IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

SPAR MARKETING SERVICES, INC.,	:	
Employer/Appellant,	:	C.A. No. K11A-03-003 WLW
	:	
v.	:	
	:	Supreme Court
UNEMPLOYMENT INSURANCE	:	No. 143,2012
APPEAL BOARD,	:	
Appellee,	:	
	:	
and	:	
	:	
TAMMY BARR,	:	
Employee/Appellee.	:	

Findings of Fact and Conclusions of Law
Upon Remand from the Delaware Supreme Court

Submitted: July 9, 2013

David B. Anthony, Esquire of Berger Harris, LLC, Wilmington, Delaware and Thomas J. Vollbrecht, Esquire of Hammargren & Meyer, P.A., of counsel; attorneys for Spar Marketing Services, Inc.

Thomas H. Ellis, Esquire of Department of Justice, Wilmington, Delaware; attorney for Unemployment Insurance Appeal Board.

WITHAM, R. J.

I. Introduction

This is the Court's findings of fact and conclusions of law on remand from the April 11, 2013 order of the Delaware Supreme Court.[1] This Court was given the limited task of determining whether the Unemployment Insurance Appeal Board's determination that Appellant Spar Marketing Services, Inc. (hereinafter "Appellant" or "Spar"), had failed to meet its burden of proof under prongs "B" and "C" of the tripartite test for employment codified at 19 *Del. C.* § 3302(10)(K)(i)-(iii) (hereinafter "the ABC test") is supported by substantial evidence and free of legal error. The parties have submitted their supplemental briefs and this matter is ready for this Court's response.

II. Relevant Factual and Procedural Background

The Court will briefly summarize the salient facts and the present posture of this case. On September 19, 2010, Tammy Barr (hereinafter "Barr"), a merchandiser who worked for Spar, filed a claim for unemployment benefits.[2] The Delaware Department of Labor (hereinafter "the DOL") charged John Avera (hereinafter "Avera"), an Unemployment Insurance Field Agent, with investigating Spar's absence from the registry of employers maintained by the DOL's Division of Unemployment Insurance (hereinafter "the Division").[3] Following this investigation,

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[1] *Spar Mktg. Servs., Inc. v. UIAB*, Del. Supr., No. 143, 2012, Jacobs, J. (Apr. 11, 2013) (ORDER).

[2] *Id.* at *1.

[3] R. at 1, 19.

Avera concluded that an employer/employee relationship existed between Spar and Claimant as defined by 19 *Del. C.* § 3302(10)(K).[4] As an employer, Spar was liable for tax assessments on Claimant's wages.[5] A letter dated October 12, 2010, followed apprising Spar of its employer status and its assessed tax rate.[6]

In a letter dated October 20, 2010, Heidi Savage, Spar's Director of Human Services and Administration (hereinafter "Savage"), disputed the DOL's tax assessment on compensation paid to Claimant.[7] Spar asserted that it classifies all merchandisers, including Claimant, as independent contractors and not employees; accordingly, Spar contended that it was not liable for tax assessment.[8] Spar thereafter appealed the DOL's determination to the Unemployment Insurance Appeal Board (hereinafter "the Board").[9]

The Board held a hearing on January 26, 2011 to consider Spar's appeal.[10] Savage was the sole witness to testify on behalf of Spar.[11] Savage testified that merchandisers contract with retailers to stock shelves and other display spaces at

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[4] R. at 19.

[5] R. at 22-23.

[6] R. at 65.

[7] R. at 24-27.

[8] R. at 27.

[9] R. at 68.

[10] R. at 72.

[11] R. at 73.

retail locations with products.[12] Savage explained that Spar posts jobs on the Internet and the merchandisers are free to select them, but there is no obligation for a merchandiser to take a particular job offer.[13]

Savage further stated that Spar has always treated merchandisers in its service as independent contractors.[14] Savage noted that Spar does not have any offices in Delaware, and that Spar's only business locations are in Auburn Hills, Michigan, and Tarrytown, New York.[15] The merchandisers do not perform work at either location.[16] Savage stressed that the merchandisers are not economically dependent on Spar.[17] Rather, merchandisers work for several different agencies and use a website maintained by the National Association for Retail Merchandising Specialists ("NARMS") to advertise their services and hunt for jobs.[18]

When asked about how merchandisers are paid, Savage testified that when a job is completed, the merchandiser submits an invoice for compensation.[19] The fee

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[12] *Id.*

[13] *Id.*

[14] *See* Tr. of Administrative Hearing, Ex. E., Spar Mktg. Servs., Inc.'s Opening Brf. On Remand, at 4 [hereinafter "UIAB Hearing Tr."].

