

NO. 75783

IN THE SUPREME COURT OF THE STATE OF NEVADA

SPAR BUSINESS SERVICES, INC.,

Appellant,

vs.

**RENEE OLSON, ADMINISTRATOR OF THE EMPLOYMENT SECURITY
DIVISION; STATE OF NEVADA, DEPARTMENT OF EMPLOYMENT,
TRAINING & REHABILITATION; *et al.*,**

Respondents.

**On Appeal from an Order Granting Motion to Dismiss
Petition for Judicial Review
of the Eighth Judicial District Court of
The State of Nevada, in and for Clark County
District Court Case No. A755501**

RESPONDENT'S SUPPLEMENTAL APPENDIX

LAURIE L. TROTTER, ESQ.
Nevada State Bar No. 8696
State of Nevada, Dept. of Employment,
Training & Rehabilitation (DETR),
Employment Security Division (ESD)
500 East Third Street
Carson City, NV 89713
(775) 684-3996
(775) 684-6344 – Fax
Attorney for Nevada ESD Respondents

Electronically Filed
Nov 08 2018 09:18 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

The attached Respondent's Supplemental Appendix is prepared and filed in order that all documents pertinent to this case be provided for the Court's review. Therefore, the decisions of both the referee (appeal tribunal) and the Board of Review are provided here. In addition, a copy of the Eighth Judicial District Court's Register of Actions for a prior case filed in late 2011 is provided here. These three documents appear only in this Supplemental Appendix and not in the Joint Appendix on file herein.

RESPECTFULLY SUBMITTED this 6th day of November, 2018.



LAURIE L. TROTTER, ESQ.
Attorney for Nevada ESD Respondents

RESPONDENT'S SUPPLEMENTAL APPENDIX

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C.	Board of Review Decision	04/24/2017	014-016

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d)(1)(B), I hereby certify that I am an employee of the State of Nevada, over the age of 18 years; and that on the date hereinbelow set forth, I electronically filed the foregoing RESPONDENT'S SUPPLEMENTAL APPENDIX with the Clerk of the Nevada Supreme Court; and, as a consequence thereof, electronic service was made in accordance with the Master List as follows:

GINA BONGIOVI, ESQ.
gina@bongiovilaw.com

THOMAS J. VOLLBRECHT, ESQ.
Fabyanske, Westra, Hart & Thomson, P.A.
tvollbrecht@fwhtlaw.com

And by mailing within an envelope which was deposited with the State of Nevada Mail for postage and mailing from Carson City, Nevada, addressed as follows:

GINA BONGIOVI, ESQ.
2620 Regatta Drive, **Suite 102**
Las Vegas, NV 89128

THOMAS J. VOLLBRECHT, ESQ.
Fabyanske, Westra, Hart & Thomson, P.A.
333 South Seventh Street, **Suite 2600**
Minneapolis, MN 55402

DATED this 7th day of November, 2018.



SHERI C. IHLER

Employment Security Division
Office of Appeals
2800 E St Louis Ave.
Las Vegas, NV 89104
Tel (702) 486-7933
Fax (702) 486-7949



5591608
<https://www.nvdetr.org>

DECISION OF THE REFEREE:

Date Decision is Mailed: 01/27/2017

Date Decision is Final: 02/07/2017

In the Matter of:

SPAR BUSINESS SERVICES INC
(formerly SPAR MARKETING SERVICES
INC)
7711 N MILITARY TRL #1000
W PALM BEACH, FL 33410

SSN: :

Appearances:

ESD attorney, witnesses (2), observer

Employer attorney, witnesses (2)

MICHAEL DEBOARD
5026 RIVER GLENN #158
LAS VEGAS, NV 89103

Appeal Rights: The decision is final unless a signed appeal to the Board of Review is filed within 11 days of the decision's mailing date or unless good cause for the delay is shown. An appeal may be filed in person at the Appeals Office or by letter to the address above.
(NRS 612.510)

Docket Number: V-06-A-07849-T (UInv Docket Number: V-17-A-00727)

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In 2006, Michael A. DeBoard filed a claim for unemployment insurance (hereinafter "UI") benefits in the State of Nevada with the Department of Employment, Training and Rehabilitation, Employment Security Division (hereinafter "ESD"). This claimant, Mr. DeBoard, named appellant Spar Marketing Services, Inc. (hereinafter "Spar") (Account Number 244975) as his employer when he filed his claim. After the filing of the claim, ESD examined its database and discovered that Spar had not reported wages nor paid contributions for Mr. DeBoard, which created an "obstructed or blocked claim" because there were no reported wages to support a monetarily eligible claim pursuant to Nevada Revised Statutes (NRS) 612.025. As a result, the claim was referred to the Contributions Section to determine if Mr. DeBoard, who was employed as a merchandiser, and other merchandisers were employees of Spar under NRS 612.085.

