IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LIFE FORCE CAREGIVERS, INC., a Delaware corporation, Appellant, v. The UNEMPLOYMENT INSURANCE APPEAL BOARD, and GJ POUR, Appellees.	))))))))))))	C.A. No.: N11A-02-005 JRS

Date Submitted: October 25, 2011
Date Decided: January 19, 2012

Upon Consideration of
Appeal From the Unemployment Insurance Appeal Board.
REMANDED.

O R D E R

This 18th day of January, 2012, upon consideration of the appeal of Life Force Caregivers, Inc. ("Life Force") from the decision of the Unemployment Insurance Appeal Board (the "Board"), dated December 15, 2010, affirming the Appeals Referee's determination that Life Force is subject to insurance tax assessments under

Delaware's unemployment insurance statute, it appears to the Court that:

1. Life Force is a licensed Personal Assistance Services Agency ("PASA") regulated by Delaware's Department of Health and Social Services ("DHSS") under 16 *Del. Admin. C.* 4469 *et seq.*[1] Life Force refers live-in caregivers ("Direct Care Workers" or "Caregivers") to elderly clients.[2] Under the PASA regulations, a "Direct Care Worker" is an individual "employed by or under contract to a personal assistance services agency to provide personal care services . . . to consumers."[3]

2. Direct Care Workers who are seeking placement opportunities through Life Force must sign an independent contractor agreement with the agency.[4] The agreement states that the Direct Care Worker "will be considered an independent contractor, free to accept or reject any assignment offered . . . by Life Force."[5] It also states that the Direct Care Worker "will not accept or negotiate direct offers of work from any client introduced to [him] by Life Force unless authorized in writing by the

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[1] *See* Record ("R.") at 57, 63-72. *See also* Appellant's Appendix ("Appellant's App.") at 64-80 (providing a complete version of 16 *Del. Admin. C.* § 4469).

[2] R. at 57-58.

[3] R. at 63, 92.

[4] R. at 58, 60, 86-87 (referring to the "Independent Contractor Agreement" admitted and considered at the Referee and Board hearings but not attached to the record). *See also* Appellee's Answering Br. at Ex. 1.

[5] *See* Appellee's Answering Br. at Ex. 1.

company."[6] In order to be registered with the agency, the Direct Care Worker must meet certain state requirements, must be oriented by Life Force on twenty-three topics and pass a competency test with regard to those topics.[7] "It is the responsibility of the personal assistance services agency to ensure that direct care workers are proficient to carry out the care assigned in a safe, effective and efficient manner."[8]

3. Separately, clients contact Life Force about hiring Direct Care Workers and Life Force pairs one of the registered Direct Care Workers with each client.[9] Life Force contacts the Direct Care Worker about the proposed assignment with a proposed compensation rate, depending on Life Force's assessment of the care required.[10] "Caregivers are permitted to refuse any referral for any reason" and will still remain on the referral list.[11] "If the compensation rate is accepted, the Caregiver goes to work for the client."[12] Once an assignment has begun, the client determines the length of the assignment, the hours and services required, and whether vacations

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[6] *Id.*

[7] R. at 34, 67 (16 *Del. Admin. C.* § 4469-2.2.2.7), 105-106; Appellant's App. at 73 (16 *Del. Admin. C.* § 4469- 4.3.2.3), 74 (16 *Del. Admin. C.* § 4469- 4.5).

[8] Appellant's App. at 74 (16 *Del. Admin. C.* § 4469- 4.5.3.2).

[9] R. at 44-45, 58, 88-89, 104-105.

[10] R. at 59, 96, 100.

[11] R. at 58, 84.

[12] R. at 59.

may be taken.[13] The client may terminate a Direct Care Worker's services at any time; Life Force may not.[14] The Direct Care Workers never work in Life Force's single Delaware office and must furnish their own materials, supplies and tools.[15] Direct Care Workers are directed, supervised and evaluated solely by the clients who receive their care.[16] LifeForce receives a copy of client evaluations of Direct Care Workers.[17] The Direct Care Worker is expected to contact Life Force periodically about his/her assignments.[18] Direct Care Workers must also keep a log of all services performed pursuant to PASA regulations.[19]

4. Life Force has three employees who complete the day-to-day administrative work of the company in Life Force's office, are paid by Life Force and receive employment benefits.[20] In contrast, Direct Care Workers are paid through Life Force by their clients for the services performed at the compensation rate agreed upon

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[13] R. at 58, 81-82.

