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.	:	
	:	
UNEMPLOYMENT INSURANCE	:	
APPEAL BOARD,	:	
Appellee,	:	
	:	
and	:	
	:	
TAMMY BARR,	:	
Employee/Appellee.	:	

Submitted: December 23, 2011
Decided: February 28, 2012

ORDER

Upon an Appeal of the Decision of the Unemployment Appeal Board. *Affirmed.*

David B. Anthony, Esquire of Berger Harris, Wilmington, Delaware and Thomas J. Vollbrecht, Esquire of Faegre & Benson, LLP, of counsel; attorneys for the Appellant.

Tammy Barr, *pro se.*

WITHAM, R.J.

The issue before the Court is whether Spar Marketing Services, Inc. met its burden of proving that the Appellee meets all three criteria under 19 *Del. C.* § 3302(10)(k).

FACTS

Tammy Barr (hereinafter "Appellee") started working for Spar Marketing Services, Inc. (hereinafter "Appellant") as a merchandiser in March of 2007. Appellant is a merchandising company with offices in Michigan and New York. Appellant states that it is one of more than ninety (90) companies offering merchandising services in the State of Delaware. Among other things, Appellant contracts with individuals to perform merchandising projects in retail stores. These projects entail constructing product displays in stores. None of these stores are owned, operated, or controlled by Appellant.

Appellee filed a claim for unemployment benefits on September 19, 2010. Department of Labor Field Agent John Avera (hereinafter "Avera") investigated the absence of Appellant from registry with the Delaware Department of Labor Division of Unemployment Insurance (hereinafter "Division"). Based on Avera's initial investigation, he determined that Appellant was an employer under Delaware law and sent Appellant a letter dated September 24, 2010 regarding this finding. A letter from the Division followed on October 12, 2010, informing Appellant, "You are recognized as a new employer," and apprising it of its assessed tax rate. Appellant responded in a letter dated October 20, 2010, disputing the Division's classification of Appellee as an employee rather than as an independent contractor and appealing

that decision.[1] The Unemployment Insurance Appeal Board (hereinafter "Board") heard the appeal on January 26, 2011. Appellant's representative Heidi Savage testified, as did a representative of the Division. Appellee did not appear at the hearing.[2] The Board stated that Appellant did not meet its burden of proving that the relationship between Appellant and Appellee fit within all three requirements for the exception to employment under 19 *Del. C.* § 3302(10)(k)(i)-(iii), and it affirmed the Division's determination that Appellant was an employer under the unemployment compensation laws of Delaware. Appellant now appeals to Superior Court pursuant to 19 *Del. C.* § 3344(c).

Standard of Review

The reviewing court serves to determine whether substantial evidence supports the Board's decision.[3] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a particular conclusion.[4] It is more than a

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[1]Appellant's response was timely filed pursuant to 19 *Del. C.* § 3344(a), which allows for 15 days to appeal the administrative ruling.

[2]Appellant points out in its reply that Appellee's brief in response to Appellant's opening brief makes numerous assertions of fact not in the record. This included e-mail documents attached as exhibits. Insofar as her submission attempts to bring new facts and documents into the record, the Court disregards such evidence as the Court is limited to consideration of evidence in the record below. 19 *Del. C.* § 3344(d); *Div. of Unemployment Insurance of Del. Dep't of Labor v. Cavan*, 1997 WL 716904, at *3 (Del. Super. Aug. 25, 1997).

[3]*Kondzielawa v. Ferry, Joseph & Pearce, P.A.*, 2003 WL 21350538, at *3 (Del. Super. June 6, 2003).

[4]*Parks v. Wal-Mart*, 2004 WL 1427016, at *2 (Del. Super. June 24, 2004).

scintilla and less than a preponderance.[5] In addition, the Court must determine whether the Board's decision is free from legal error.[6] Superior Court does not hold responsibility as a trier of fact with authority to weigh evidence, to determine credibility, or to make findings of fact and conclusions.[7]

> 19 *Del. C.* § 3344 states in pertinent part:
> (a) The Department may delegate to a suitable employee of the Department the power to make preliminary determinations on all questions relating to the liability of employing units for the assessments mentioned in this subchapter, but such administrative rulings shall be subject to the review of the Unemployment Insurance Appeal Board. . . .
> . . . .
> (c) The Unemployment Insurance Appeal Board's decision shall be final and conclusive as to the liability of the employing unit unless, within 10 days after mailing thereof the complainant or the Department appeals to the Superior Court for the county in which the complainant resides.
>
> 19 *Del. C.* § 3302(10) states as follows:
> "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 that: (i) Such individual has been and will continue to be free from control and

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[5] *City of Wilmington v. Clark*, 1991 WL 53441, at *2 (Del. Super. Mar. 20, 1991) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

[6] *PAL of Wilmington v. Graham*, 2008 WL 2582986, at *4 (Del. Super. June 18, 2008) (citing *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265 (Del. 1981)).

