerned the assessment of a tax and whether an employer/employee relationship existed, SMS' appeal was not heard by a referee, but by the Board in the first instance. The Board's decision followed a hearing that SMS attended but Ms. Barr did not, and became final on March 20, 2011.²

SMS timely appealed the Board's decision to the Superior Court. The Board did not file papers or otherwise appear before

¹ A copy of the February 28, 2012 Superior Court Order is attached hereto as **Exhibit A**.

² A copy of the Board's March 20, 2011 Decision is attached hereto as **Exhibit B**.

the Superior Court. Without holding argument, the Superior Court affirmed the Board by Order dated February 28, 2012. The Superior Court's Order only addressed one of the three questions presented by SMS on appeal. SMS timely commenced this appeal on March 22, 2012. This is SMS' opening brief in support of its appeal.

SUMMARY OF ARGUMENT

1. The Superior Court erroneously held that the following facts are sufficient to demonstrate "direction and control in connection with the performance of services" under 19 Del. C. § 3302 (10)(k)(i) (prong "A" of the "ABC" test): (1) Ms. Barr and SMS executed an Independent Merchandiser Agreement prior to her providing any services to SMS; (2) Ms. Barr agreed to provide her own liability insurance and worker's compensation insurance; (3) Ms. Barr agreed to follow certain invoicing procedures; and (4) Ms. Barr agreed to maintain an active email account. Those facts are insufficient as a matter of law; moreover, the Superior Court improperly ignored substantial undisputed contrary evidence. Reversal is therefore mandated.

2. Unless reversed, the Superior Court's Order also creates an impermissible Catch-22 for businesses and individuals seeking to establish valid independent contracting relationships in Delaware by counseling them against having upfront written agreements establishing that relationship and against having independent contractors provide their own liability and worker's compensation

insurance. It is reasonable to assume that the Superior Court and the Board would cite the absence of a clear, upfront agreement and the putative employer's payment of those insurance premiums as evidence defeating independent contractor status in future disputes. As such, the Superior Court Order cannot be allowed to stand.

3. The Superior Court Order does not address prongs "B" or "C" of the "ABC" test. If this Court considers those prongs, it will be evident that the Board erroneously applied prong "B" by ignoring the disjunctive "or" in the statute and by ignoring undisputed record evidence showing that Ms. Barr performed services outside all SMS' places of business.

4. The Board erroneously applied prong "C" in finding that Ms. Barr was not engaged in an independent trade by: (i) relying on legally irrelevant facts, and (ii) ignoring facts demonstrative of Ms. Barr's independent profession.

STATEMENT OF FACTS

SMS is a merchandising company with its offices outside the State of Delaware. A-93:8-12. It has no place of business in Delaware. *Id.* SMS is one of more than 90 companies offering merchandising services in Delaware. A-94:1. Merchandising services primarily concern increasing of product sales in retail stores with the focus on product availability and customer awareness. A-91:8-92:10.

SMS supplies labor and services for companies that work with retailers, wholesalers and manufacturers across the United States and, among other things, contracts with individuals and businesses to perform services in retail establishments on behalf of those service companies, manufacturers, wholesalers and retailers. Those individuals are referred to as merchandisers. Merchandisers such as Ms. Barr advertise themselves and solicit work through merchandising companies such as SMS on a website and nation-wide database maintained by the National Association for Retail Merchandising ("NARMS"). A-93:22-94:20. SMS and other companies, in turn, also utilize that website and database to identify merchandisers with whom they may wish to contract. A significant percentage of merchandisers in the industry are classified as independent contractors. A-102:4-6.

SMS and the merchandisers enter into a written independent contractor agreements before any services are provided. Ms. Barr's

Independent Merchandiser Agreement is found at A-6-8 (the "Merchandiser Agreement") and is attached hereto as **Exhibit C**. After SMS and Ms. Barr executed the Merchandiser Agreement, SMS offered Ms. Barr's projects for the completion of merchandising services in retail stores located throughout Delaware. None of those stores was owned, operated or controlled by SMS, and SMS has no physical presence in Delaware. A-93:10-12. Accordingly, SMS does not require merchandisers to attend any meetings in Delaware, or elsewhere. A-93:13.

SMS did not train Ms. Barr or supervise any services that Ms. Barr elected in her sole discretion to perform under her contract with SMS. A-24 to A-27. Ms. Barr was wholly in control of her schedule and whether and when she chose to work with SMS. *Id.* Simply stated, Ms. Barr, and the other merchandisers contracting with SMS, "can do whatever they want whenever they want." A-102:7-8. SMS retained no right of first refusal over Ms. Barr's services; she was not obligated to personally perform any contracted services, and she had the ability to perform merchandising services for all of the other companies offering merchandising work in Delaware. A-24-27. In short, Ms. Barr was not under SMS' direction or control and was not economically dependent on SMS while engaging in her independent trade.