The claim of Mr. DeBoard was assigned to ESD Compliance Audit Investigator, Carol Larry, who conducted a field office investigation and issued a report with her findings (Exhibit 136, pages 111-115). On October 20, 2006, Ms. Larry issued a formal determination finding that an employee/employer relationship existed and that wages paid to Mr. DeBoard and other similarly employed individuals were reportable to the State of Nevada for unemployment tax purposes under NRS Chapter 612 (Exhibit 136, pages 105-107). The determination notified Spar of its appeal rights and the finality of determination under NRS 612.485.

Spar filed a timely appeal to the determination. The matter was scheduled for an administrative hearing (Case Number V-06-A-07849-T) before assigned Referee Kelly Nguyen (or Appeal Tribunal) on January 24, 2007. However, one day prior on January 23, this Referee received from Spar's Human Resources Benefits Administrator, Debbie Chaffee, via fax a letter requesting to withdraw its appeal (Exhibit 136, page 119). Upon receipt of the withdrawal request, this Referee signed an order permitting the withdrawal of the appeal under NRS 612.495 on January 23, 2007 (Exhibit 136, page 475). Spar's withdrawal of the appeal resulted in the formal determination issued on October 20, 2006 becoming final under NRS 612.485.

On or about April 4, 2007, Audit Investigator Larry was assigned to investigate another obstructed claim of Judy G. Stacy who also named Spar as her employer when she filed a claim for UI benefits. On April 13, 2007, Ms. Chaffee informed Ms. Larry that the company had not reported Ms. Stacy's wages because they considered her as an independent contractor who worked as a merchandiser.

On June 12, 2007, the Contributions Section mailed Spar Notices of Past Due Report (or past due notices) for the quarters ending March 31, 2004 through March 31, 2007 because the company was delinquent in paying contributions and reporting wages for those quarters. On June 18, 2007, Ms. Chaffee signed and completed all these past due notices indicating that the company never had employees in the State of Nevada (Exhibit 136, pages 142-153 and 169). Spar's Statement of Employer Account dated July 17, 2007 showed an account balance of zero (Exhibit 136, page 171).

As a result of the company's delinquency in failing to file their Employer's Quarterly Contribution and Wage Reports (or quarterly reports), on September 11, 2007, ESD filed a Notice of Levy Assessment (or levy notice) against Spar for the period ending March 31, 2004 through March 31, 2007 that established a total liability of \$7,480.58 (Exhibit 43). The levy notice notified Spar of its right to petition for readjustment with the Administrator within 15 days after the assessment. On or about September 26, 2007, Spar filed a verified petition for readjustment to the levy notice and posted the amount assessed (Exhibits 44-46). The petition was based on the fact that individuals (other than Michael A. DeBoard who was determined to be an employee of Spar) were not similarly situated to Mr. DeBoard and were independent contractors. The petition requested a hearing pursuant to NRS 612.670(2) and (3) in the event that ESD wished to pursue the issue of employment status of the individuals included in the levy notice. Spar's Statement of Employer Account dated October 16, 2007 showed a credit balance of \$7,480.58 (Exhibit 136, page 170).

On October 18, 2007, the Contributions Section mailed Spar a letter notifying that its quarterly reports were due and delinquent necessitating the filing levies of assessment for claimant Mr. DeBoard and others (Exhibit 136, page 155). On October 24, 2007, Ms. Chaffee signed and completed the Employer's Quarterly Contribution and Wage Reports for the quarters ending December 2006 and March 31 through June 30, 2007 certifying that the information (i.e. there were no wages or contribution payable to the State of Nevada) was true and correct (Exhibit 136, pages 172-174). On October 30, 2007, ESD filed another Notice of Levy of Assessment for the period ending March 31, 2004 through March 31, 2007 that established a total liability of \$25,538.94 (Exhibit 136, page 176).

On November 8, 2007, Spar's former counsel, Scott Ikeda, contacted an ESD representative (Ian Payette) who informed him that Christa Williams was the examiner assigned to Spar's account. The

following day on November 9, 2007, Mr. Ikeda mailed Ms. Williams a letter inquiring if Spar had to submit another petition for readjustment to the levy notice filed on October 30, 2007 (Exhibit 136, page 175).

Christa Williams is an ESD Contributions Examiner assigned to the Employer Account Services Unit that is charged with but not limited to maintaining employer accounts, issuing account refunds, assisting employers on filing their quarterly reports. Ms. Williams does not have the authority of an ESD auditor or investigator to determine whether an employer has independent contractors.