[15] UIAB Hearing Tr. at 6.

[16] *Id.*

[17] *Id.* at 7.

[18] *Id.* at 6-7.

[19] *Id.* at 8.

received by the merchandiser depends on the particular client, although most fees are paid on a flat, rather than hourly, rate.[20] The merchandiser is not free to negotiate the fee for any given project and must accept what is offered.[21] Spar pays the merchandiser regardless of whether Spar ultimately receives payment from the retailer.[22] However, the store managers direct the behavior of the merchandiser while the merchandiser is on the premises.[23] According to Savage, store managers will, on occasion, refuse to allow a merchandiser to complete an assignment.[24] On such occasions, the merchandiser is not penalized and still receives payment from Spar.[25]

Katherine Rauso, a representative of the Division, also testified.[26] Rauso pointed out that the merchandisers who work for Spar are required to complete an employment application and be accepted by Spar in order to perform certain tasks for Spar's retail store clients.[27] According to Avera's investigation, merchandisers are not told that they're independent contractors until after they have accepted the position

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[20] *Id.*

[21] *Id.*

[22] *Id.* at 13.

[23] *Id.* at 12.

[24] *Id.* at 13.

[25] *Id.*

[26] R. at 74; UIAB Hearing Tr. at 13.

[27] R. at 74.

at Spar.[28] Additionally, Rauso testified that Spar, and not the retailer, gives any negative feedback to the merchandisers.[29]

The Board issued its decision on March 20, 2011.[30] In it, the Board examined the statutory definition of "employment" for the purposes of unemployment insurance taxes, codified by 19 *Del. C.* § 3302(10).[31] The Board then evaluated whether Spar satisfied the statutory exclusion, commonly known as the ABC test.[32] The Board concluded that Spar failed to show that its services fell outside those of employment by satisfying each of the three prongs of the ABC test.[33] The Board relied in large part on the 1982 Superior Court decision in *Department of Labor v. Medical Placement Services*, in which the court found that Medical Placement Services failed to meet its burden of establishing all three prongs of the ABC test, and thus was an employer of the medical technicians it supplied to institutions and private individuals on a temporary basis for a fee.[34]

Spar thereafter filed a timely appeal of the Board's decision to this Court

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[28] *Id.*

[29] *Id.*

[30] R. at 74-76.

[31] R. at 74.

[32] R. at 75.

[33] R. at 74-75.

[34] R. at 75.

pursuant to 19 *Del. C.* § 3344.[35] In a decision issued on February 28, 2012, this Court concluded that substantial evidence supported the Board's conclusion that Spar did not meet its burden with respect to prong A of the ABC test.[36] Having concluded that the ABC test is conjunctive, this Court did not evaluate whether substantial evidence supported the Board's findings with respect to the second and third prongs.[37] The holding was reached without the benefit of briefing by the Board, which had declined to participate.[38]

Spar filed a timely appeal to the Delaware Supreme Court.[39] The Supreme Court directed the Board to participate in Spar's appeal.[40] In its answering brief, filed on October 25, 2012, the Board abandoned its previous position and conceded that Spar satisfied prong A of the ABC test.[41] However, the Board continues to contend

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[35] R. at 82.

[36] *Spar Mktg. Servs., Inc. v. UIAB & Barr,* 2012 WL 1414097, at *3 (Del. Super. Feb. 28, 2012).

[37] *Id.*

[38] *Id.* at *1.

[39] Spar Mktg. Servs., Inc.'s Opening Brf. On Remand at 1 [hereinafter "SMS's Opening Brf."].

[40] *Id.*

[41] *See* Ans. Brf. of Appellee Unemp't Ins. App. Bd., E-File 47328945, at 6. This Court notes that it is unfortunate that the UIAB chose not to participate at the Superior Court level which would have been helpful.

that Spar has not carried its burden with respect to prongs B and C.[42] The Supreme Court heard oral argument on April 3, 2013.[43] During the course of argument, the Supreme Court determined that the record was not adequately developed with respect to prongs B and C, and remanded the case in an order issued on April 11, 2013.

The Court will now ascertain whether the Board's findings and conclusions with respect to prongs B and C are supported by substantial evidence and free from legal error.

III. Standard of Review

Appellate review of an administrative agency decision is limited.[44] This Court's role in reviewing a decision of the UIAB is to determine whether the Board's factual findings are supported by substantial evidence and whether its decision is free of legal error.[45] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[46] This Court does not substitute its judgment for that of an administrative body, even if it would have reached a different conclusion.[47]

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[42] *Id.* at 7-15.

[43] *See* SMS's Opening Brf. Ex. A.

[44] *E.I. DuPont De Nemours & Co. v. Faupel,* 859 A.2d 1042, 1046 (Del. Super. 2004).

[45] 19 *Del. C.* § 3323(a); *Histed v. E.I. DuPont de Nemours & Co.,* 621 A.2d 340, 342 (Del. 1993).

[46] *Olney v. Cooch,* 425 A.2d 610, 614 (Del. 1981).

[47] *Id.* at 613.

IV. Discussion

Unemployment insurance taxes are governed by the definitions provided in 19 *Del. C.* § 3302. Subsection (10)(K) provides that individuals who perform services for others for wages are presumed to be employees, unless the recipient of the services satisfies the statutory exclusion, commonly known as the "ABC" test. That test provides that wages are to be assessed by an employer unless and until it has been shown to the satisfaction of the Department of Labor that:

> (i) Such individual has been or 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
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> (ii) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside all of the places of business of the enterprise for which the service is performed; and
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> (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.[48]

This test is conjunctive; failure to satisfy any one of the prongs will render the enterprise subject to the act.[49]

The first issue to be decided on remand is whether the Board's determination that Spar did not meet its statutory burden of proof with respect to Section 3302(10)(K)(ii) (hereinafter "Prong B") is supported by substantial evidence and free of legal error. In its March 20, 2011 decision, the Board determined that Spar failed

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[48] 19 *Del. C.* § 3302(10)(K)(i)-(iii).

[49] *State Dep't of Labor v. Med. Placement Servs., Inc.,* 457 A.2d 382, 384 (Del. 1982).

to show that the services its merchandisers provide are performed outside the usual course of business or are performed outside all places of business of the enterprise for which the service is performed. Spar now contends that this conclusion is unsupported by substantial evidence in the record, and relied upon a misreading of the plain language of 19 *Del C.* § 3302(10)(K)(ii). The Court disagrees.

Prong B of the ABC test required Spar to show that Barr's "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."[50] When tasked with interpreting this subsection, the Board looked to this Court's decision in *State Department of Labor v. Medical Placement Services, Inc.*, for guidance.[51] In *Medical Placement Services*, the Court was tasked with determining whether M.P.S., a supplier of medical technicians, was an employer for unemployment insurance tax purposes.[52] In that case, the Court concluded that the very nature of the supplier's enterprise was that business could not transpire on its premises; that is, "the enterprise in which M.P.S. is engaged involves supplying technicians to *medical facilities and private homes.*"[53] Drawing an analogy between Spar's merchandisers and the medical technicians employed by Medical Placement Services, the Board determined that the merchandisers' work is inherently

[50] § 3302(10)(K)(ii) (emphasis added).

[51] R. at 74.

[52] *Medical Placement*, 457 A.2d at 383.

[53] *Id.* at 386.

transient, and as such, the retail locations at which Spar's merchandisers work are subsumed within the "place of business" as contemplated by Section 3302(10)(K)(ii).[54]

Spar argues that this analogy is not sound and that the Board's reliance upon the *Medical Placement* opinion constitutes a reversible error of law. It urges this Court to narrowly construe the phrase "the places of business" as used in Section 3302(10)(K)(ii) to exclude the retail establishments in which the merchandisers perform their services. I decline to do so. This Court has, on at least one occasion, declined to narrowly define this phrase.[55] However, it has not yet explicitly defined this phrase for the purposes of unemployment compensation. When confronted with a novel issue of statutory construction, it is the policy of this Court to defer to an administrative agency's construction of its own regulations and statutes administered by that agency, unless the Court finds such construction clearly erroneous.[56] Furthermore, the Unemployment Compensation Act is remedial, and, consequently, it should be liberally construed in favor of its beneficiaries.[57] As such, the Court finds that the Board did not clearly err in determining that the retail establishments in

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[54] R. at 74.