The issue before the Superior Court, and previously before the Board, was whether the relationship between SMS and Ms. Barr

satisfied the criteria for establishing independent contractor status under Delaware law, codified at 19 Del. C. §§ 3302(10)(K)(i)-(iii). This "ABC" three-part test is satisfied if:

[A] Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract for the performance of services and in fact; and

[B] Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

[C] Such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

19 Del. C. §§ 3302(10)(K)(i)-(iii).

As set forth in detail herein, the record evidence clearly establishes that SMS properly classified Ms. Barr as an independent contractor. It is equally clear that there is not substantial evidence supporting the Superior Court's Order or the Board's decision affirmed by that Order.

A. SMS Did Not Exercise Control and Direction Over Ms. Barr Under Contract or In Fact.

1. The Merchandiser Agreement between SMS and Ms. Barr does not permit SMS to control or direct her and unambiguously classifies her as an independent contractor.

The Merchandiser Agreement expressly sets forth SMS' lack of control and direction over Ms. Barr. Specifically, it prohibits SMS from any attempt to: "on its own account, restrict or supervise the timing, method, manner or means of Merchandiser's

performance and completion of any Project." A-6 at § 4 (emphasis added). It further specified that Ms. Barr, in her sole discretion, may "accept or refuse any Project offered by SMS for any or no reason without liability." A-6 at § 2. Ms. Barr was also contractually entitled to subcontract out any project she chose to accept from SMS. A-7 at § 8. She was free to work for any other entities, including direct competitors of SMS. A-7 at § 9. SMS retained no right of first refusal to her services. *Id.* Under the Merchandiser Agreement, compensation was determined on a project-by-project basis as mutually agreed between Ms. Barr and SMS. A-6. If she considered the offered compensation insufficient for any project, Ms. Barr could reject it. A-6 at § 2.

The Merchandiser Agreement also clearly stated that it "does NOT create any employee/employer relationship." A-6 at Introduction (emphasis in original). By signing the Merchandiser Agreement, Ms. Barr acknowledged that she did not consider herself to be an employee of SMS and, consequently, that she "will not be eligible to receive unemployment compensation benefits from SMS if [the Merchandiser Agreement] is terminated or if SMS otherwise ceases to offer Projects to me." A-8. All of these contractual provisions were provided to Ms. Barr for her review and acceptance (or rejection) prior to her performing any services for SMS.

2. There is no record evidence that Ms. Barr was not "in fact" free from the direction and control of SMS in connection with the performance of her merchandising services.

There is no record evidence that SMS failed to comply with any provision of the Merchandiser Agreement. Moreover, additional record evidence leaves no doubt that Ms. Barr was free from SMS' direction and control in connection with her performance of merchandising services. For instance, SMS did not (i) fix required work hours or work days, (ii) set a minimum or maximum amount of projects that Ms. Barr could accept or reject in her sole discretion, (iii) supervise Ms. Barr while she was performing merchandising services, (iv) require Ms. Barr to attend meetings; or (v) provide Ms. Barr with any training whatsoever. A-25 to A-26. SMS also did not provide Ms. Barr with any tools of the trade, and she was solely responsible for providing all the equipment she needed to complete a project, such as transportation, internet access, tools and other supplies. A-26. All of that evidence is undisputed.

Both under the Merchandiser Agreement and in practice, Ms. Barr had the flexibility to work as many hours as she wanted, whenever she wanted. A-92:5-6. Moreover, SMS did not fix any specific amount of time Ms. Barr had to dedicate to any project. For example, if Ms. Barr completed a flat-rate assignment she accepted in 15 minutes, she was paid the same amount as if the project had taken longer. A-92:9-10. Accordingly, Ms. Barr set

her own hours and made as much profit as she wanted depending on her voluntary choices in accepting or declining projects offered by SMS. A-102:7; A-26. Importantly, SMS did not supervise or control the manner in which Ms. Barr performed merchandising services. A-25. Rather, SMS merely reviewed the results of the services Ms. Barr provided. *Id.* SMS did not, however, take any action to direct the manner in which Ms. Barr performed her services. A-25; A-103:2-4; A-98:24-99:2.

With respect to record evidence allegedly supportive of a finding of 'direction and control,' the Superior Court stated that: (1) SMS maintained a pool of merchandisers contacted on an as-needed basis; (2) merchandisers are required to sign an Independent Merchandiser Agreement which states that they are independent contractors; (3) merchandisers are required to act professionally; (4) merchandisers are required to maintain worker's compensation and general liability insurance; (5) merchandisers have to follow certain invoicing procedures; and (6) merchandisers have to maintain an active email account. None of these facts supports a finding of 'direction or control' during the performance of merchandising services which is what is required under the statute.

That SMS maintained a list of independent contractor merchandisers from whom it would solicit merchandising services takes nothing away from the undisputed fact that those merchandisers had complete discretion as to whether to accept any

work offered to them by SMS and takes nothing away from the undisputed facts demonstrating that they were free from SMS' direction and control with respect to any work they chose at their discretion to accept for completion. It also has nothing to do with control or direction in connection with the performance of merchandising services, which is the statutory requirement.

