



IN THE SUPREME COURT OF THE STATE OF DELAWARE

SPAR MARKETING SERVICES, INC.,)
)
 Appellant,)
)
 v.) No. 143,2012
)
 UNEMPLOYMENT INSURANCE) On appeal from a decision
) of the Superior Court at
 APPEAL BOARD,)
) C.A. No. K11A-03-003 WLW
 Appellee,)
)
 And)
)
 TAMMY BARR,)
)
 Appellee.)

ANSWERING BRIEF OF APPELLEE
UNEMPLOYMENT INSURANCE APPEAL BOARD

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NATURE OF AND STAGE OF THE PROCEEDINGS

This is an appeal by Appellant, Spar Marketing, Inc. ("Spar"), from the decision of the Superior Court affirming Appellee Unemployment Insurance Appeal Board's ("UIAB") determination that Spar failed to establish that Appellee Tammy Barr ("claimant") was free from its direction and control thus failing to qualify for the statutory exemption from unemployment insurance taxes found at 19 Del. C. § 3302(10)(K). At the request of the court, the Department of Justice submits this Answering Brief on behalf of the UIAB.

SUMMARY OF ARGUMENT

- I. Admitted. Spar established that claimant was free from its direction and control in accordance with 19 *Del. C.* § 3302 (10(K)(i)).
- II. Denied. The UIAB correctly determined that Spar failed to establish that claimant's merchandising services were performed outside Spar's usual course of business or outside all of Spar's places of business.
- III. Denied. The UIAB correctly determined that Spar failed to establish that claimant is customarily engaged in an independently established trade, profession or business of the same nature as Spar's, i.e., providing merchandising opportunities to merchandisers with her own clients for an administrative fee.

COUNTERSTATEMENT OF FACTS

Spar is a supplier of merchandising and other marketing services throughout the United States and internationally to consumer product manufacturers and retailers, mass merchandisers, electronics store chains, and grocery stores. Its clients include home entertainment, general merchandise, health and beauty care, consumer goods and food products companies. Its merchandising services consist primarily of regularly scheduled dedicated routed services and special projects provided at the store level for a specific retailer or single or multiple manufacturers under single or multi-year contracts. (B-1) Its offices are located in Michigan and New York. It has no Delaware office. (B-2)

On December 5, 2008, claimant entered into an "Independent Merchandiser Agreement" with Spar. (B-3 through 5) Pursuant to that agreement, at paragraph 6, claimant was required to purchase insurance or its cost would be deducted from her compensation and its cost would be borne by Spar. Claimant also provided Spar with her social security number. (B-6) The claimant undertook her first assignment with Spar in 2008 and her last in 2010. (B-7) Before merchandisers like claimant are able to accept Spar assignments they must: (1) complete an application setting forth their experience in the merchandising industry; and (2) submit to an interview. Spar paid claimant

directly for her services. (B-8,9) Spar negotiated the terms of claimant's compensation for the assignments she accepted directly with Spar's clients. Claimant was paid for her services on a biweekly basis; Spar received a mark up from its clients for providing "administrative services" to ensure the clients' satisfaction with the work being performed. Claimant and 211 other merchandisers worked under Spar District Manager Debbie Graham who provided administrative services for a 6-state region. Spar merchandisers are paid according to their invoices, assuming the assignment has been completed satisfactorily, whether Spar receives payment from its clients or not. (B-10 through 16) Claimant did not attend the UIAB hearing. (B-17)

ARGUMENT

I. THE SUPERIOR COURT ERRED IN CONCLUDING THAT SPAR FAILED TO PROVE THAT THE CLAIMANT WAS FREE FROM ITS CONTROL AND DIRECTION IN RENDERING MERCHANDISING SERVICES TO SPAR'S CLIENTS.

QUESTION PRESENTED

Whether the Superior Court erred when it rejected Spar's argument asserting that the claimant was free from its control and direction in rendering merchandising services to Spar's clients and that Spar had not satisfied the test of 19 Del. C. § 3302(10)(K)(i)?

STANDARD OF REVIEW

The Delaware Unemployment Compensation Act sets forth the applicable standard of judicial review for a UIAB decision. The findings of the UIAB as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. This court has held that the sole function of the reviewing courts on appeal from an administrative board is to determine whether or not there was substantial competent evidence to support the finding of the board, and, if so, to affirm the findings of the board. *Unemployment Ins. Appeal Bd. v. Div. of Unemployment Ins.*, 803 A.2d 931, 936 (Del. 2002); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965). Substantial evidence means such relevant evidence as a reasonable mind might

accept as adequate to support a conclusion. *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). Further, substantial evidence means more than a mere scintilla of evidence, but is less than a preponderance of the evidence. *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

MERITS OF ARGUMENT

The UIAB concedes that it and the Superior Court erred in concluding that Spar failed to satisfy the test of 19 Del. C. § 3302(10)(K)(i) in determining that the claimant was not free of its direction and control in providing merchandising services to Spar's clients.