[14] R. at 46, 58, 97-98.

[15] R. at 82.

[16] R. at 58, 81. *See also* R. at 43-45.

[17] R. at 58.

[18] R. at 59.

[19] Appellant's App. at 77 (16 *Del. Admin. C.* § 4469-5.5.1.5).

[20] R. at 58, 86.

initially by the Direct Care Workers.[21] Clients are billed an additional commission determined on a case-by-case basis for Life Force's referral.[22] Life Force must pay its Direct Care Workers whether it receives payment by the client or not.[23] Direct Care Workers are responsible for filing their own taxes and receive 1099 Forms.[24] Direct Care Workers do not receive benefits or medical insurance from Life Force.[25] Life Force has liability insurance to cover the company and its three employees but it does not cover the Direct Care Workers.[26] "Life Force also maintains a workers['] compensation insurance policy, but the [Direct Care Worker] pays all premiums for the coverage."[27] Direct Care Workers may be registered with Life Force and other referral agencies at the same time, and are often licensed in different professional occupations altogether.[28]

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[21] R. at 58.

[22] R. at 58, 88.

[23] R. at 107.

[24] R. at 32, 37-38, 58, 85.

[25] R. at 58, 85.

[26] R. at 58, 82.

[27] R. at 44, 58, 83.

[28] R. at 57-58, 80, 85. *See also* R. at 84 ("[W]e [Life Force] encourage them [Caregivers] to be registered with as many agencies as possible because we cannot guarantee work. And we want them to benefit maximally from any work available with other agencies.").

5. From November of 2008 to November of 2009, Claimant, G.J. Pour ("Claimant"), worked for an elderly man on a daily basis, "cleaning, bathing, cooking, shopping and dressing" him.[29] Claimant had acquired this client through Life Force and signed an independent contractor agreement.[30] According to Josephine Grant, the Office Manager of Life Force, Claimant continued to provide personal care individually while Claimant also worked for clients referred to him by Life Force.[31] Life Force billed the elderly client, paid Claimant approximately $18,000.00 for these services, and issued Claimant a 1099 in connection with these payments.[32] At some point prior to January 2010, Claimant independently terminated his services with his elderly client, but remained on Life Forces's referral list, free to accept or reject future referrals.[33] In January 2010, Claimant filed an unemployment claim with the Department of Labor ("DOL").[34] Thereafter, DOL conducted an audit of Life Force and determined that an employer/employee relationship existed between Life Force

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[29] R. at 3.

[30] R. at 97, 99-100.

[31] *Id.*

[32] R. at 3, 6.

[33] R. at 59, 97-98.

[34] R. at 29.

and Claimant pursuant to 19 *Del. C.* § 3302(10)(K).[35] As an employer, Life Force was liable for tax assessments on Claimant's wages.[36] The DOL mailed a Debit Memo to Life Force demanding payment in tax assessments due on behalf of Claimant.[37]

6. In a letter dated April 23, 2010, Life Force's Director, Victor Evereklian, disputed the DOL's tax assessment on compensation paid to Claimant.[38] Life Force asserted that Claimant was an independent contractor and not an employee; accordingly, Life Force was not liable for the tax assessment.[39] Life Force appealed the decision of the DOL to an Appeals Referee and a hearing was held on September 15, 2010.[40] The Appeals Referee concluded that Life Force failed to meet the criteria necessary to classify Claimant as an independent contractor under 19 *Del. C.* § 3302(10)(K).[41] Specifically, the Appeals Referee concluded: "The claimant was not free from direction and control, did not perform services outside the usual course of

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[35] R. at 29, 37.

[36] R. at 29.

[37] R. at 1.

[38] R. at 2.

[39] R. at 2.

[40] R. at 28-30.