The fact that an express independent contractor agreement was executed prior to provision of any services on behalf of SMS establishes a lack of direction and control, not the contrary as asserted by the Superior Court. Indeed, the Delaware "ABC" test presumes the existence of such a contract. See 19 Del. C. § 3302(10)(K)(i): "Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract for the performance of services and in fact." (emphasis added).

With respect to the provision in the Merchandiser Agreement under which the merchandisers agree to act professionally, that provision simply confirms that merchandisers are, in fact, professionals and not employees. Moreover, it is undisputed that SMS did not supervise the performance of Ms. Barr's services, such that it could monitor or direct her wholly generalized obligation as a professional to act professionally.

Similarly, the fact that Ms. Barr had to maintain her own worker's compensation and general liability insurance is strong

evidence of self-employment; it does nothing to establish an employer/employee relationship. It does nothing to establish direction and control over the provision of merchandising services, nor does a requirement to follow approved invoicing procedures after completion of those merchandising services. To the contrary, the undisputed fact that merchandisers invoiced SMS for payment following completion of any accepted project is supportive of independent contractor status.

The requirement to maintain an active email account is also supportive of, and wholly consistent with, the undisputed record evidence that SMS had no direction and control. SMS had no physical presence in Delaware and did not monitor or supervise merchandising services as they were performed. The only way that SMS could contact merchandisers to offer them projects, or obtain results following completion of services, was electronically, which requires that both contracting parties maintain an active email account. The maintenance of that account has nothing at all to do with the actual provision of merchandising services (which is the test under "A"), and there is no record evidence to the contrary.

Finally, if this Court deems it appropriate to look beyond the Superior Court Order to the Board's decision, it will find that the Board also relied on a factual finding that Ms. Barr and other merchandisers received merchandising projects directly from SMS. A-75. While accurate, this fact is irrelevant. It is inherent in

any two-party independent contractor relationship that the independent contractor (Ms. Barr in this instance) contracts directly with the other party (SMS in this instance) to provide something of value (merchandising services in this instance). That routine fact of contractual life does nothing to establish any direction and control in connection with actual performance of the contracted service. Among other things, Ms. Barr still retained complete control over whether she would accept any merchandising assignments; she still retained complete control over whether she would personally perform any merchandising assignments she chose to accept; and SMS still retained zero control over the performance of those services. There is no record evidence to the contrary.

B. Ms. Barr Performed Services Outside of all of SMS' Places of Business.

Ms. Barr admitted in her application for unemployment benefits that all services she contracted with SMS were performed in her home or in the retail stores located throughout Delaware. A-13. No services were performed at any place of business owned, operated or in any way controlled by SMS. A-93:8-12; A-98:23-99:2. SMS does not have any offices or places of business in Delaware. A-93:12. Rather, SMS' places of business are outside of Delaware, A-93:9-10, and SMS provides services to retailers, wholesalers and manufacturers from those locations beyond the services performed by individual merchandisers with whom it contracts in the State of Delaware. See A-9 to A-10.

C. Ms. Barr Was Engaged in an Independently Established Trade, Occupation, Profession or Business.

The record evidence establishes without contradiction that Ms. Barr was engaged in an independently established trade, occupation, profession or business. Ms. Barr, like all Delaware merchandisers, was not economically dependent on SMS. There are over 90 merchandising companies—of which SMS is only one—who contract in Delaware with individual merchandisers such as Ms. Barr. A-94:1. Ms. Barr was free to solicit work from and contract with as many or as few of those companies as she desired in her sole discretion. Moreover, she (as much as any other independent business person) retained control over whether or how much profit she could earn (or how much loss she might sustain) through her discretion to accept or reject projects based on her independent assessment of what the project was worth and her ability to negotiate a price for the project. A-96:4-6; A-103:15-16.

Ms. Barr obtained an individual taxpayer identification number from the IRS as individual/sole proprietor and was responsible for maintaining her own appropriate general liability and worker's compensation insurance. A-6; A-9. Ms. Barr retained the right to subcontract out the projects she accepted from SMS in her sole discretion. A-6 at § 8. Ms. Barr had the express right to work for other companies, including direct SMS competitors, of which there were dozens active in Delaware. A-7 at §9. She assumed personal responsibility for damages, injuries or claims arising out

of the performance of any services she provided as well as personal financial responsibility and liability for all costs of completing her services. A-7 at §§ 7, 10. Ms. Barr also agreed to comply with all federal, state and local requirements as a business and/or self-employed individual, including all requirements regarding the appropriate collection and payment of any and all requirement self-employment taxes. *Id.*

Ms. Barr's merchandising business was also portable and independent from SMS. SMS provided Ms. Barr with no office or materials. Instead, Ms. Barr provided herself with any required office, materials, expenses and supplies needed to perform and complete the merchandising services she contracted to provide. A-26. Ms. Barr could advertise for work through NARMS and in many other ways. A-93:23-94:5. Finally, given that Ms. Barr had complete control over her own schedule, and no contractual restrictions imposed by SMS, she was a free agent with the ability to generate profits through, among other things, her choice of merchandising companies with whom she contracted, her choice of projects, her skill and speed in performing those projects (particularly flat-rate work), her management of expenses, her negotiation of rates, and her ability to subcontract work to others. A-92:4-97:15; 103:15-1; A-26.