II. THE UIAB DID NOT ERR WHEN IT CONCLUDED THAT SPAR FAILED TO ESTABLISH THAT CLAIMANT PERFORMED HER MERCHANDISING SERVICES OUTSIDE THE USUAL COURSE OF SPAR'S BUSINESS OR OUTSIDE SPAR'S PLACES OF BUSINESS.

QUESTION PRESENTED

Whether the UIAB erred when it rejected Spar's assertion that claimant's merchandising services were provided outside all of its places of business?

STANDARD OF REVIEW

The Delaware Unemployment Compensation Act sets forth the applicable standard of judicial review for a UIAB decision. The findings of the UIAB as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. This court has held that the sole function of the reviewing courts on appeal from an administrative board is to determine whether or not there was substantial competent evidence to support the finding of the board, and, if so, to affirm the findings of the board. *Unemployment Ins. Appeal Bd. v. Div. of Unemployment Ins.*, 803 A.2d 931, 936 (Del. 2002). *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

MERITS OF ARGUMENT

The statute at issue in this case exempts employers from unemployment insurance tax assessments if they satisfy the so-called "ABC Test." In order to benefit from the statutory

exemption, Spar had the burden of satisfying all of the exemption's three tests or prongs, and its failure to satisfy even one left it subject to the taxing provisions of Delaware's unemployment insurance law as both the Superior Court and the UIAB held. *Dep't of Labor v. Medical Placement Servs., Inc.*, 457 A.2d 382, 384 (Del. Super. Ct. 1982), *aff'd*, 467 A.2d 454 (Del. 1983) (TABLE).

In Delaware, the definition of "employment" for unemployment insurance tax purposes found at 19 Del. C. § 3302(10)(K)(i-iii) includes all services performed by an individual for wages unless:

- (i) Such individual has been and will continue to be 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. (Emphasis supplied.)

Therefore prong B of the ABC test required a showing by Spar that claimant's merchandising services were provided outside the usual course of its business or outside all the places of its business enterprise. The Superior Court did not analyze this prong of the test however the UIAB did, and

following the reasoning of *Medical Placement Services*, determined that Spar failed the test.

Spar made no efforts to show that claimant's services were offered outside the usual course of its business of bringing merchandisers, like claimant, together with its clients and by whom Spar is paid. Spar, for example, made no showing that claimant went to one of its client's stores to perform services unrelated to merchandising.

Spar made no effort to show that the claimant's merchandising services were performed anywhere other than at its clients' stores. The UIAB concedes claimant may have performed administrative tasks on her computer at home, but her merchandizing services were obviously not done at home. Spar asserts that it has no Delaware offices; claimant worked at home.

Thirty years ago in *Medical Placement Services* a similar argument was made by a business that supplied trained healthcare technicians (registered nurses, license practical nurses, and nurses' aides) to institutions and private individuals on a temporary basis for a fee. Writing for the Superior Court, Judge O'Hara held that the healthcare technicians' services, though provided in private homes or in nursing homes, would be treated as within the employer's place of business because the enterprise of the business (supplying technicians to medical

facilities and private homes) was such that the healthcare technicians' services could not be provided at the employer's premises.

The Spar merchandisers, like claimant, are more closely analogous to the *Medical Placement Services* healthcare technicians than they are to the newspaper delivery workers in *Athol Daily News v. Bd. of Rev. of the Div. of Employment & Training*, 786 N.E.2d 365 (Mass. 2003), cited by Spar, whose connection with the address at which a delivery is to be made is fleeting and insubstantial. In the words of Judge O'Hara, Spar's clients' stores are "necessarily included" within Spar's enterprise within the "places of business" phrase of the statute. Therefore, it is not "illogical" to treat newspaper deliverers differently than merchandisers; it is logical and consistent, to treat merchandisers like healthcare technicians under the Prong B test. The UIAB followed the law and substantial evidence supports its decision.

III. THE UIAB DID NOT ERR WHEN IT CONCLUDED THAT SPAR FAILED TO ESTABLISH THAT CLAIMANT WAS CUSTOMARILY ENGAGED IN AN ESTABLISHED TRADE, OCCUPATION, PROFESSION OR MERCHANDISING BUSINESS

QUESTION PRESENTED

Whether the Superior Court erred when it rejected Spar's argument asserting that the claimant was engaged in an independently established trade, occupation, profession, or merchandising business?