On November 12, 2007, Ms. Chaffee completed the delinquent quarterly reports for the quarters ending March 31, 2004 through December 31, 2005 and for the quarters ending December 31, 2006 through March 31, 2007 certifying that the information (i.e. there were no wages for either quarter) contained in these reports was true and correct (Exhibit 136, pages 177-184, 188 and 189). On December 5, 2007, Ms. Chaffee completed the delinquent quarterly reports for the quarters ending March 31 through September 30, 2006 reporting wages of \$679.33, \$2,663.33, and \$145.60, respectively, for claimant Mr. DeBoard. On December 19, 2007, ESD closed claimant Mr. DeBoard's claim because no payroll reports were received for four or more quarters, which were the first quarter of 2004 through the first quarter of 2007 exclusive of the first three quarters of 2006 (Exhibit 136, page 199). On December 26, 2007, Ms. Chaffee filed zero wage report for the quarter ending December 31, 2007 (Exhibit 136, page 220).

On January 15, 2008, Mr. Ikeda mailed Contributions Examiner Williams a letter in which he stated that through their conversations, it was his understanding that ESD had agreed to suspend Spar's account and for Spar to discontinue filing quarterly reports as the company had not had any employees in Nevada since claimant Mr. DeBoard for whom contributions of \$187.88 were paid (Exhibits 47, 48). The letter stated that Ms. Williams had asked if Spar would like to keep a credit balance of \$7,291.06 or be paid by ESD for which he requested that a check for the credit balance be sent to Spar. On March 10, 2008, Ms. Williams prepared a Statement of Refund to Spar for the sum of \$7,291.06 (Exhibit 136, page 224).

On November 18, 2009, Audit Investigator Larry was assigned to investigate another obstructed claim of Robert M. Zicarelli who also named Spar as his employer when he filed a claim for UI benefits (Exhibit 136, pages 227-229). She concluded that the levies for wages were removed because Spar submitted zero wage reports for the quarters in 2004 through 2007 resulting in the erroneous closing of the account and issuance of the refund check. She recommended supplemental levies for wages for the fourth quarter of 2006 through the third quarter of 2009 (Exhibit 136, page 227).

On January 15, 2010, ESD filed a Notice of Levy Assessment against Spar for the period ending March 31, 2008 through September 30, 2009 that established a total liability of \$1,546.40 (Exhibit 136, page 271). On January 28, 2010, Spar's Director of Human Resources, Heidi Savage, mailed to the attention of Jennifer at ESD's Carson City address a letter requesting again to suspend Spar's account that previously had a suspension approved by Ms. Williams and to confirm that Jennifer had instructed her not to file another petition for readjustment (Exhibit 136, page 272).

On February 24, 2010, Audit Investigator Larry was assigned to investigate another obstructed claim of Gina Zicarelli (Exhibit 136, pages 238-240) and Brianna Zicarelli, both of whom also named Spar as their employer when each filed a claim for UI benefits (Exhibit 136, pages 247-249). She concluded

the same in both claims that the account should not have been closed because Spar continued to employ merchandisers and refused to report them as required (Exhibit 136, pages 238, 247). In the claim of Ms. Brianna Zicarelli, she recommended supplemental levies for the fourth quarter of 2009 (Exhibit 136, page 248).

On March 19, 2010, ESD mailed Spar a letter notifying that its quarterly reports were due and delinquent necessitating the filing supplemental levies of assessment for all three Zicarelli claimants and others (Exhibit 136, page 273). Spar's Statement of Employer Account dated March 26, 2010 showed a balance of \$21,796.34 for interest, penalties, and levies for the quarters in 2004 and 2005 (Exhibit 136, page 277). On March 30, 2010, ESD filed a Notice of Levy of Assessment against Spar for the period ending December 31, 2006 through December 31, 2009 that established a total liability of \$26,303.13 (Exhibit 136, page 278).

ESD never provided Spar with a hearing pursuant to NRS 612.670(2) and (3) as requested when it filed a petition for readjustment to the levy notice and posted the amount assessed in September 2007. ESD has no prescribed regulations to determine the manner in which petitions for modification are determined under NRS 612.670.

On October 19, 2011, Spar's counsel, Thomas Vollbrecht, requested the prior ESD Administrator, Cynta Jones, via a letter to issue a formal determination that its merchandisers were independent contractors under Nevada law based on the company's belief that the status was previously confirmed and settled between ESD and Spar in January 2008 (Exhibit 136, pages 281-289).

On December 9, 2011, Spar filed a Petition for Judicial Review to ESD's Board of Review decision declining further review of the Appeals Referee (William Rigor's) decision affirming the claimant Ms. Gina Zicarelli's entitlement to UI benefits. On April 11, 2012, the District Court entered a Stipulation and Order of Remand for the Administrative Tribunal to conduct a new evidentiary hearing before a new referee concerning this matter AFTER (emphasis added) the ESD Administrator entered an order pursuant to the request filed by Spar under NRS 612.245 regarding its employer status previously determined by ESD and that said order may be appealed to the Administrative Tribunal.