ARGUMENT

I. QUESTIONS PRESENTED

1. Whether the Superior Court erred when it held that Ms. Barr was not free from SMS' direction and control in connection with the performance of her merchandising services. A-114-26; A-83.

2. Whether the Board erred in concluding that Ms. Barr did not perform her merchandising services either outside SMS' usual course of the business or outside of all the places of business of SMS for which the service is performed. A-119-21; A-126-28; A-83.

3. Whether the Board erred when it concluded that Ms. Barr was not engaged in an independently established trade or profession. A-121-123; A-128-130; A-83.

II. SCOPE OF REVIEW

The standard of review of a Superior Court order affirming a decision of the Board is whether there is substantial evidence in the record to support the Board's factual findings and whether its conclusions are free from legal error. *UIAB v. Duncun*, 337 A.2d 308, 309 (Del. 1975). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

The Supreme Court will apply the same standard of review of the Superior Court's order affirming the Board as the Superior Court applies in reviewing the Board in the first instance.

Johnson v. Chrysler Corp., 213 A.2d 64, 66 (Del. 1965). Accordingly, in determining whether a decision of the Board is free from legal error, the Court will review the Board's legal conclusions *de novo* to determine whether the Board erred in formulating or applying legal principles. *PAL of Wilmington v. Graham*, 2008 WL 2582986, at *4 (Del. Super. June 18, 2008).

A claimant seeking unemployment insurance benefits bears the initial burden of establishing that she performed services for wages. *Dep't of Labor v. Med. Placement Services, Inc.*, 457 A.2d 382, 384 (Del. Super. 1982), *aff'd without op.*, 467 A.2d 545 (Del. 1983) (TABLE).³ Once an individual establishes that she performed services for wages, the burden shifts to the employer to establish the existence of an independent contractor, as opposed to an employer/employee, relationship. *Dep't of Labor v. Med. Placement Services*, 457 A.2d 382, 384 (Del. Super. 1982), *aff'd without op.*, 467 A.2d 545 (Del. 1983) (TABLE). An employer meets its burden when it satisfies all three prongs of the statutory "ABC" test. *Id.*

³ As the Superior Court noted in affirming the Board in this case, *Medical Placement Services* discusses and analyzes 19 Del. C. § 3302(9)(k). Subsequently, the provision moved to 19 Del. C. § 3302(10)(k) but the language of the provision did not change. *Spar Marketing Services, Inc. v. Unemployment Ins. Appeal Bd.*, 2012 WL 1414097, at *2 n.11 (Del. Super. Feb. 28, 2012).

III. MERITS OF ARGUMENT

A. The Superior Court Erred By Affirming The Board's Conclusion That Ms. Barr Was Not Free From SMS' Direction and Control In Connection With Her Performance Of Merchandising Services.

1. The Superior Court relied on irrelevant facts unrelated to the performance of services when it erroneously held that Ms. Barr was not free from SMS' direction and control.

In concluding that Ms. Barr was not free from SMS' direction and control, the Superior Court relied on facts unrelated to the "performance of service" as required by Delaware law. Specifically, the Superior Court relied entirely on the following facts : (1) SMS maintains a pool of merchandisers who are contacted on an "as needed" basis; (2) the merchandisers are required to execute the Independent Merchandiser Agreement before performing any services for SMS; (3) the merchandisers are contractually obligated to act professionally; (4) the merchandisers are responsible for their own general liability and worker's compensation insurance; (5) the merchandisers must invoice SMS for services performed; and (6) the merchandisers must maintain an active email address. *Spar Marketing Services, Inc.*, 2012 WL 1414097, at *3.

These facts wholly fail to support a determination that SMS exercised direction and control "in connection with the performance of such service." 19 Del. C. § 3302 (10)(K)(i) (emphasis added). Although this Court has not written on this issue, other states'

highest courts have consistently held that the inquiry under the "A" prong of the three-part test should be focused on control over the manner in which the services are performed, not control over unrelated aspects of the parties' relationship or even control over the results of the work. For example, in construing a nearly identical statute, the Idaho Supreme Court held that "[t]he appropriate test in making this determination considers whether the putative employer has control over the details of the work, the manner, method or mode of doing the work, and the means by which the work is to be accomplished, as contrasted with the results of the work." *Excell Constr., Inc. v. Dep't of Labor*, 116 P.3d 18, 24-25 (Idaho 2005); see also *Danielle Viktor, Ltd. v. Dep't of Labor*, 892 A.2d 781, 791 (Pa. 2006) (interpreting a similar statute and holding that the question under the "A" prong is whether individuals are "free from control or direction over the performance of their work"); *Athol Daily News v. Bd. of Review of the Div. of Employment & Training*, 786 N.E.2d 365, 371 (Mass. 2003) (construing a nearly identical statute and holding that where the individual controls "the mode, manner and means" of the performance of services, he is an independent contractor); *Smith v. Ariz. Dep't of Econ. Sec.*, 623 P.2d 810, 819 (Ariz. 1980) (construing a similar statute and holding that there was no control over "the manner in which" the services were performed); *Sarah Coventry, Inc. v. Caldwell*, 254 S.E.2d 375, 378-79 (Ga. 1979) (construing a nearly

identical statute and holding that the individual "was free from any significant control or direction over the performance of her services.").