STANDARD OF REVIEW

The Delaware Unemployment Compensation Act sets forth the applicable standard of judicial review for a UIAB decision. The findings of the UIAB as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. This court has held that the sole function of the reviewing courts on appeal from an administrative board is to determine whether or not there was substantial competent evidence to support the finding of the board, and, if so, to affirm the findings of the board. *Unemployment Ins. Appeal Bd. v. Div. of Unemployment Ins.*, 803 A.2d 931, 936 (Del. 2002). *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

MERITS OF ARGUMENT

Prong C of the ABC test required a showing by Spar that claimant was engaged in an independently established trade,

occupation, profession, or merchandising business. The Superior Court did not analyze this prong of the test. However the UIAB did and, again following the reasoning in *Medical Placement Services*, determined that Spar failed the test.

Spar was correct to observe (at page 31 of its Opening Brief) that to meet the Prong C test, it was required to show that claimant, Ms. Barr herself, was customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed, which in this case would be merchandising for hire. Spar was also correct to observe (Opening Brief at page 21) that the record does not indicate whether claimant actually performed merchandising services for other entities because she did not appear at the UIAB hearing. This would seem fatal to its argument. Indeed Spar should have compelled claimant's attendance by subpoena.

Spar offered no proof that claimant was engaged in a merchandisers-for-hire scheme with clients of her own. Spar offered no proof that claimant advertises her own business. Instead, Spar offered (Opening brief at page 4) that "merchandisers such as Barr advertize themselves and solicit work through merchandising companies like Spar."

Contrary to Spar's assertion that it demonstrates her independence, claimant did not voluntarily obtain insurance

coverage, assuming she had it. She was required under Paragraph 6 of the "Independent Merchandiser Agreement" to purchase it to be allowed to undertake Spar assignments. Nor was there proof that she provided Spar with a tax I.D. number for a business, instead she gave Spar her social security card and number. Spar did not offer into evidence any professional or business license issued to claimant or to any business enterprise she may have organized or controlled that she could have either sold or given away.

Spar argues that it did not assume any administrative duties regarding claimant's merchandising services, an assertion contradicted by the testimony of its sole witness who explained that the differential between what Spar was paid by its clients and what Spar paid to the merchandisers was for "administrative services" to make certain work was done on time and correctly.

That claimant was contractually free to accept other merchandising assignments or to delegate Spar assignments to third parties does not constitute substantial evidence that she actually did those things. And while these contract provisions are certainly relevant to a Prong A determination, they are "weightless" in the Prong C context. In short, Spar's arguments concerning what other merchandisers do, or what claimant was contractually free to do, fail to establish the objective it set for itself (and as required by statute), namely, to prove that

the claimant herself was customarily engaged in an enterprise of her own.

The facts in *Yurs v. Director of Labor, Dept. of Labor, Div. of U.C.*, 235 N.E.2d 871 (Ill. App. 1968), a case relied upon by the Superior Court in *Medical Placement Services*, are more nearly analogous to the facts of the instant matter than are those of *Skyhawke Tech. LLC v. Unemployment Compensation Bd. of Review*, 27 A.3d 1050 (Pa. Cmwlth. 2011) cited by Spar where the claimant testified: (1) that he believed himself to be an independent contractor and not an employee when he performed global positioning satellite mapping of golf courses for Skyhawke; and (2) that Skyhawke would not exercise control over “[his] activities or business operation.” *Id.* at 1051. In *Yurs*, on the other hand, an organist who performed at a funeral home was found to be an employee of the funeral home and not an independent contractor where the funeral home: (1) included the organist’s charge as part of the funeral home’s bill to the customer; (2) payment to the organist was made by the funeral home and was not contingent on receiving payment from the customer; (3) there was no evidence that the organist determined her rate of pay; and (4) there was no evidence of any advertising or professional listing of her services.

In closing, the ABC test is meant to be a difficult test for an employer to pass. In fact the Prong A test is essentially

the common law test of establishing a master/servant relationship such that if an employer was to prove the absence of control over a worker, the worker was an independent contractor and the employer had no concerns about being vicariously liable for the worker's acts. In the unemployment insurance setting, however, to avoid liability for unemployment insurance taxes, an employer must show more than an absence of control. This is in harmony with the remedial nature of Chapter 33 of the Delaware Code and is consistent with the court's practice of construing this law in favor of employees who are unemployed through no fault of their own. See *Haskon, Inc. v. Coleman*, 310 A.2d 657 (Del. Super. Ct. 1973). Spar failed the Prong C test. The UIAB followed the law and substantial evidence, more than a scintilla and perhaps a preponderance of the evidence, supports its decision.

CONCLUSION

For the reasons expressed and upon the authorities cited herein, the UIAB respectfully requests this Court affirm its decision or, alternatively, remand this case to Superior Court so it can rule on the issue of whether Spar satisfied the second and third prongs of the "ABC" test.

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CERTIFICATE OF MAILING AND/OR DELIVERY

The undersigned certifies that on October 25, 2012, he caused the Appellee Delaware Unemployment Insurance Appeal Board's **Answering Brief** to be delivered to the following person(s) in the form and manner indicated:

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