On August 28, 2013, Mr. Vollbrecht filed a request under NRS 612.245 with the ESD Administrator to make a formal determination as to whether its Nevada merchandisers are similarly situated to Michael A. DeBoard, a merchandiser who was previously determined to be an employee of Spar. On December 9, 2013, the Administrator issued an administrative determination finding that Spar remained legally obligated to report its merchandisers as employees and pay contributions to ESD for all of its merchandisers pursuant to the finality of the determination issued in 2006 (Exhibits 120-125). The determination notified Spar of its appeal rights under NRS 612.495.

On February 7, 2014, ESD received Spar's appeal to the administrative determination (Exhibits 126 & 127). This matter was scheduled for an administrative hearing before this Referee on July 16, 2015. The hearing notice advised the parties the following issues would be considered:

1. Did ESD by and through its actions agree that all Nevada merchandisers, other than the claimant, Michael A. DeBoard, were independent contractors and not employees of Spar?

2. Whether services performed by Mr. DeBoard and other similarly situated individuals constitute employment for unemployment purposes under NRS 612.085.

The July 15, 2015 hearing was continued for further examination of Division witness Carol Larry and submission of additional exhibits (Exhibit 136, pages 569-583). The hearing was reconvened on July 27, 2016. The delay was due to Ms. Larry's unavailability and the subsequent departure and replacement of ESD's Senior Legal Counsel Neal Rombardo.

STIPULATION

ESD stipulated that Spar's appeal to the administrative determination issued on December 9, 2013 was timely under NRS 612.495.

FINDINGS OF FACT

Spar Marketing Services, Inc. (hereinafter "Spar") is a corporation headquartered in West Palm Beach, Florida but provides services to Nevada clients. Spar is in the business of providing merchandising services to other companies and businesses who seek to increase product sales in retail stores through product availability and customer awareness. The services provided by Spar generally include sending workers to retail stores for the purpose of setting up the displays, developing with its clients a planogram (a layout of how the displays would be set up), and supplying the planogram to the workers. These workers are required to set up the displays, and to reset and reorganize merchandise in the manner set forth in the planogram. Spar has been operating in Nevada since 1986. On August 22, 2013, Spar Marketing Services, Inc. filed a Certificate of Amendment changing its corporation name from Spar Marketing Services, Inc. to Spar Business Services, Inc. (also hereinafter "Spar") (Exhibit 136, pages 558-561).

Facts considered in the October 20, 2006 determination are as follows: Mr. DeBoard worked as a merchandiser at various retail stores for Spar. He was responsible for resetting DVDs and reorganizing merchandise using planograms and instructions provided by Spar. He was supervised by a lead merchandiser while performing his services. There were specific orders on how the duties were to be performed. He was required to abide by the terms and conditions outlined in the Independent Merchandiser Agreement, as well as the procedures in the General Merchandiser Manual. The company provides in-store merchandising services. Mr. DeBoard's services were not outside the company's usual course of business. The nature of Spar's business requires that the work be performed at its clients' places of business. These places of business become the job sites. While the work was being performed, Mr. DeBoard was at the places of business for Spar. Therefore, his services were not outside of all of the places of business. Mr. DeBoard was not engaged in an independently established business and did not maintain any attributes of an independently established trade, occupation, business or profession (i.e. business license, business listings, or financial exposure to suffer a loss or make a profit).

All three Zicarelli claimants--Robert, Gina, and Brianna--were hired as merchandisers between 2005 and 2007. Mr. Zicarelli was trained on how to perform his job duties by his mother Gina and assigned to retail stores that included CVS Pharmacy, Kmart, Albertsons, and Walmart; he was given a time frame in which to complete the work and told how long each job should take; he had to contact the

district manager (Lorry Clark) or his mother when he had questions (Exhibit 136, pages 232 & 233). Both Gina and Brianna Zicarelli had to take an E-training course on the company website and a test at the end of the course; they had to follow a procedural manual that was online; their daily assignments were on the company website which showed the job number, store name, number, and location, and job instructions; they had to call Spar if they had a problem or needed help; they were also given a time frame in which to complete the work (Exhibit 136, pages 241 & 242, and pages 250 & 251). In April 2006, Ms. Gina Zicarelli became the district supervisor to supervise and train merchandisers in Nevada (Exhibit 136, pages 241 & 242). All three claimants were paid a \$10 hourly rate for performing work as merchandisers.

REASONS FOR DECISION OF ISSUES UNDER CONSIDERATION

At the outset, this Referee notes that any and all arguments put forth in the closing briefs of ESD and Spar (Exhibits 137 and 138, respectively) were fully considered in deciding the issues under consideration. These issues are discussed below.

1. Did ESD by and through its actions agree that all Nevada merchandisers, other than the claimant Michael A. DeBoard, were independent contractors and not employees of Spar?