Here, in support of its decision that Ms. Barr was not free from the direction and control of SMS, the Superior Court relied on its prior decision in *Dep't of Labor v. Medical Placement Servs., Inc.*, 457 A.2d 382, 384 (Del. Super. 1982), *aff'd with op.*, 467 A.2d 454 (Del. 1983) (TABLE). The *Medical Placement* Court adopted a "liberal interpretation" of "control" and held that the employer there did not satisfy the "A" prong of the statutory test. *Id.* at 385. There, the Superior Court relied on the facts that: (i) the employer maintained a "pool of qualified technicians to be contracted as need", (ii) the employer required technicians to sign "contracts of employment" signifying that each technician would be solely responsible, (iii) technicians were "assigned to their respective situations" by the employer, and (iv) the employer "determine[d]" the rate and schedule of payment. *Id.*

The facts of *Medical Placement*, however, are distinguishable from this case for a number of reasons, and the Superior Court erred in finding no distinction between that case and the matter *sub judice*. First, contrary to the findings of the Board, SMS does not maintain a "pool of merchandisers." Rather, SMS engages merchandisers who, among other methods of advertising their services, have registered on the website operated and maintained by

NARMS—a national association for merchandisers—and offers projects to those individuals who hold themselves out as professional merchandisers to the 90 or so merchandising companies in Delaware. A-93:22-94:6. Second, SMS and Ms. Barr did not sign a “contract of employment” as in *Medical Placement*, but rather signed an “Independent Merchandiser Agreement” that expressly states that Ms. Barr is an independent contractor free to perform services for SMS’ competitors and subcontract the projects she chooses to other individuals. A-6-8. Third, SMS did not “assign” projects to Ms. Barr. Rather, Ms. Barr was free to accept or reject projects in her sole discretion without penalty or prejudice to her ability to accept or reject future assignments. A-6 at § 2; A-96:3-6. Finally, the compensation earned by Ms. Barr was not “determined” by SMS, but instead was set by the requirements of the project and fixed by the retailer, wholesaler, or manufacturer, which Ms. Barr was free to accept or reject based on her independent determination of the value of the project. A-96:10-97:15. Moreover, Ms. Barr, and other merchandisers, are permitted to and do negotiate with SMS for project payments. A-6 at § 3; A-103:14-16. The contrary findings of the Board are not supported by substantial evidence.

- 2. The record evidence establishes that Ms. Barr was free from SMS’ direction and control in connection with the performance of her services.**

The record evidence in this matter leads to only one conclusion—that Ms. Barr was free from the direction and control of

SMS in connection with the performance of her merchandising services. For instance, SMS did not (i) fix required work hours or work days, (ii) set a minimum or maximum amount of projects that Ms. Barr could accept or reject in her sole discretion, (iii) supervise Ms. Barr while she was performing work, (iv) provide Ms. Barr with training, (v) require Ms. Barr to attend meetings, or (vi) provide Ms. Barr with any tools of her trade. A-25-26. All of these facts show that Ms. Barr was free from SMS' direction and control over the manner, means and method of her performance of services. See *Skyhawk Tech. LLC v. Unemployment Compensation Bd. of Review*, 27 A.3d 1050, 1054 (Pa. Cmwlth. 2008) (holding that each of the aforementioned factors are indicia of freedom from direction and control).

Ms. Barr's freedom from SMS' direction and control is also evidenced by the fact that she was free to work for SMS' competitors without penalty. SMS did not, under contract or in fact, restrict Ms. Barr's ability to work for any other entity, including competitors of SMS. A-7 at § 9. Ms. Barr was free to utilize the national database operated by NARMS as well as other methods to hold herself out as a merchandising professional to any of the over 90 companies contracting with professional merchandisers in Delaware. A-93:24-94:10. That the record does not indicate whether Ms. Barr actually performed merchandising services for other entities—because she did not appear at the

hearing before the Board-is inconsequential because "it is enough that the sales representatives *could* offer their services to other entities, including competing entities" to demonstrate a lack of control over the performance of services. *Tobey-Karg Sales Agency v. Dep't of Labor*, 34 A.3d 899, 906 (Pa. Cmwlth. 2011) (emphasis in original).

