



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:
And)
) Superior Court
) in and for Kent County
TAMMY BARR,)
) K11A-03-003 WLW
)
Claimant Below)
Appellee.)

APPELLANT'S REPLY BRIEF

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INTRODUCTION

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.

In its Opening Brief, Appellant argues that the Superior Court and the Board erroneously concluded that Ms. Barr was SMS' employee under the ABC Test. Specifically, under prong "A" of the "ABC" test, the Superior Court erred because (i) the record evidence shows that SMS did not exercise direction and control over Ms. Barr, (ii) there were no restrictions, contractual or otherwise, on Ms. Barr's ability to provide services to SMS' competitors, (iii) Ms. Barr maintained complete discretion to accept or reject assignments offered to her by SMS, (iv) Ms. Barr was permitted to sub-contract SMS assignments to persons of her choosing, and (v) SMS did not control the method or manner in which Ms. Barr completed her assignments, train Ms. Barr, or provide her with tools or equipment to aid her in the completion of her assignments.

With respect to prong "B", which was only considered by the Board, the record evidence demonstrates that Ms. Barr performed all of her services in her home and at various retail locations, *i.e.*

outside of SMS' places of business. 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.

The Board also erroneously applied prong "C" in finding that Ms. Barr was not engaged in an independent trade by relying on legally irrelevant facts and ignoring facts demonstrative of Ms. Barr's independent profession. Specifically, the Board erred because (i) Ms. Barr advertised her services on a national database available to any entity wishing to retain her services, (ii) SMS did not assume administrative responsibilities regarding Ms. Barr, (iii) Ms. Barr retained the unfettered discretion to accept or reject projects, and (iv) 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.

Ms. Barr failed to appear before this Court and did not file an answering brief. Likewise, the Board did not timely file a response to SMS' opening brief. On June 12, 2012, the Court issued a brief delinquency notice warning that if Ms. Barr and the Board did not respond within seven days, the Court would

consider entering an order resolving the matter against Ms. Barr.

Ms. Barr has ignored the Court's June 12 letter and still has not entered an appearance in this Court or filed any response to SMS' opening brief. For its part, the Board decided not to participate in this appeal stating that "[a] body acting in a judicial or quasi-judicial capacity has no cognizable interest in seeking to have its ruling sustained." (Trans. ID. 44986055).

This is SMS' reply brief in further support of its appeal.

ARGUMENT

The Board and the Superior Court held in Ms. Barr's favor, yet Ms. Barr has failed to defend her rights before this Court. Given that both Ms. Barr and the Board have elected not to participate in this appeal, the Superior Court's February 28, 2012 Order should be reversed and this case should be remanded with instructions to deny Ms. Barr's claim for unemployment insurance benefits.

Where a party is meritorious before the Board, but elects not to participate in an appeal of the Board's decision, that party's favorable judgment will be reversed for its "failure to properly defend its interests." *Elder v. Careers USA*, 2011 WL 3081437, at *3 (Del. Super. July 21, 2011) (reversing the Board's decision in favor of the employer where the employer elected not to file an answering brief despite that "under the facts of this case, [the Board's decision] would likely have been affirmed by this Court."). See also *Cohen v. Allied Barton Security Servs.*, 2007 WL 2430062, at *1 (Del. Super. Aug. 24, 2007) ("This Court has held that 'Rule 107(e) inextricably vests in the Court the power to reverse the Board's decision for failure of the Appellee to file its answering brief.' Despite adequate notice, Appellee has not filed an answering brief, nor has it provided any explanation for its inaction. Therefore, due to 'Appellee's failure to diligently prosecute and file its

brief pursuant to Rule 107(e)' the April 5, 2006 decision of the Board is reversed.") (quoting *Hunter v. First USA/Bank One*, 2004 WL 838715, at *4 (Del. Super. Apr. 15, 2004)).

For these reasons, the Superior Court's February 28, 2012 Order should be reversed and this case should be remanded with instructions to deny Ms. Barr's claim for unemployment insurance benefits.

Alternatively, if the Court proceeds on the merits of this case, SMS rests on its arguments set forth in its opening brief.

CONCLUSION

For the foregoing reasons, the Superior Court's order affirming the Board should be reversed and this case should be remanded with instructions to deny Ms. Barr's application for unemployment insurance benefits.

Respectfully submitted:

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