SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5264

May 23, 2013

Susan E. Baynard
P.O. Box 249
Greenwood, DE 19950

Richard E. Torpey
3601 Washington, Apt.2
Wilmington, DE 19802

Thomas R. Riggs, Esquire
Ferry, Joseph & Pearce, P.A.
824 Market St. Suite 2
P.O. Box 1351
Wilmington, DE 19899

RE: *Susan E. Baynard v. Delaware Attorney Services, LLC and Unemployment Insurance Appeal Bd.*
C.A. No. S12A-08-002 RFS
Date Submitted: March 12, 2013

Richard E. Torpey v. Delaware Attorney Services, LLC and Unemployment Insurance Appeal Bd.
C.A. No. S12A-08-001 RFS
Date Submitted: April 5, 2013

Dear Ms. Baynard, Mr. Torpey and Mr. Riggs:

I decide these separate cases in one Letter Order because of their similarity of facts and issues. The issued raised on appeal from the Unemployment Insurance Appeal Board ("Board") is whether the Claimants were employees or independent contractors for Delaware Attorney Services, LLC ("DAS").[1]

[1]The Board is a party by statute but takes no position on this appeal.

Uncontested facts. Claimant Susan Baynard ("Baynard") and Claimant Richard Torpey ("Torpey")(or "Claimants") both worked as process servers for Golt Adjustment Services ("Golt"). When the owner died unexpectedly, his sole proprietorship was closed. Without interruption in work, Kim Ryan ("Ryan"), who had been Golt's office manager. opened DAS in July 2011. DAS was engaged in the business of process serving.

As part of her enterprise, Ryan informed the process servers who had worked for Golt that if they stayed with DAS, they would be working as independent contractors. She provided each one with an Independent Contractor Agreement (the "Agreement"). Baynard signed the Agreement. Torpey did not.

Posture. In February 2012, Baynard filed a petition with the Department of Labor ("DOL"), Division of Unemployment ("Division") for unemployment benefits. In March 2012, Torpey filed for unemployment benefits. On March 22, 2012, a Division claims deputy referred both cases to a Departmental Referee to determine whether Baynard and Torpey were "self-employed individuals."

The Appeals Referee scheduled a hearing for each Claimant. Baynard did not appear for her hearing. Appearing for DAS were Kim Ryan ("Ryan") and Daniel Newcomb "(Newcomb"), president and vice president of DAS, respectively. The Referee concluded that under 19 *Del.C.* § 3302(10)(K) Baynard was an employee of DAS and not an independent contractor. This result means DAS was responsible to report Baynard's wages and also for the payment of assessments in the amount determined by the DOL.

Torpey attended the Appeal Referee's hearing, as did Ryan and Newcomb. Torpey testified that Golt had always deducted taxes from his pay including unemployment taxes. He also stated that DAS had existed under Golt, but Ryan explained that Golt traded under different names, including one named Delaware Attorney Services, which had no relation to Delaware Attorney Services, LLC, that is, DAS.

By February 2012, DAS had no further work for Torpey. The Appeals Referee found that Torpey was a DAS employee who had been discharged from his work without just cause and therefore entitled to unemployment benefits. DAS did not appeal the discharge finding.

Standard of review. This Court's role on a decision of an administrative decision is to determine whether the agency's factual findings are supported by substantial evidence and whether the decision is free of legal error.[2] The Court will not disturb the agency's findings if there is evidence in the record from which the agency's conclusions could be fairly and reasonably drawn.[3]

Board's factual findings as to Baynard stand. DAS appealed to the Board to reverse the Appeals Referee's decision that Baynard was an employee. Baynard did not appear. Ryan testified that Baynard signed the Agreement, which was in evidence. Counsel had entered an appearance for DAS and argued that the Appeals Referee misapplied 19 *Del.C.*§ 3302 to Baynard's case. Section 3302 provides definitions that govern unemployment insurance taxes.[4]

To start with the Agreement, "Section Three, Relationship of the Parties" provides that the parties are in an "Independent Contractor-Owner relationship." Further, the Contractor "is not to be considered an agent or employee of Owner for any purpose," nor is the Contractor entitled to any benefits provided to Owner's employees. The "Owner is interested only in the results to be achieved, and the conduct and control of the work will lie solely with the Contractor." Baynard signed the Agreement August 31, 2011. The plain language of the Agreement shows that Baynard was an independent contractor for DAS.