[55] *See Medical Placement*, 457 A.2d at 386 n.5 (citing *Bluto v. Dep't of Emp't Sec.*, 373 A.2d 518 (Vt. 1977), for its definition of "place of business," which was held to include the business area in which the employer operated).

[56] *Toccafondi v. Bd. of Pension Trustees,* 1994 WL 234004, at *3 (Del. Super. May 11, 1994).

[57] *White v. Security Link,* 658 A.2d 619, 623 (Del. Super. 1994).

which the merchandisers perform their services are necessarily included within Spar's enterprise and are, thus, subsumed within "place of business" as contemplated by Section 3302(10)(K)(ii).

Moreover, there is substantial evidence in the record to support the Board's conclusion that Spar did not satisfy the requirements of Prong B. A careful review of the record reveals that Spar has only two business locations, and neither are located in Delaware. Furthermore, Savage testified that the merchandisers Spar utilizes do not perform work at either the Michigan or New York location. Instead, it is the nature of Spar's business enterprise that the merchandisers it utilizes perform their services at Spar's clients' retail stores. Accordingly, the retail establishments in which the merchandisers work are virtually indistinguishable from the locations considered by the Superior Court in *Medical Placements*.

In sum, because there is substantial evidence in the record to support the Board's factual findings and the Board committed no legal error, the Board's conclusion that Spar did not satisfy Prong B of the ABC test is affirmed.

Drawing an analogy between Spar's merchandisers and the claimants in *Medical Placement*, the Board found that the substantial weight of the evidence demonstrates that Spar controlled its merchandisers within the meaning of 19 *Del. C.* § 3302(10)(K)(i). Turning to the second prong, the Board also found that the merchandisers' services were not performed either outside of Spar's usual course of business or performed outside of all of the place of business of the enterprise for which the services were performed.

The Court next considers whether the Board properly applied the third prong

of the ABC test to the facts presented. Spar takes issue with the Board's finding that the merchandisers were not "customarily engaged in an independently established trade, occupation, profession or business of the same nature" as Spar, as required by Section 3302(10)(K)(iii) (hereinafter "Prong C"). Appellant contends that it fully satisfied its obligation under this prong by presenting evidence in the form of Savage's testimony and documentation that Barr customarily engaged in an independently established business of the same nature as that of Spar. Appellant points to a wealth of evidence supporting this conclusion: merchandisers are free to accept and reject projects; maintain their own general liability and workers' compensation insurance; market their services to Spar and more than ninety other merchandising companies through an independent trade association and website; and work for other companies, including Spar's competitors.

Although Appellant demonstrated that it regarded and treated the merchandisers as independent contractors, it did not establish particular facts demonstrating that Barr herself maintained an independently established merchandising business. Barr did not testify at the hearing, and the record does not indicate whether she actually performed merchandising services for other companies, nor does it conclusively establish whether her livelihood depended on her continued relationship with Spar. Evidence that the merchandisers, as a class, were contractually free to accept assignments from Spar's competitors and other merchandising companies leads to no different conclusion. The dictates of Section 3302(10)(K)(iii) are clear. The enterprise seeking to invoke the statutory exception must provide support, in the form of testimonial or documentary evidence presented at the

administrative hearing, that the *claimant* "is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."[58] Savage's testimony, without more, is not enough to satisfy Prong C of the ABC test. Accordingly, the Board's conclusion that Appellant failed to satisfy the requirements of Section 3302(10)(K)(iii) is affirmed.

CONCLUSION

For the reasons stated above, Appellant has failed to satisfy, by a preponderance of credible evidence, prongs B and C of the ABC test. Therefore, I continue to recommend that the decision of the Unemployment Insurance Appeal Board be affirmed.

NOW, THEREFORE, IT IS ORDERED that the Prothonotary shall forthwith transmit these findings and conclusions of law to the Clerk of the Supreme Court of Delaware.

Resident Judge

WLW/dmh
oc: Prothonotary
xc: Counsel of Record
Delaware Supreme Court

[58] 19 *Del. C.* § 3302(10)(K)(iii).