[7] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

> 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.

DISCUSSION

Appellant states three grounds for appeal of the Board's decision: (1) the Board's factual findings are not supported by substantial evidence; (2) the Board's legal conclusions that Appellant is an "employer" and that Appellee performs "services" on Appellant's behalf are erroneous; and (3) the Board abused its discretion.

Addressing the Appellant's first and second grounds for appeal, before the burden falls upon Appellant to fulfill the three conditions for a statutory exemption under 19 *Del. C.* § 3302(10)(K), Appellee must first prove that she performed services for wages with Appellant.[8] Simply put, wages are "all remuneration for personal services . . . ."[9] As the Board noted, services must be performed on behalf of the employer and not for personal customers of the claimant from whom the employer receives no benefit.[10] There exists substantial evidence on the record that

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[8] *Cavan*, 1997 WL 716904, at *5.

[9] 19 *Del. C.* § 3302(18).

[10] *See Cavan*, 1997 WL 716904, at *6.

Appellee and the other merchandisers associated with Appellant are paid directly by Appellant for the services they provide. In the Court's mind, two facts provide substantial evidence that the services in question were performed on behalf of Appellant. First, Appellant's representative, Heidi Savage, testified that a merchandiser is paid regardless of whether Appellant ultimately receives payment from a client/store. Second, from time to time a store manager refuses to allow the merchandiser to finish his or her work. On these occasions the merchandiser still receives payment from Appellant. These two facts lend substantial evidence to the conclusion that Appellee provided services on behalf of Appellant.

In attempting to avoid liability for unemployment insurance payments, the employer bears the burden of proving that claimant meets all three of the statutory conditions under 19 *Del. C.* § 3302(10)(K).[11] In examining the nature of the relationship between the parties, the common law principles of master and servant do not apply.[12] The first requirement of the statute is with regard to control exercised in the relationship: "(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 . . . ."[13] The

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[11]*Dep't of Labor v. Medical Placement Servs., Inc.*, 457 A.2d 382, 384 (Del. Super. 1982), *aff'd*, 467 A.2d 454 (Del. 1983) (TABLE). It is important to note that this case discusses 19 *Del. C.* § 3302(9)(k). *Id.* at 383-84. Subsequently, the provision moved to 19 *Del. C.* § 3302(10)(K), but the language of the provision did not change. *Cavan*, 1997 WL 716904, at *6 n.1.

[12]*Medical Placement Servs., Inc.*, 457 A.2d at 384.

[13]19 *Del. C.* § 3302 (10)(K)(i).

Court maintains a liberal interpretation of "control" in favor of the claimant.[14]

The Board correctly cited to19 *Del. C.* §3302(10)(K) and the *Department of Labor v. Medical Placement Services, Inc.* case. The Board found the Court's control factors analysis in the *Medical Placement* case to be similar to the control factors at play in this case. In deciding that a referral service exercised control, the *Medical Placement* Court noted:

> "In the instant case, M.P.S. maintains a pool of qualified technicians to be contacted as needed. Included in the contract of employment is a provision that the technicians 'shall be solely responsible as Independent Technician.' Moreover, the technicians are assigned to their respective situations as specified by M.P.S. Finally, M.P.S. determines the rate and schedule of payment and pays its technicians out of its own account."[15]

The Board noted that Appellant maintained a pool of merchandisers contacted on an as needed basis. The merchandisers are required to sign an "Independent Merchandiser Agreement," which states therein that the merchandiser will be considered an independent contractor. The Board found that the agreement itself contains several provisions indicative of control: a professionalism requirement, a requirement to maintain worker's compensation and general liability insurance, a requirement to follow certain invoicing procedures, and a requirement to have an active e-mail account. The Court finds this to be substantial evidence that Appellant exercised control over Appellee and failed to meet its burden of proving that the

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[14]*See Medical Placement Servs., Inc.*, 457 A.2d at 385.

[15]*Id.*

claimant meets all three requirements of 19 *Del. C.* § 3302(10)(K). "Failure of the employer to demonstrate a claimant's relationship to even one of the statutory conditions will leave him within the parameters of the Act with all its attendant benefits."[16] As such, the Court need not reach the second and third prongs of 19 *Del. C.* § 3302(10)(K).

With regard to Appellant's third ground for appeal, abuse of discretion by the Board, after a full review of the record, the Court finds that the Board complied with all applicable provisions of 19 *Del. C.* § 3344. There is no evidence of an abuse of discretion by the Board.

CONCLUSION

The Board put forth substantial evidence that Appellant failed to meet its burden of proof of establishing that Appellee meets all three criteria of 19 *Del. C.* § 3302(10)(K). The Board's decision is hereby affirmed.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: David B. Anthony, Esquire
Tammy Barr, pro se

[16] *Id.* at 384.