The Board reversed the decision of the Referee, finding instead that DAS showed that under 19 *Del.C.* § 3302 Baynard was a sub-contractor not an employee of DAS.

On appeal to this Court, Baynard intertwines the facts of her Golt work and her DAS work. Appended to her brief are six exhibits which contain information that could have been presented at either hearing, if Baynard had appeared. As it is, this Court may not consider the documents for the first time on appeal. The question at bar is the nature of Baynard's work status at DAS, and the Golt argument is irrelevant

---

[2]*Histed v. E.I DuPont de Nemours & Co.*, 621 A.2d 340 (Del.1993).

[3]*Asplunh Tree Expert Co. v. Clark*, 369 A.2d 1084 (Del.Super.).

[4]*Life Force Caregivers, Inc. v. Unemployment Ins. App. Bd.*, 2012 WL 1409638, *4 (Del.Super.).

to this inquiry.

As to DAS, Baynard argues that she was classified as a sub-contractor but treated like an employee. Her only support for this assertion is that sometimes she was given specific delivery times for service. These dates or times are set by a court, not by DAS. Baynard argues that she signed the Agreement only because she needed the work.

None of these arguments overrides the determinative facts that Baynard understood that DAS worked with the process servers as independent contractors and that she signed the Agreement, which she also understood.

In her reply brief, Baynard argues for the first time that she had been receiving unemployment benefits from her employment with Golt. Without ruling on the merits, the Court finds that Baynard waived this argument by not raising it below.

The evidence supports the terms of the Agreement. Baynard controlled the time and manner of affecting service, except for mandatory deadlines set by a Delaware Court. Baynard was paid per delivery and did not have a set schedule. She worked on call, as needed, and she was not precluded from performing similar work for other service providers. She received no benefits from DAS. She was free to turn down a job, in which case, DCA would contact another process server.

The Board's factual finding that Baynard worked as an independent contractor is supported by substantial record evidence and will not be disturbed on appeal.

The Board's factual findings as to Torpey stand. DAS appealed to the Board to reverse the Appeals Referee's decision that Torpey was an employee.

Ryan testified that when DAS was formed in July 2011, she asked the process servers if they wanted to work for DAS as independent contractors because DAS did not have as much work as Golt had had. The process servers agreed and signed IRS Forms W-9 and 1099 as independent contractors. Torpey did not sign the Agreement, but he was given work in his area and complied with the terms in the Agreement.

Ryan testified that Torpey was paid a flat rate per job, was not reimbursed for his expenses, that he could have worked for other process serving businesses, that

Torpey had no set hours and controlled the manner in which he made service. She testified that based on more than 20 years in the process service business, she learned that most such businesses rely on independent contractors to make service and hire employees only for administrative positions.

Torpey stated that did not sign the Agreement because his attorney was out of town. He said at one point that he knew of no changes at DAS and at a later point testified that Ryan said changes were going to be made. Torpey noted differences in his DAS paychecks, which Ryan attributed to working with a different bank.

The Board reversed the decision of the Appeals Referee, finding instead that Torpey was an independent contractor not an employee of DAS.

On appeal to this Court, Torpey argues first that Ryan misrepresented the facts when she testified that she did not reimburse Torpey for his expenses. Torpey addressed the Board, but he did not respond to Ryan's statement or make any references to reimbursement. An issue not raised below will not be considered on appeal, nor will the documents attached to Torpey's brief be considered. The Board included Ryan's statement about reimbursement in its summary of the evidence but did not rely on it in reaching its conclusion.

Even if Ryan had been reimbursed, this fact alone would not outweigh the substantial evidence that Torpey was an independent contractor for DAS.

Torpey argues next that his work was controlled by Ryan. He asserts that by calling him when there was work, by giving him time-sensitive documents and by requiring him to call in with his results at the end of the work day, DAS controlled his work. However, these factors are inherent to the business of process serving and do not establish that DAS controlled the manner in which Torpey carried out his work. The question of control of work is one of degree.[5] DAS provided Torpey with work when it was available. Although he had to report to the DAS office to pick up the paperwork and report his success or failure, those factors do not prove a degree of control that establishes an employee/employer relationship. Torpey affected service as he chose and was accountable for his methods.

---

[5]*Nocks v. Townsend's, Inc.*, 1999 WL 743658, *6 (Del.Super.).