Counsel for Spar argues that its letter to ESD sent on January 15, 2008 was a mutually-agreed final resolution that was effectuated by: 1) ESD's refund of its previously-deposited security (less the amount attributable to Mr. DeBoard) that was posted when it filed a petition for readjustment to the levy notice of September 11, 2007; 2) ESD's subsequent failure to contact Spar to dispute any portion of that letter; and 3) ESD's failure to provide Spar with a hearing as legally obligated under NRS 612.670(3) if it contested Spar's assertions that all merchandisers other than Mr. DeBoard were not similarly situated to him and were independent contractors, not employees. This Referee addresses each of these arguments as follows.

With respect to the refund of Spar's deposited security that were posted with the filing of its petition for readjustment to the levy notice, the record establishes that the levies were assessed because Spar was delinquent or refusing to pay contributions and report wages for its Nevada merchandisers for the quarters from 2004-2007. To reiterate, it was on June 18, 2007 when Spar's Benefits Administrator, Debbie Chaffee, signed and completed all these past due notices indicating that the company NEVER had employees in Nevada. This Referee finds that Ms. Chaffee's actions were tantamount to a misrepresentation of material facts. This finding is buttressed by the fact that Ms. Chaffee knew that the 2006 determination had found Spar's merchandisers, including Mr. DeBoard, were employees since she was the company representative who requested to withdraw the appeal to that determination just five months earlier on January 23, 2007. This Referee also finds that due to Ms. Chaffee's misrepresentation that Spar had no employees for whom wages were reportable on June 18 and again on November 12, 2007 when she signed and completed the same; Ms. Williams processed the refund in good-faith reliance on the misrepresented information as counsel for ESD similarly argues.

With respect to ESD's subsequent failure to contact Spar to dispute any portion of the January 15, 2008 letter, the record establishes that the alleged "mutually-agreed final resolution" was verbal. Therefore, the germane question is whether Ms. Williams' purported telephone conversations with Mr. Ikeda which

led to *his* understanding that ESD had agreed to suspend Spar's account and for Spar to discontinue filing quarterly reports as the company had not had any employees in Nevada since Mr. DeBoard. In answering this question, this Referee cites NAC 612.710 that states in pertinent part: "An oral response, including, without limitation, a response given over the telephone, by a member of the staff of the Division is not a decision or an official advisory opinion of the Administrator." Clearly, any alleged oral responses from Ms. Williams have no legal effect under Nevada law. In addition, since the "final resolution" was verbal, it was not binding on either ESD or Spar. Moreover, Ms. Williams' testimony establishes that she is a Contributions Examiner assigned to the Employer Account Services Unit that is charged with issuing account refunds, assisting employers on filing their quarterly reports, etc. and *not* investigating and determining the existence of an employee/employer relationship. In fact, those duties fall within the job of Compliance Audit Investigator Larry whom Spar knew had conducted a field office investigation and issued the 2006 formal determination finding that Mr. DeBoard and other merchandisers were employees of Spar, not independent contractors. However, Spar ceased communicating with Ms. Larry in April 2007 and began communicating with various ESD employees in Carson City. Spar's efforts to avoid reporting wages and paying contributions for its merchandisers came to light in November 2009 when Ms. Larry was assigned to investigate another obstructed claim of Mr. Zicarelli.

The bottom line is that there is no *res judicata* regarding either of ESD's decision to suspend Spar's account or refund its deposited security. Neither decision, singularly or collectively, was a determination nor redetermination of the Administrator as defined under any provisions of Chapter 612 of the Nevada Revised Statutes.

With respect to ESD's failure to provide Spar with a hearing as legally obligated under NRS 612.670(3) if it contested Spar's assertions that all merchandisers were not similarly situated to Mr. DeBoard and were not employees, this Referee finds that this argument is not meritless. There is no dispute that on September 26, 2007, Spar timely filed a verified petition for readjustment to ESD's September 11, 2007 levy notice and posted the amount assessed of \$7,480.58 pursuant to Subsection (1). As Spar argues, Subsection (3) provides: "The Administrator may by regulation prescribe the manner in which petitions for modification are determined. The regulations must guarantee to the employer a FAIR (emphasis added) hearing on the question of the employer's liability for contributions." However, Ms. Williams' testimony establishes that ESD has promulgated no such regulations because the filing of such a petition is "a rare, rare occasion," as corroborated by the fact that ESD never provided Spar with its statutory hearing as requested in September 2007.

The provisions of NRS 612.670 have been in effect since 1937. It is incumbent on ESD to prescribe regulations which must guarantee to the employer a fair hearing on its liability for contributions as intended by the Nevada Legislature. Irrespective of the reasons why such regulations have never been prescribed, the agency cannot deny the administrative remedy afforded to the employer under the statute and SHALL act without further undue delay in prescribing these regulations.

While it is well-established that the opportunity to be heard is essential to the administration of due process of law, such opportunity must be granted at a meaningful time and in a meaningful manner. It cannot be said that if ESD were to provide Spar with its statutory right to a hearing under NRS 612.670 in 2017 as opposed to in 2007, it would remain meaningful both in time and manner. Before deciding

if Spar is entitled to equity relief since ESD has abrogated its statutory duty owed to the company, this Referee must first address the next issue.

2. Whether services performed by Mr. DeBoard and other similarly situated individuals constitute employment for unemployment purposes under NRS 612.085?

As stated above, Spar's withdrawal of the appeal resulted in the formal determination issued on October 20, 2006 by Audit Investigator Larry becoming final under NRS 612.485. Therefore, the Administrator was limited to determining only whether Spar had submitted substantial evidence that its other merchandisers were not similarly situated to Mr. DeBoard. This Referee now decides whether to affirm the administrative determination finding that Spar remained legally obligated to report its merchandisers as employees and pay contributions to ESD for all of its merchandisers pursuant to the 2006 determination.

NRS 612.085 provides: "Services performed by a person for wages shall be deemed to be employment subject to this chapter unless it is shown to the satisfaction of the Administrator that:

- 1. The person has been and will continue to be free from control or direction over the performance of the services, both under his contract of service and in fact;**
- 2. The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprises for which the service is performed; and**
- 3. The service is performed in the course of an independently established trade, occupation, profession or business in which the person is customarily engaged, of the same nature as that involved in the contract of service."**

It is important to first note that the aforementioned conditions are in the conjunctive. All three conditions must be met before a worker's services can be excluded.

There is a general presumption under NRS 612.085 that a worker is an employee of the putative employer. *See State Dep't of Employment, Training & Rehab., Employment Security Div. v. Reliable Health Care Servs. of S. Nevada, Inc.*, 115 Nev. 253, 983 P.2d 414 (1999). The employer has to prove each criterion of NRS 612.085 by a preponderance of substantial evidence.

In this case, Spar argues that it has met its burden of establishing that the merchandisers included in the 2009-2012 assessment were not similarly situated to Mr. DeBoard and that they provided their services as independent contractors and not as employees. However, this Referee notes that the matter at hand for which this hearing was held resulted from Spar's appeal to the administrative determination issued on December 9, 2013 in which the Administrator determined that Spar remained legally obligated to report its merchandisers as employees and pay contributions to ESD for all of its merchandisers pursuant to the finality of the 2006 determination (Exhibits 120-125). This determination found that an employee/employer relationship existed and that wages paid to Mr. DeBoard and other similarly employed individuals were reportable to the State of Nevada for unemployment tax purposes. Therefore, the issue remains whether services performed by Mr. DeBoard and other similarly situated individuals constitute employment for unemployment purposes under NRS 612.085 and NOT limited to the merchandisers included in the 2009-2012 assessment. In fact, the record also reveals that there was a

2004-2007 assessment for which Spar petitioned for readjustment.

Spar argues that the testimony and affidavit of its President, Robert Brown, and Vice President of Field Administration, Renee Deschaine, supported by the written contract between the company and merchandisers establish that they were not “similarly situated” to Mr. DeBoard. However, this Referee finds neither testimony persuasive and at times evasive. This Referee instead gives credence to the sworn statements of the claimant-merchandisers (i.e. Mr. DeBoard and the Zicarellis) made at or about the time of the filing of their claims and adopts the facts considered in the the 2006 determination that became final and conclusive.

With respect to the control criterion, the issue is not whether the employer exercises control severely, minimally or not at all, but whether the employer had the right to control. Mr. DeBoard and the Zicarellis were trained and supervised while performing services as merchandisers for Spar. Mr. DeBoard was given orders on how the duties were to be performed. The Zicarellis were given job instructions and a time frame for completing the work. Spar has not proven by a preponderance of substantial evidence that its other merchandisers are not similarly situated to Mr. DeBoard regarding supervision and control.

With respect to the second criterion, the 2006 determination found that Spar provides in-store merchandising services; the nature of its business requires that the work be performed at its clients’ places of business; and these places of business become the job sites and the places of business for Spar while work was being performed by Mr. DeBoard as a merchandiser. “A place of business is a place where workers perform tasks in pursuit of company profits.” *Id.* at 260. Spar’s places of business are its clients’ places of business where its merchandisers perform work in order to generate company profits. Spar has not proven by a preponderance of substantial evidence that the work perform by its merchandisers is outside the usual course of its business or outside of all the places of business.

With respect to the third criterion, the 2006 determination found Mr. DeBoard was not engaged in an independently established business and did not maintain any attributes of an independently established trade, occupation, business or profession. An independently established trade or occupation requires a specific education, training, and a certification or license. *Id.* Mr. DeBoard had no business license when performing work for Spar. The Zicarellis were trained or required to take a training course to perform work as merchandisers. There is no evidence that they were engaged in an independently established business. Spar has not proven by a preponderance of substantial evidence that its merchandisers have an identifiable occupation that requires education, formal training, a certification or license, or engage in an independently established business.