Ms. Barr's freedom from SMS' direction and control over the performance of her services is also evident by the fact that she had the flexibility to work as many hours as she wanted. Ms. Barr had the sole discretion to accept or reject projects offered by SMS and other merchandising companies. A-6 at § 2. Moreover, SMS did not fix any specific amount of time Ms. Barr had to dedicate to any project. For example, if Ms. Barr completed a flat rate project she accepted in 15 minutes, she was paid the same amount as if the project had taken longer because the payment was based on a predetermined rate. A-92:9-10. Accordingly, Ms. Barr set her own hours and made as much profit as she wanted depending on her voluntary choices in accepting or declining projects offered by SMS. A-102:7; A-26. All of these factors militate in favor of finding that Ms. Barr was free from SMS' direction and control in connection with the performance of her services. See, e.g., *Comm'r of the Div. of Unemployment Assistance v. Town Taxi of Cape Cod, Inc.*, 862 N.E.2d 430, 434-35 (Mass. App. Ct. 2007); *Sky King 101, LLC v. Thurmond*, 2012 WL 604038, at *2 (Ga. Ct. App. Feb. 27, 2012)

(relying on *Sarah Coventry, Inc. v. Caldwell*, 254 S.E.2d 375 (Ga. 1979)); *SkyHawke Tech.*, 27 A.3d at 1058.

Ms. Barr also was free to negotiate her rate of pay. A-95:17-19; A-6 at § 3. In other situations where Ms. Barr did not negotiate her rate of pay, it was fixed by the retailer, wholesaler, or manufacturer, and Ms. Barr was free to accept or reject that rate of pay based on her own independent assessment of how much she thought a project was worth. A-92:11-14; 95:15-96:6. Moreover, even if SMS had set Ms. Barr's rate of compensation—which the record indicates that it did not—it would be of no moment because “[s]etting the rate of compensation is unrelated to control over the work process itself.” *Excell Constr.*, 116 P.3d at 25.

Importantly, SMS did not supervise or control the manner in which Ms. Barr performed merchandising services; instead, SMS was limited to reporting and reviewing the results of her work. A-25. Merely reviewing the results of an individual's work is not indicative of direction and control over the performance of services. Rather, it is simply a function of determining whether contractual requirements were satisfied and sheds no light on the existence of an employer/employee relationship. See *Excell Constr.*, 116 P.3d at 25 (“Unlike control over the manner, method or mode by which a task is performed, merely exerting control over the results of the work does not suggest an employment relationship.”).

3. **The facts relied on by the Superior Court create an illogical result that forces Delaware businesses into an impermissible catch-22.**

The Superior Court held that an employer/employee relationship existed here because, among other things, SMS required Ms. Barr to sign a contract before providing services and maintain general liability and workers' compensation insurance. *Spar Marketing Services, Inc.*, 2012 WL 1414097, at *3. This holding counsels businesses and individual seeking to establish valid independent contracting relationships in the State of Delaware against having an upfront written agreement establishing that relationship and against having the independent contractor provide his or her own insurance.

It is reasonable to assume that, in any future employment status dispute, the Superior Court and the Board will cite the absence of a clear, upfront agreement and the putative employer's payment of those insurance policy premiums as evidence defeating independent contractor status. Moreover, paying of insurance has no bearing on the analysis of the "A" prong because it has nothing to do with the performance of services. See *Excell Constr.*, 116 P.3d at 25 (holding that the "practice of dictating who pays for insurance is part of the relationship between [the company] and its workers, but sheds no light on which party controls how actual work is performed.").

Finally, Ms. Barr's agreement to maintain an e-mail address for communication purposes (such as to receive notification of offered projects), adhere to minimum professionalism requirements and follow certain invoicing procedures for payment purposes does not indicate control "in connection with the performance of such a service." 19 Del. C. § 3302 (10)(K)(i) (emphasis added). It simply confirms her status as a professional, provides an ability to communicate back-and-forth which is necessary precisely because there is no direction and control—or contact—during the provision of services, and standardizes invoicing after the completion of a project, which again, has no connection with direction and control during the performance of services. Furthermore, the fact that compensation is provided solely based upon invoicing after the completion of services is an indicia of independent contracting, not employment.

The contractual requirements in the Merchandiser Agreement relied upon by the Superior Court and Board did not control or direct the manner, method, or means by which Ms. Barr performed her services. Consequently, that reliance was improper because "control for the purposes of [the A-prong] is not a matter of approving or directing the final work product," rather "it is a matter of controlling the means of its accomplishment because every job, whether performed by an employee or by an independent contractor, has parameters and expectations." *Skyhawk Tech. LLC*,

27 A.3d at 10546 (quoting *C E Credits OnLine v. Unemployment Compensation Bd. of Review*, 946 A.2d 1162, 1169 (Pa. Cmwlth. 2008)).

The Superior Court also committed error by failing to address the Board's improper imposition on SMS of a burden greater than that provided by the statute. In order to satisfy the "A" prong of the three-part statutory test, SMS must show that Ms. Barr was "free from control and direction in connection with the performance of such service, both under the individual's contract for the performance of services and in fact." 19 Del. C. § 3302 (10)(K)(i) (emphasis added). But the Board imposed a much higher burden, concluding that "the evidence does not support [SMS'] contention that [Ms. Barr is] completely independent and free from the Employer's control." A-75 (emphasis added). This misapplication of the statutory standard also entitles SMS to reversal. See *Richardson Park United Methodist Church v. Del. Fire Prevention Comm'n*, 2006 WL 1933699, at *3 (Del. Super. July 11, 2006) (reversing administrative agency where it imposed "a burden more onerous than that which is mandated by the statute.").