Torpey asserts that because he intentionally worked only for DAS, he is a DAS employee. Ryan testified that the process servers were not prohibited from working for other such companies. Torpey chose to work for one company. His decision does not mean that he is a DAS employee.

In his reply brief, Torpey argues that he never noticed a change in his IRS 1099 form because H.R. Block prepared his taxes. Torpey was informed by Ryan of his change in status, a fact which he does not dispute. This argument has no merit.

This Court has previously stated that despite any contract or understanding between the parties, a Court must look to the actual circumstances of employment to the nature of the work relationship.[6] Although Torpey was not a party to the Agreement, he did not protest its terms, and, in fact, continued to work for DAS on the new terms. The Board's factual finding that Torpey was an independent contractor is supported by substantial record evidence and will not be disturbed on appeal.

Legal discussion. Unemployment insurance taxes are governed by the definitions provided in 19 *Del.C.* § 3302.[7] Section 3302(10)(A)–(J) define types of employment for which employers must assess employees' wages for taxation purposes. Subsection (10)(K) requires that wages are to be assessed by an employer

> 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 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 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.

---

[6] *State v. Medical Placement Services, Inc.*, 457 A.2d 382, 384 (Del.Super.1982).

[7] *Life Force, supra*, at *4.

Under this statute, the Board's first determination is whether the individual performed services for wages.[8] The party seeking to apply the exception bears the burden of showing this fact.[9] As to both Claimants the Board found that it was undisputed that both Claimants affected service on behalf of DAS and both received a predetermined fee from DAS for each successful delivery. This finding is supported by substantial record evidence and consistent with case law.[10]

The burden then shifts to the business owner to prove each of the three statutory criteria.[11] As to the first criterion, I found above that DAS did not control or direct the performance of either Baynard or Torpey in deciding how to affect service. Both Claimants picked up work from the DAS office and carried out the task as they chose.

While Torpey did not sign the Agreement, he was on notice of this fact and signed tax forms pertinent to independent contractors. He acted in compliance with the terms of the Agreement. As this Court has previously stated, "regardless of any contract or agreement between the parties, a Court must look to the actual circumstances of employment to determine whether the relationship meets the exclusion criteria."[12] The Court finds that DAS has carried its burden of proof on the first criterion as to Baynard and Torpey.

The second criterion requires a showing that the service is performed outside the ususal course of business or is performed outside all places of business for which the service is performed. Here, the second provision applies. Claimants performed

---

[8]*Life Force Caregivers, supra* at *4 (Del.Super.)(citing *State Dep't. of Labor v. Medical Placement Services, supra,* at 384 (Del.Super.1982).

[9]*Id.*

[10]In *Shaving Mug, Inc. v. Unemployment Ins. App. Bd.*, 1982 Del.Super. LEXIS 1015 (not reported in Westlaw), this Court found that barbers and hairdressers were not paid wages by Shaving Mug because the operators received fees for their services directly from customers. Further, the customers were the operators' customers not Shaving Mug's customers.

[11]*Medical Placement Services, supra,* at 384.

[12]*Div. of Unemployment ins. of the Delaware Dep't. of Labor v. Cavan*, 1997 WL 716904, *4 (Del.Super.)(citing *Medical Placement Services, supra*, at 384).

their work outside DAS's place of business by traveling to various addresses throughout Delaware to make service. Both Claimants testified that they came to the DAS office only to pick up paperwork to be delivered. They had no office time. DAS has met its burden of proof that Baynard and Torpey worked outside the DAS office. This conclusion is confined to the facts of this case, which are consistent with an independent contractor status, and shall not be construed to mean that all process servers meet this requirement.

The third criterion is that the individual is customarily engaged in an independently established business of the same nature as that of DAS. That is, independent contractors often work for more than one company. Ryan testified that it is customary in the process serving profession, it is industry practice to use independent contractors. Although neither Baynard nor Torpey served process for any another business entity, the Agreement did not preclude this possibility and Ryan did not verbally prohibit this practice.

For all these reasons, the Court concludes that the Board's factual findings in *Baynard v. Delaware Attorney Services, Inc.* and in the separate case of *Torpey v. Delaware Attorney Services, LLC* are supported by substantial evidence and the decision is free from legal error.

The decision of the UIAB as to Susan Baynard is **AFFIRMED.**

The decision of the UIAB as to Richard Torpey is **AFFIRMED.**

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes