



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 POST-REMAND SUPPLEMENTAL MEMORANDUM

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19 Del. C. § 3302(10)(K)(ii)-(iii)	<i>Passim</i>
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INTRODUCTION

As directed, Appellant, employer-below Spar Marketing Services, Inc. ("SMS"), submits this opening supplemental memorandum to address the Superior Court's decision on remand.¹ Respectfully, the Superior Court's conclusions regarding the "B" and "C" Prongs are incorrect factually and legally and provide no foundation upon which to sustain Appellee Unemployment Insurance Appeal Board's ("Board") decision that SMS failed to satisfy the "ABC" test. This Court should therefore reverse the Superior Court and the Board and hold that the claimant below, Ms. Barr, was an independent contractor under Delaware law when she contracted and provided merchandising services to SMS.

ARGUMENT

I. QUESTIONS PRESENTED

A. Whether the Superior Court and Board erred in concluding that Ms. Barr did not perform her merchandising services outside of all SMS places of business.

B. Whether the Superior Court and Board erred in concluding that Ms. Barr was not customarily engaged in an independently established trade when providing merchandising services to SMS.

II. SCOPE OF REVIEW

The standard for review of the Board decision is to determine whether there is substantial evidence in the record to support the Board's factual findings and whether its conclusions are free from

¹ The Superior Court's "Findings of Fact and Conclusions of Law Upon Remand," dated July 9, 2013, is attached hereto as **Exhibit A**.

legal error. *UIAB v. Duncan*, 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). This Court applies the same standard to the Superior Court's decision on remand affirming the Board. *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965). This Court reviews all legal conclusions *de novo* to determine whether there were errors in formulating or applying legal principles. *PAL of Wilmington v. Graham*, 2008 WL 2582986, at *4 (Del. Super. June 18, 2008).

III. MERITS OF ARGUMENT

The issue before the Superior Court on remand was whether the relationship between SMS and Ms. Barr satisfied the "B" and "C" Prongs for establishing independent contractor status:

[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)(ii)-(iii).

Despite now conceding that SMS satisfied the "A" Prong, the Board and Superior Court continue to rely almost exclusively on *Dep't of Labor v. Med. Placement Services, Inc.*, 457 A.2d 382 (Del. Super. 1982), a decision that expressly relied on a failure to satisfy the "A" Prong as the foundation for finding employment status. Moreover,

the Superior Court on remand misinterpreted and misapplied *Medical Placement* and the governing statute in concluding that SMS failed to satisfy the "B" and "C" Prongs.

The Superior Court also improperly ignored its May 23, 2013 Letter Order in *Baynard v. Delaware Attorney Services, LLC et al.*, C.A. No. S12A-08-002 RFS and *Torpey v. Delaware Attorney Services, LLC et al.*, C.A. No. S12A-08-001 RFS.² There the Superior Court affirmed the Board's decisions that a process serving company satisfied the "B" Prong even though process servers pick up deliveries at its place of business and effect service at other locations. The Board implicitly rejected the 'enterprise' location theory relied on here by the Superior Court. The Board also found that the "C" prong was satisfied even though the individuals at issue only worked for one process serving company. Application of the same Board-approved interpretations here confirms that SMS satisfied the "B" and "C" Prongs of the "ABC" test such that the Superior Court's decision on remand to the contrary must be reversed.

A. The Superior Court Erred By Affirming The Board's Conclusion That Ms. Barr Did Not Perform Her Services Outside All Of SMS' Places Of Business.

The Superior Court's "B" Prong holding misreads and misapplies the *Medical Placement* case. It also ignores the Board's current interpretation of the "B" Prong.

² A copy of the Letter Order is attached hereto as **Exhibit B**. It was issued the same day that SMS filed its Reply Brief on Remand below, and SMS provided a copy to the Superior Court on May 29, 2013.

The Superior Court conceded that SMS has places of business outside of Delaware where it conducts business, that Ms. Barr performed no services at those locations, and that SMS did not own, operate or control any location where Ms. Barr did perform services. The Superior Court also conceded that, in *Medical Placement*, the nature of the putative employer's enterprise was such that no business could be conducted on its premises. Unfortunately, the Superior Court then ignored this material distinguishing fact.