[41] R. at 30.

business and was not customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the services performed for the employer."[42] Based on this finding, the Appeals Referee affirmed the decision of the DOL and found the employer liable for the tax assessments.[43]

7. On October 15, 2010, Life Force filed an appeal with the Board for further review of the Referee's decision primarily on the basis that the Referee's decision was supported only by conclusory statements of the auditor without any basis in the record and contrary to the facts presented.[44] Life Force argued further that the Referee did not appropriately focus on the threshold issue of the claimant's independent contractor status.[45] In this regard, Life Force argued that it did, in fact, present evidence to substantiate its claim that Claimant was an independent contractor.[46]

8. On December 15, 2010, a hearing was held by the Board to consider the

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[42] R. at 29-30, 59.

[43] *Id.*

[44] R. at 48-50.

[45] *Id.* at 50. Life Force also contended that the Referee's decision lacked any evidence from Claimant due to his absence from the hearing, which precluded Life Force from cross-examining him. *Id.* at 48.

[46] *Id.*

Life Force appeal.[47] Life Force presented testimony from its Director, Victor Evereklian, and its Office Manager, Josephine Grant, to support the contention that Life Force exercises no control over Direct Care Workers. The DOL designated one representative, Catherine Rauso, to question Life Force. Claimant did not attend the hearing. The Board found that the substantial weight of the evidence supported the Referee's decision that Life Force "failed to meet its burden of proving that it is exempt from the definition of 'Employment' or 'Employer' by virtue of the provisions of 19 *Del. C.* § 3302(10)(K)."[48] The Board relied primarily on the 1982 Superior Court decision in *Department of Labor v. Medical Placement Services*,[49] in which the court found that Medical Placement Services failed to meet the three prongs of 19 *Del. C.* § 3302(10)(K)(i)-(iii), and was an "employer" of the medical technicians it supplied to institutions and private individuals on a temporary basis for a fee.[50]

9. Life Force filed a notice of appeal to this Court on February 17, 2011. It argues that there was not substantial evidence to support the Board's decision and,

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[47] R. at 73.

[48] R. at 61.

[49] 457 A.2d 382, 384 (Del. Super. 1982).

[50] *Id.* at 387.

in fact, the substantial evidence supported the conclusion that Life Force did not have "control" over Claimant's work.[51] Life Force contends that even Ms. Rauso, the DOL representative present at the hearing, admitted that based on the information obtained at the hearing, Claimant is an independent contractor.[52] Furthermore, Life Force argues that the Board "ignored the PASA regulations [which specifically allow a PASA to contract with an independent contractor to perform caregiving work], industry practice and the substantial weight of the evidence in misinterpreting a single case from 1982 to impose assessments against Life Force."[53] Life Force asserts that Direct Care Workers do not get "wages," as defined under 19 *Del. C.* § 3301(18), because Direct Care Workers do not provide personal services to Life Force. Nor do they receive commissions, bonuses, holiday pay, back pay or dismissal pay. As a result, they argue that assessments cannot be imposed against Life Force based on "wages."[54] Finally, Life Force distinguishes the relationship with its Direct Care

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[51] Appellant's Opening Br. ("Opening Br.") at 7-8 (July 11, 2011) (citing *Fairfield Builders v. Vatillana*, 302 A.2d 58, 60-61 (Del. 1973) ("Most importantly, [defendant] retained no power of control over the means and methods of doing the work . . . .")).

[52] Opening Br. at 6; R. at 86 (BOARD MEMBER: "So is it my understanding with the new information that you obtained that it is your knowledge that Mr. Pour . . . is an independent contractor, is that correct?" MS. RAUSO: "[Y]es. I mean I have questions myself [sic] would like to ask regarding their testimony.").

[53] Opening Br. at 6.

[54] *Id.* at 14.

Workers from that between the organization and medical technicians in *Medical Placement Services*.[55]

10. In opposition, the Board argues that its decision aligned with 19 *Del. C.* § 3302(10)(K) and Delaware precedent. In particular, the Board states that: (1) the substantial evidence presented to the Board demonstrated that Life Force had the right and duty to control its workers, failing the first prong of 19 *Del. C.* § 3302(10)(K)(i); (2) Life Force did not present any evidence that Claimant had any "independently established trade, occupation, profession or business . . . of the same nature" as that of caregiving, failing the third prong of 19 *Del. C.* § 3302(10)(K)(iii); and (3) it would be against public policy to suggest that the elderly clients of Life Force are the employers of Caregivers because they "direct and control" the services discharged.[56] Life Force filed a reply brief in support of its appeal on August 12, 2011.

