

1. The Superior Court affirmed the Unemployment Insurance Appeal Board’s (“UIAB”) determination that appellant, Spar Marketing Services, Inc. (“Spar”), had failed to meet its burden of proof under the so-called “ABC” test of

19 *Del. C. § 3302(10)(K)(i)-(iii)*.¹ The UIAB found that Spar had not satisfied prong “A” of the ABC test, which corresponds to subsection (i) of the statute. As a result, the Superior Court did not reach or address prongs “B” or “C”—which correspond to subsections (ii) and (iii) of the statute, respectively—since Spar was required to satisfy all three prongs in order to prevail.

2. On appeal to this Court, the appellee, UIAB, conceded in its brief that the Superior Court erred in holding that Spar had not satisfied prong “A.” The parties then proceeded to address the merits of prongs “B” and “C,” both of which were addressed by the Board, but not by the Superior Court.²

3. During oral argument before this Court, it became apparent that the parties had not made an adequate presentation on the merits of the issues that

¹ 19 *Del. C. § 3302(10)(K)(i)-(iii)* provides that “employment” means:

(K) Notwithstanding any other provisions of this chapter and irrespective of whether the common-law relationship of employer and employee exists, services performed by an individual for wages, unless and until it is shown to the satisfaction of the Department [of Labor] that:

(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; and

(ii) 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

(iii) 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.

² *Spar Mktg. Servs., Inc. v. UIAB*, 2012 WL 1414097, at *3 (Del. Super. Feb. 28, 2012) (addressing prong “A,” but not prongs “B” or “C”).

pertain to prongs “B” and “C.” As shown by the attached transcript of the oral argument, relevant legal authority was not cited in either party’s brief, including a recent decision by the Appellate Division of the Superior Court of New Jersey.³ As a result, even if we were otherwise inclined to address the merits of the issues pertaining to prongs “B” and “C,” the current record is inadequate for this purpose. It is institutionally preferable that those issues be addressed, in the first instance, after supplemental briefing, by the Superior Court.

NOW, THEREFORE, IT IS HEREBY ORDERED that this matter is REMANDED to the Superior Court to decide the issues pertaining to prongs “B” and “C” of the ABC test, under 19 *Del. C.* § 3302(10)(K), after court-ordered supplemental briefing by the parties. The Superior Court shall submit its supplemental decision to this Court within 90 days from the date of this Order. Jurisdiction is retained.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

³ *Spar Mktg. Servs., Inc. v. New Jersey Dep’t of Labor*, 2013 WL 890071 (N.J. Super. Mar. 12, 2013).