The *Medical Placement* Court held that the putative employer could not satisfy the "B" Prong disjunctive of services "performed outside of all the places of business of the enterprise for which the service is performed" precisely because the locations where the individuals performed services were the only locations where any business was performed. There was no other place of business. But here, SMS does have its own places of business, and Ms. Barr performed no services at those places of business. As such, SMS satisfied the plain language requirement of the "B" Prong and demonstrated that *Medical Placement* is inapplicable.

Nothing in the statute or *Medical Placement* supports the Superior Court's conclusion that merchandiser services, because they are not performed at any SMS place of business, are "inherently transient" such that the locations where those services are performed are necessarily "subsumed within the 'place of business' as contemplated by Section 3302(1)(K)(ii)." Decision on Remand at 10-11. That interpretation, if affirmed, would compel the conclusion that any

service within the usual course of the business for which the service is performed can never satisfy the "B" Prong: it will either be performed at that entity's place of business or will be deemed "inherently transient" and constructed to be performed at that entity's place of business. In short, the Superior Court's interpretation nullifies the statutory disjunctive ("or") and everything following that disjunctive. That is plain legal error.

"Statutes 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). The Board may not construe a statute to render part of it "mere surplusage." *Grimes v. Alteon, Inc.*, 804 A.2d 256, 264 (Del. 2002).

Finally, although the Superior Court recited its policy of deference to an agency's statutory construction unless that construction is clearly erroneous, Decision on Remand at 11, it then proceeded to ignore the Board's most recent construction of the "B" Prong in *Baynard* and *Torpey*. In those cases, the Board found that process servers who pick up projects at the company's office satisfy the "B" prong even though the "inherently transient" process serving "enterprise" necessarily includes the outside locations where service is effected. Here, Ms. Barr never set foot in any SMS place of business, and there is no logical difference between a process serving enterprise where service is effected outside of the company's place of business and a merchandising services enterprise where Ms. Barr's services were all performed outside of all of SMS' places of business.

B. The Superior Court Erred by Affirming The Board's Erroneous Conclusion That Ms. Barr Was Not Customarily Engaged In An Independently Established Business.

The Superior Court acknowledged that the record contains "a wealth of evidence" that merchandising is an independently established business and that SMS treated Ms. Barr as an independent contractor. But it still held that SMS did not satisfy the "C" Prong because SMS did not prove that Ms. Barr simultaneously provided merchandising services to multiple companies. By so holding, the Superior Court echoed the Board's position previously advocated before this Court:

JUSTICE BERGER: Well, let me interrupt you. You seem to be suggesting that if the claimant had three other clients, or whatever you'd like to call them -

MR. ELLIS: Yes.

JUSTICE BERGER: -- that were, were part of their business, then that would be fine. But if Spar was the only relationship the claimant had in terms of doing business, then that somehow negates being an independent contractor?

MR. ELLIS: That's, that's right.

April 3, 2013 Oral Argument Transcript, p. 28.

The statute contains no requirement that an independent contractor have multiple clients. No minimum or maximum numbers are prescribed. The number of clients is left entirely to the independent contractor's discretion and initiative. SMS proved that Ms. Barr had substantial opportunity and unlimited discretion to engage with as many merchandising clients as she wanted. The statute requires nothing else, a reality that the Board subsequently accepted in *Baynard* and *Torpey*.

There, the Board declared process servers to be independent contractors despite the fact that they provided services to only one client. There, as here, the individuals were free contractually to work for as many clients as they wished, and the company did not interfere with that right. The Board's correct interpretation in *Baynard* and *Torpey* compels reversal of the Superior Court here.

CONCLUSION

For the foregoing and previously-stated reasons, the Superior Court's decision on remand affirming the Board should be reversed, and this Court should hold that SMS established under all three prongs of the "ABC" test that Ms. Barr provided merchandising services to it as an independent contractor and not as an employee under Delaware law.

Respectfully submitted:

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