11. The Court's review of the Board's decision is limited to determining

[55] 457 A.2d 382 (Del. Super. 1982). In contrast to the technicians in *Medical Placement Services*, Life Force argues that (1) "the Direct Care Workers are not *Life Force's caregivers*, but only are listed with Life Force among other agencies"; (2) the Direct Care Workers have a choice as to whether they want to work directly with each consumer, who then "directs, supervises, and evaluates the services being provided"; and (3) "Life Force does not pay the Direct Care Worker out of Life Force funds, but separately bills, collects, and remit [sic] the entirety of the Direct Care Worker's fees from the Consumer." Opening Br. at 18.

[56] Claimant failed to file an answering brief so the Court will decide the issue on papers which have been filed pursuant to Superior Court Rule 107(e).

whether the Board's findings are supported by substantial evidence and free from legal error.[57] Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[58] The Court considers the record in the light most favorable to the prevailing party before the Board.[59] The Court does not weigh evidence, assess credibility, or make independent factual findings.[60] It is solely within the purview of the Board to judge credibility and resolve conflicts in testimony.[61]

12. Unemployment insurance taxes are governed by the definitions in 19 *Del. C.* § 3302. Pursuant to these definitions, "employment" encompasses:

> [S]ervices 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 direction in connection with the performance of such service, both under the individual's contract for the performance

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[57] *Thompson v. Unemployment Ins. Appeal Bd.*, 25 A.3d 778, 781-82 (Del. 2011) (quoting *Unemployment Ins. Appeal Bd. v. Duncan*, 337 A.2d 308, 308 (Del. 1975)) (citing *Straley v. Advance Staffing, Inc.*, 2009 WL 3451913, at *2 (Del. Supr. Oct. 27, 2009)) (citations omitted).

[58] *James Julian, Inc. of Delaware v. Testerman*, 740 A.2d 514, 519 (Del. Super. 1999) (citations omitted).

[59] *See Thompson*, 25 A.3d at 782 (citing *Pochvatilla v.United States Postal Serv.*, 1997 WL 524062, at *2 (Del. Super. June 9, 1997)).

[60] *Thompson*, 25 A.3d at 782 (quoting *Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094, 1098 (Del. 2006)).

[61] *Straley v. Advance Staffing, Inc.*, 2009 WL 3451913, at *3 (Del. Oct. 29, 2009) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del.1965)).

> 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.[62]

Under this framework, the first determination to be made by the Board is whether the individual was in a relationship of employment with the company, *i.e.* whether the individual performed services for wages.[63] This relationship must be established by the party implementing the statute for purposes of unemployment tax assessments, at which point the burden then shifts to the party seeking the benefit of the statutory exemption, usually the employer, to prove each of the three enumerated criteria.[64]

13. This Court, in *Cavan*, considered the threshold question of whether operators renting space from a business to provide beauty services were individuals

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[62] 19 *Del. C.* § 3302(10)(K).

[63] *Medical Placement Services*, 457 A.2d at 384; *Div. of Unemployment Ins. v. Cavan*, 1997 WL 716904, at *5 (Del. Super. Aug. 25, 1997).

[64] *Medical Placement Services*, 457 A.2d at 384 ("The Court initially notes that those states with similar, if not identical statutes have allocated the burden of proof to the party seeking the benefit of the statutory exemption after a showing that the individual involved has performed services for wages.") (citations omitted); *Cavan*, 1997 WL 716904, at *5 ("Thus, before the burden of proof is allocated to an employer seeking the benefit of the statutory exemption under 19 *Del. C.* § 3301(10)(K)(i)-(iii), the other party must first establish that the individual involved has performed services for wages.").

performing services for wages.[65] The court ultimately remanded the case to the Board to make a factual determination as to this question, but suggested in dicta that the operators were not wage earners within the statute because their services were performed for their own customers and not on behalf of the business.[66] In analyzing the business/operator relationship, the fact that the business owner had little control over the manner in which the operators performed, the prices they charged, or the results they accomplished played a significant role in the court's suggestion that the employer/employee relationship did not exist.[67] In addition, the court noted that payment from a customer directly to an operator provided strong evidence of an individual who did not receive wages, even when the business happened to be an intermediary in that payment and took out portions of the operator's payment for "rent, utilities, supplies and retail items."[68]

14. In its decision, the Board appropriately explained that "employment"

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

[66] *Id.* at *6.