B. The Board Erroneously Concluded That Ms. Barr Did Not Perform Her Services Outside All Of SMS' Places Of Business.

The Superior Court did not consider the "B" prong of the three-part "ABC" test; in the event that this Court decides to review that issue, it will discover that the Board's conclusion

that Ms. Barr did not perform her services outside all of SMS' places of business is erroneous. Under the "B" prong, SMS must show that Ms. Barr's "service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed." 19 Del. C. § 3302(10)(K)(ii) (emphasis added). The Board found that, notwithstanding the fact that SMS does not have any offices in Delaware, Ms. Barr nonetheless performed services inside SMS' places of business precisely because the services were within the usual course of SMS' business. A-73, 76. By so holding, the Board improperly read the "either" and the "or" completely out of the statute. According to the Board, so long as the services were within SMS' usual course of business, they could not be considered to be performed outside of SMS' actual acknowledged places of business, thereby reading the disjunctive out of the statute.

Relying on *Medical Placement*, the Board concluded that Ms. Barr's services were not performed outside the places of SMS' business. A-76 (citing *Medical Placement Services, Inc.*, 457 A.2d at 386). There, the employer was in the business of "supplying trained health care personnel to institutions and private individuals." *Medical Placement Services*, 457 A.2d at 383. The Superior Court found that the "nature of the [employer] is such that business cannot be transpired on its premises" because "the

enterprise in which [the employer] is engaged involves supplying technicians to medical facilities and private homes." *Id.* at 386. The Court there held that consequently, the medical facilities and private homes "are necessarily included within the enterprise and are, thus, subsumed within 'place of business' as contemplated by [the statute]." *Id.* Here, the Board reasoned that the same is true of SMS. "[SMS] is a business that supplies merchandisers to retail establishments for the completion of specific projects. Therefore, the Board finds that merchandisers' services are not performed outside the places of [SMS'] enterprise." A-76 (internal quotations omitted).

The Board's conclusion is unsupported factually and legally. First, the factual record established that, unlike what was found in *Medical Placement Services*, SMS does conduct merchandising services from its acknowledged business locations. A-93:7-12. It is simply not the case that services are only performed by merchandisers in retail establishments.

Second, as a matter of law, through its attempted application of *Medical Placement Services*, the Board improperly read the disjunctive completely out of the statute. The requirements under the "B" prong are expressly drafted as "either/or" not "and". To satisfy those alternate requirements, SMS must establish either that Ms. Barr's services were performed outside of SMS' usual course of business or that the services are performed outside of

all of SMS' places of business. 19 Del. C. § 3302(10)(K)(ii). The Board concluded that, because the merchandisers' services are within SMS' usual course of business, those services cannot be performed outside of SMS' places of business. A-76. That conclusion ignores the "either/or" disjunctive and reads the second part of the "B" prong out of existence.

As such, the Board's conclusion violates the plain language of the statute. Under Delaware law, "[s]tatutes must be construed as a whole, in a way that gives effect to all of their provisions and avoids absurd results." *Chase Alexa, LLC v. Kent Cnty. Levy Court*, 991 A.2d 1148, 1152 (Del. 2010). "Every sentence, phrase or word will, if possible, be given weight and consideration." *Rodney Square Investors, L.P. v. Bd. of Assessment Review of New Castle Cnty.*, 448 A.2d 237, 239 (Del. Super. 1982). The Board may not construe a statute in a manner that renders part of it "mere surplusage." *Grimes v. Alteon, Inc.*, 804 A.2d 256, 264 (Del. 2002).

Here, it is undisputed that Ms. Barr performed her merchandising services outside of all of SMS' places of business. As Ms. Barr admitted in her application for unemployment benefits, all of her services were performed "online at home, and [at] various store locations." A-13. The record is clear that SMS maintains offices outside of Delaware in which services are performed and does not own, operate, or otherwise control any

location in Delaware at which Ms. Barr performed her services. A-93:9-15. The record evidence applied to the plain language of the statute therefore leads to only one conclusion—that Ms. Barr performed her services outside all of SMS' places of business. As such, SMS has satisfied the unambiguous requirement set forth in 19 Del. C. § 3302(10)(K)(ii). See also, *Contract Mgmt. Services, Inc. v. Dep't of Labor*, 745 So.2d 194, 199 (La. Ct. App. 2000) (holding that where medical personnel were provided by a company to hospitals and other medical institutions, the individuals' services were performed outside the company's place of business).

In a similar case under a functionally equivalent statute, the Massachusetts Supreme Court rejected a comparably overbroad interpretation and held that "outside", logically, means not within a business's premises. In *Athol Daily News* the individuals at issue were adult newspaper carriers. 786 N.E.2d at 367. The carriers picked up the newspapers either in the company's circulation room or at bundled drop points near carriers' homes. *Id.* Carriers then delivered the newspapers to subscribers' homes, bundled the newspapers at predetermined locations for youth carriers to deliver to subscribers, or delivered the newspapers to vending machines. *Id.* at 368. Notwithstanding the fact that the carriers sometimes picked up the newspapers in the company's distribution room, the Court held that it was "clear that all the carriers make deliveries outside of premises owned by [the company]

or which could fairly be deemed its place of business." *Id.* In so holding, the Court rejected the argument that the area where the newspapers were delivered was the company's place of business because such argument was "illogical." *Id.* at n. 11.