The manner and method in which Spar required Mr. DeBoard and other merchandisers to perform his or her services are consistent with an employee-employer relationship. This Referee finds that the preponderance of substantial evidence on record establishes that Spar has failed to meet all three conjunctive criteria of NRS 612.085.

Since this decision finds that Spar has not submitted substantial evidence to establish that its other merchandisers are not similarly situated to Mr. DeBoard, Spar remains legally obligated to report all its merchandisers as employees and pay contributions to ESD pursuant to the 2006 determination.

However, ESD never provided Spar with a hearing on its liability for contributions pursuant to NRS 612.670(2) and (3), even after Spar complied with the statutory requirements of filing a timely petition for readjustment and posting the levy amount assessed in September 2007. Accordingly, this Referee finds that there is a statutory basis in granting Spar equitable relief on the existing levies assessed and contributions owed to ESD. ESD is directed to remove any and all existing levies, penalties, and interest assessed against Spar and to waive any and all contributions owed by Spar from the quarter ending March 31, 2004 through the quarter ending December 31, 2016. Effective with the quarter ending March 31, 2017 onward, Spar is directed to report wages and to pay contributions to ESD for all its merchandisers.

DECISION: The administrative determination issued on December 9, 2013 under NRS 612.245 is affirmed. Spar Business Services, Inc. (formerly Spar Marketing Services, Inc., Account Number 244975) remains legally obligated to report its merchandisers as employees and to pay contributions to the Employment Security Division for all of its merchandisers pursuant to the determination issued on October 20, 2006 under NRS 612.085. The Employment Security Division is hereby directed to remove any and all existing levies, penalties, and interest assessed against Spar and to waive any and all contributions owed by Spar Business Services, Inc. from the quarter ending March 31, 2004 through the quarter ending December 31, 2016. Effective with the quarter ending March 31, 2017 onward, Spar Business Services, Inc. is hereby directed to report wages and to pay contributions to the Employment Security Division for all its merchandisers.

IT IS SO ORDERED.

SENIOR APPEALS REFEREE

/s/ KELLY NGUYEN



**For Spanish Language Interpretation
Para la traducción al Español**

Aviso: Esta notificación contiene información importante acerca de su reclamo, incluyendo plazos para la apelación. Si Ud. tiene problemas para leer y entender Inglés, puede contactarse con un representante de la División de seguridad de empleo para asistencia en traducción. Los numeros de telefono son:

El Norte de Nevada....775-687-8148

El Sur de Nevada.....702-486-2957

Numero de llamada gratuita....888-687-8147

Si esta decisión establece que Ud. no tiene derecho a los beneficios del Seguro de Desempleo, usted tiene derecho a apelar esta decisión. La apelación ante el Tribunal del Distrito debe presentarse en el Condado en el que fue realizado el trabajo en la fecha correspondiente o antes de la fecha límite para la apelación ante el Tribunal tal como se establece arriba (NRS 612.525 y NRS 612.530). Si usted no la presenta dentro de este plazo, puede perder el derecho de apelar y puede perder su oportunidad de recibir los beneficios por desempleo o cuestionar un sobresueldo. Si usted no tiene derecho a los beneficios por desempleo, usted podría ser responsable del reembolso de algún beneficio que haya tenido anteriormente.

Recipient List

LAURIE TROTTER
1340 SO. CURRY STREET
CARSON CITY, NV 89703

SPAR BUSINESS SERVICES INC
7711 N MILITARY TRL #1000
W PALM BEACH, FL 33410

THOMAS VOLLBRECHT, ESQ.
333 SOUTH SEVENTH STREET STE 2600
MINNEAPOLIS, MN 55402

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REGISTER OF ACTIONS

CASE NO. A-11-652992-J

Spar Marketing Services, Inc., Plaintiff(s) vs. Dennis Perea, Defendant(s)	§ § § § § §	Case Type: Civil Petition for Judicial Review Date Filed: 12/09/2011 Location: Department 24 Cross-Reference Case Number: A852992
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PARTY INFORMATION

Defendant	Perea, Dennis	Lead Attorneys
Defendant	State of Nevada Dept of Employment Training and Rehabilitation	J.Thomas Susich <i>Retained</i> 775-823-8873(W)
Defendant	Zicarelli, Gina M	
Plaintiff	Spar Marketing Services, Inc.	Gina Bonglovi <i>Retained</i> 7024851200(W)