[67] Id. at *5. *See also Yurs v. Director of Labor, et al.*, 235 N.E.2d 871, 875 (Ill. App. 1968) (finding that an organist performed "services" for an employing unit because the business had obliged to provide organ music, not the organist specifically, and no employment relation was created between the organist and the customer).

[68] *Id.* at *5 ("The record indicated that each operator could charge whatever fee she wanted to and then kept track of what fees she took in, so it appears that [the business] NFIT was simply returning that sum back to the operator, minus 50 percent to cover rent, utilities, supplies and retail items.").

within 19 *Del. C.* § 3302(10)(K) "includes all services performed by an individual for wages"[69] and that "[w]ages means all remuneration for personal services."[70] The Board additionally noted that "'services' . . . must in most cases be performed on behalf of the Employer and not for the personal customers or clients of the Claimant, from whom the Employer receives no remuneration or other benefit."[71] The Board then jumped to the conclusion that Direct Care Workers are wage earners without explanation of the fact(s) that support this conclusion.[72] Life Force argues in its opening brief that Direct Care Workers provide no personal services to Life Force and earn no wages from Life Force; rather, Direct Care Workers provide services to the individual clients and get paid by those clients in a "separate billing" system that Life Force happens to handle.[73] In its response, the Board fails to address this argument, and the threshold question of whether Claimant performed any services for "wages" from Life Force.

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[69] R. at 59; *see Medical Placement Services*, 457 A.2d at 383 (summarizing 19 *Del. C.* § 3302(9) before it was renumbered 19 *Del. C.* § 3302(10)).

[70] R. at 59; 19 *Del. C.* § 3302(18).

[71] R. at 59 (citing *Cavan*, 1997 WL 716904, at *6).

[72] *See* R. at 59 ("A statutory exclusion exists when a *wage earner* meets all three criteria enumerated under 19 *Del. C.* § 3302(10)(K).") (emphasis supplied). A discussion of the three prongs ensued. *See id.*

[73] Opening Br. at 14.

15. In light of the Record before the Court and the factors supplied in *Cavan*, the Court cannot assess whether the Board's conclusory finding that Claimant performed services to Life Force for wages is supported by substantial evidence or free from legal error. The Court recognizes that the facts here align very closely to those in *Medical Placement Services*, where the court acknowledged but did not carefully analyze this threshold question.[74] Nonetheless, due to the highly factual nature of this inquiry, and the legitimate bases to distinguish *Medical Placement Services* that have been argued by Life Force, the Court is satisfied that a more thorough explanation from the Board regarding the "wage earner" issue is required before the Court can properly review the propriety of that decision.[75]

16. For the reasons herein stated, the matter is **REMANDED** to the Board with an instruction to provide a more detailed factual determination as to whether Claimant

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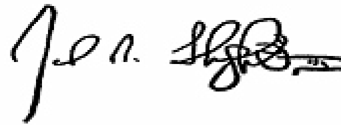
[74] *Medical Placement Services*, 457 A.2d at 384.

[75] *See McQuay v. Delaware Alcoholic Beverage Control Comm'n*, 338 A.2d 129, 131 n.1 (Del. 1975) (per curiam) ("The general rule is that remand is proper where an agency has made invalid, inadequate or incomplete findings.") (citing 2 Am.Jur.2d Administrative Law § 765; *Helvering v. Rankin*, 295 U.S. 123, 131 (1935) ("If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record.") (citations omitted)). *See also Battista v. Chrysler Corp.*, 517 A.2d 295, 298 (Del. Super. 1986) ("Pursuant to [19 *Del. C.*] § 2345 of the Act, the Board has a duty to set forth in detail its proper conclusions of fact and findings of law. *Farley v. Sears, Roebuck & Co.*, Del.Super., 258 A.2d 293 (1969). Absent the above, the orderly process of administrative review suffers because the reviewing Court cannot properly exercise its function." *Barnes v. Panaro*, Del.Supr., 238 A.2d 608 (1968).").

performed “services” for “wages” within the definition of “employment” under 19 *Del. C.* § 3302(10)(K) and Delaware precedent.

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary

cc: Michael W. Arrington, Esquire