



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 POST-REMAND REPLY SUPPLEMENTAL MEMORANDUM

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ARGUMENT

I. SMS SATISFIED THE "B" PRONG, AND THE BOARD'S INTERPRETATION IS ERRONEOUS AS A MATTER OF LAW.

The claimant performed no services at any SMS place of business or at any location owned, operated, controlled or supervised by SMS. As such, SMS met the plain language requirements of the "B" Prong:

[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;

19 Del. C. § 3302(10)(K)(ii) (emphasis added).

The Board contends that the Court should hold that SMS failed to satisfy the "B" Prong based on the holding in *Dep't of Labor v. Med. Placement Services, Inc.*, 457 A.2d 382 (Del. Super. 1982). But the relevant facts differ materially. In *Medical Placement*, the defendant's "enterprise" was construed broadly because the services there were only performed at client locations, and the company had no other place of business. As such, client locations were the only possible place where the defendant could carry out its enterprise.

Here, SMS has other places of business, and the claimant performed no services at those locations. Moreover, the claimant here performed services at her home in addition to the retail stores that SMS did not own, operate, control or supervise. Also unlike the company in *Medical Placement*, SMS did not direct or control the claimant's services at those non-SMS locations.

The Board's further contention that the "B" Prong was violated because a portion of the claimant's services required going inside a

building has no statutory or logical support. The statute does not differentiate between services performed inside or outside of physical structures. Nor is there any logical reason to hold that services performed inside random retail stores that SMS did not own, operate, control or supervise violated the "B" Prong, but services performed by individuals who contracted to deliver newspapers to specified locations pursuant to a regular schedule, see *Athol Daily News v. Bd. of Review of the Div. of Employment and Training*, 786 N.E.2d 365 (Mass. 2003), and services performed by individuals who contracted to serve process for a process serving company, see *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, satisfied the "B" Prong. Whether the claimant entered a building to perform services or remained outside the building but on the property of another bears no relation to whether such services were performed outside of SMS' places of business.

The Board's contention that the claimant's places of business constituted SMS' places of business because her services were within SMS' usual course of business cannot be squared with the plain language of the statute. The "B" Prong expressly permits SMS to prove that services within its usual course of business were performed outside of all of its places of business. SMS met that obligation by proving that it has places of business at which no claimant services were performed, by proving that no claimant services were performed under its direction or control, and by proving that no claimant

services were performed at any location it owned, operated, controlled or supervised. The statute requires nothing more, and neither does *Medical Placement*.

II. MULTIPLE CLIENTS ARE NOT REQUIRED TO SATISFY THE "C" PRONG.

The "C" Prong required SMS to establish that:

[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)(iii). SMS proved that merchandising is an independently established business. SMS proved that the claimant was not trained, supervised, directed or controlled by SMS, that she owed SMS no duty of loyalty, that she alone decided if and when she would contract with SMS, and that she was not obligated to personally perform contracted services. In short, SMS proved that the claimant customarily engaged as an independent contractor in an independently established business whenever she chose to contract with SMS.

The statute requires nothing more. It does not obligate SMS to establish the extent to which the claimant chose to engage with SMS or any other entity. There is no minimum required number of clients. There is no minimum required number of projects or hours of service. There is no minimum required amount of revenue.

The statute only requires proof that the claimant was free to engage in the independently established merchandising business. SMS provided that proof, and the Board provided nothing to the contrary.

Nothing more was required of SMS, a conclusion that the Board, itself, has subsequently confirmed.

Although neither Baynard nor Torpey served process for any [l]other business entity, the Agreement did not preclude this possibility and Ryan did not verbally prohibit this practice.

Baynard and Torpey, 2013 WL 2325302, at *5 (Del. Super. May 23, 2013). It is telling that the Board has not even tried to distinguish its assertion here that SMS must establish the claimant actually performed services for multiple clients from its later admission in *Baynard and Torpey*, affirmed by the Superior Court, that there is no such requirement so long as the contractor is free, by contract and in fact, to work for multiple clients. Simply put, the Board got it wrong here but subsequently got it right in *Baynard and Torpey*.

CONCLUSION

For the foregoing and previously-stated reasons, the Superior Court's decision on remand 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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