C. The Board's Conclusion That Ms. Barr Was Not Engaged In An Independently Established Trade Is Not Supported By Substantial Evidence And Is Erroneous.

The Superior Court also did not address whether Ms. Barr was engaged in an independently established trade. If this Court decides to review that issue, it will find that the Board, without citation to or reliance on any facts in the record, erroneously concluded that Ms. Barr was not engaged in an independently established trade or occupation. A-76.

In order to satisfy the "C" prong of the "ABC" test, SMS must show that Ms. Barr was "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." 19 *Del. C.* § 3302(10)(K)(iii). In support of its conclusion that SMS failed to demonstrate this statutory requirement, the Board once again relied in error on *Medical Placement*.

In *Medical Placement*, the Superior Court found that the medical technicians at issue there were not engaged in an independently established trade because: (i) the technicians were paid directly by the company, (ii) the company actively procures its clients and employs its own discretion in pairing technicians

with their respective assignments, (iii) the company assumed administrative responsibility in its enterprise, particularly with respect to wages, (iv) payment to the individuals was not contingent on payment from the client, (v) the individuals do not determine their own rate of pay, and (vi) there was no evidence of professional listings or advertisements of the individuals' services. *Id.* at 386-87.

In concluding that the arrangement between SMS and Ms. Barr was the same as that in *Medical Placement*, the Board overlooked many critical facts. First, Ms. Barr advertised her services on a national database maintained by NARMS to approximately 90 merchandising companies in Delaware. A-93:23-94:5. Second, SMS did not assume administrative responsibilities regarding Ms. Barr, and she provided all required office materials or supplies needed to perform and complete any services they contract to provide. A-26. Third, Ms. Barr had unfettered discretion to accept or reject projects. A-6 at § 2. Fourth, Ms. Barr was able to determine the amount of money she made through, among other things, her choice of merchandising companies, her choice of projects, her skill and speed in performing those projects (particularly flat-rate work), her management of expenses, and her ability to subcontract work to others. A-92:4-97:15, A-26.

That Ms. Barr retained the right to accept or reject projects in her sole discretion strongly indicates that she was engaged in an independently established trade. As one court aptly noted:

It is difficult to fathom a situation where someone other than an individual engaged in his or her own business would possess the unmitigated prerogative to accept or reject assignments at will, to work only when he or she chose to ... and to perform the services however he or she saw fit to do so.

Skyhawk Tech., Inc., 27 A.3d at 1058 (quoting *Beacon Flag Car Co., Inc. v. Unemployment Compensation Bd. of Review*, 910 A.2d 103, 108 (Pa. Cmwlth. 2006));

Also strongly indicative of Ms. Barr's economic independence and her participation in an independently established trade is that the Merchandiser Agreement did not restrict or otherwise prohibit Ms. Barr from providing services to other entities, including competitors of SMS. A-7 at § 9. See *Town Taxi of Cape Cod, Inc.*, 862 N.E.2d at 436 (holding that where an individual advertises her services to multiple entities and is not contractually prohibited from providing services to other entities it is indicative of the "entrepreneurial spirit exhibited by a typical independent contractor."). Stated differently,

The better approach to the evaluation required by part (c) is to consider whether the service in question could be viewed as an independent trade or business because the worker is capable of performing the service to anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services.

Athol Daily News, 786 N.E.2d at 373. See also *Zimmer-Jackson Assoc., Inc. v. Dep't of Labor and Indus.*, 752 P.2d 1095, 1099 (Mont. 1988) (holding that the ability of a worker to engage in an activity without hindrance from anyone implies a "proprietary interest" in the activity); *Twin States Pub. Co., Inc. v. Indiana Unemployment Ins. Bd.*, 678 N.E.2d 110, 114 (Ind. Ct. App. 1997) (holding that the ability to perform services for multiple companies is indicia of an independently established trade).

Here, the record demonstrates that there were over 90 entities at Ms. Barr's disposal to which she could provide her services. A-94:1. In order to shop her services to multiple entities, Ms. Barr obtained an individual taxpayer identification number from the IRS as individual/sole proprietor and maintained her own appropriate general liability and worker's compensation insurance. A-6; A-9. Further discrediting the Board's conclusion is the fact that, under the Merchandiser Agreement, Ms. Barr had the ability to subcontract out the projects she accepted in her sole discretion from SMS. A-6 at § 8. It simply does not stand to reason that an individual not engaged in an independently established trade could subcontract work out to other individuals.

For these reasons, the Board's conclusion that Ms. Barr was not engaged in an independently established trade is erroneous and not supported by substantial evidence in the record.

CONCLUSION

For all the foregoing reasons, the Superior Court's affirmation of the Board's decision that Ms. Barr was an employee of SMS and not an independent contractor should be reversed and SMS should not be liable to pay unemployment insurance taxes.

Respectfully submitted:

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