EVENTS & ORDERS OF THE COURT

	OTHER EVENTS AND HEARINGS 12/09/2011 Case Opened 12/09/2011 Petition for Judicial Review <i>Petition for Judicial Review</i> 12/19/2011 Notice of Intent to Participate <i>Notice of Intent to Participate and Defend</i> 01/07/2012 Summons <i>Summons</i> 01/12/2012 Answer <i>Answer to Petition for Judicial Review</i> 01/12/2012 Record on Appeal <i>Record On Appeal</i> 01/12/2012 Affidavit of Service <i>Affidavit of Service</i> 01/16/2012 Motion to Associate Counsel <i>Motion to Associate Counsel - Thomas James Vollbrecht Esq</i> 01/17/2012 Consent to Service By Electronic Means <i>Consent to Service by Electronic Means Through E-Filing Program</i> 01/24/2012 Non Opposition <i>Non-Opposition to Motion to Associate Counsel</i> 02/21/2012 Motion to Associate Counsel (3:00 AM) (Judicial Officer Barker, David) <i>Plaintiff's Motion to Associate Counsel (Thomas Vollbrecht, Esq.)</i> Minutes Result: Granted 03/28/2012 Order Admitting to Practice <i>Order Admitting to Practice - Thomas James Vollbrecht Esq</i> 04/11/2012 Notice of Change of Firm Name <i>Notice of Firm Change</i> 04/16/2012 Stipulation and Order <i>Stipulation and Order for Remand</i> 04/16/2012 Notice of Entry of Stipulation and Order <i>Notice of Entry of Stipulation and Order for Remand</i> 07/18/2012 Order to Statistically Close Case <i>Civil Order to Statistically Close Case</i> 01/05/2015 Case Reassigned to Department 24 <i>District Court Case Reassignment 2015</i>
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FINANCIAL INFORMATION

	Plaintiff Spar Marketing Services, Inc. Total Financial Assessment Total Payments and Credits Balance Due as of 10/22/2018	270.00 270.00 0.00
12/09/2011	Transaction Assessment	270.00
12/09/2011	Efile Payment Receipt # 2011-140787-CCCLK Spar Marketing Services, Inc.	(270.00)

Employment Security Division
Board of Review
500 East Third Street
Carson City, NV 89713
Tel (775) 687-6820
Fax (775) 684-0466



5988138
<https://www.nvdetr.org>

BOARD OF REVIEW

In the Matter of:

SPAR BUSINESS SERVICES INC
7711 N MILITARY TRL #1000
W PALM BEACH, FL 33410

RENEE OLSON, ADMINISTRATOR
EMPLOYMENT SECURITY DIVISION
STATE OF NEVADA
500 E. THIRD STREET
CARSON CITY, NV 89713

Date Decision is Mailed: 04/24/2017
Date Board's Decision is Final: 05/05/2017
Final Date for Appeal to Court: 05/16/2017

Appeal Rights: An appeal to the state district court of the county in which the work was performed must be filed on or before the "Final Date for Appeal to Court," as set forth above (NRS 612.525 and 612.530).

Docket Number: V-17-B-00243 (V-17-A-00727)

AFFIRMATION OF REFEREE'S DECISION:

Having reviewed the complete record and having considered the arguments presented by the parties:

I. The Board of Review adopts the FINDINGS OF FACT of the appeals referee as its FINDINGS OF FACT.

II. The Board of Review adopts the REASONS of the appeals referee as its REASONS.

DECISION: The decision of the appeals referee is affirmed in all respects; the administrative determination issued on December 9, 2013, pursuant to Nevada Revised Statutes (NRS) 612.245, is affirmed. Spar Business Services, Inc. (formerly Spar Marketing Services, Inc., account number 244975) remains legally obligated to report its merchandisers as employees and to pay contributions to the Employment Security Division for all of its merchandisers, in accordance with the determination issued on October 20, 2006, pursuant to NRS 612.085.

The Employment Security Division is hereby directed to remove any and all existing levies, penalties, and interest assessed against Spar Business Services, Inc. and to waive any and all contributions owed by Spar Business Services, Inc. from the quarter ending March 31, 2004 through the quarter ending December 31, 2016.

Effective with the quarter ending March 31, 2017 onward, Spar Business Services, Inc. is hereby directed to report wages and to pay contributions to the Employment Security Division for all its merchandisers.

This decision is unanimous.

BOARD OF REVIEW

/s/ KATIE JOHNSON, CHAIRPERSON

Recipient List

LAURIE TROTTER, ESQ.,
SENIOR LEGAL COUNSEL
EMPLOYMENT SECURITY DIVISION
STATE OF NEVADA
1340 SO. CURRY STREET
CARSON CITY, NV 89703

SPAR BUSINESS SERVICES INC
7711 N MILITARY TRL #1000
W PALM BEACH, FL 33410

THOMAS VOLLBRECHT, ESQ.
FABYANSKE, WESTRA, HART & THOMSON, P.A.
333 SOUTH SEVENTH STREET, SUITE 2600
MINNEAPOLIS, MN 55402

RENEE OLSON, ADMINISTRATOR
EMPLOYMENT SECURITY DIVISION
STATE OF NEVADA
500 E. THIRD STREET
CARSON CITY, NV 89713