

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
THIRD DEPARTMENT**

In re the Claim of Gawrys

140 A.D.3d 1363 (3d Dep't 2016) · Decided June 9, 2016

SUMMARY

The court reversed Unemployment Insurance Appeal Board decisions finding that Medical Delivery Services was liable for unemployment insurance contributions based on remuneration paid to the claimant and similarly situated drivers. It held that the employer was denied due process when it was prevented from presenting relevant, noncumulative expert testimony concerning federal regulations governing the drivers' work, and remitted the matter for a new hearing.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	Garry, J.; McCarthy, J.P.; Egan Jr., J.; Devine, J.; Aarons, J.
JURISDICTION	New York
DECIDED	June 9, 2016
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Employer appealed from two decisions of the Unemployment Insurance Appeal Board determining that the claimant was an employee and that Medical Delivery Services was liable for unemployment insurance contributions.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Medical Delivery Services v. Claimant, Unemployment Insurance Appeal Board

TOPICS

unemployment benefits administrative law evidence appellate procedure relevance

PRACTICE AREAS

employment law administrative law unemployment insurance evidence

QUESTIONS PRESENTED

1. Whether the ALJ improperly prevented Medical Delivery Services from eliciting relevant, noncumulative expert testimony concerning federal transportation regulations and the claimant's employment status.
2. Whether the exclusion of that testimony deprived Medical Delivery Services of due process and required reversal and a new hearing.

HOLDINGS

1. An employer has the right to call and examine witnesses in an unemployment insurance hearing, and relevant, noncumulative expert testimony concerning whether governmental regulations mandated the alleged control over a claimant may not be excluded merely because the parties entered a stipulation addressing the regulations.
2. The procedural irregularity violated due process and required reversal of the Board's decisions and remand for a new hearing.

KEY QUOTATIONS

“In view of this procedural irregularity, we find that due process requires that the decisions be reversed and the matter remitted for a new hearing” (140 A.D.3d at 1364)

“A party in an unemployment insurance hearing has “the right to call, examine and cross-examine parties and witnesses”” (140 A.D.3d at 1363)

FACTUAL BACKGROUND

Medical Delivery Services transported time-sensitive radioactive medicine and retained delivery drivers to pick up and deliver the medicine to medical facilities and pharmacies. After the claimant's relationship with MDS ended, he applied for unemployment benefits, and the Department of Labor classified him as an employee rather than an independent contractor. At the administrative hearing, MDS sought to present expert testimony concerning whether federal transportation regulations mandated the direction and control exercised over the claimant, but the ALJ barred the testimony after accepting a broad stipulation by the claimant's attorney.

PROCEDURAL HISTORY

The Department of Labor initially determined that the claimant was an employee of Medical Delivery Services and that the company owed unemployment insurance contributions based on payments to the claimant and similarly situated drivers. After a hearing, an Administrative Law Judge sustained the determination. The Unemployment Insurance Appeal Board adopted the ALJ's findings and opinion and denied reconsideration. The Appellate Division reversed the Board's decisions and remitted for a new hearing.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The matter was remitted to the Unemployment Insurance Appeal Board for a new hearing and further proceedings not inconsistent with the court's decision.

CASES CITED

- Matter of Lombard [SOH Distrib. Co., Inc. — Commissioner of Labor], 52 A.D.3d 981, 981-982 (3d Dep't 2008)
- Matter of Scott [CR England Inc. — Commissioner of Labor], 133 A.D.3d 935, 938 (3d Dep't 2015)
- Matter of Leazard [TestQuest, Inc. — Commissioner of Labor], 74 A.D.3d 1414, 1414-1415 (3d Dep't 2010)
- Matter of Wannan [Andrew Garrett Inc. — Commissioner of Labor], 57 A.D.3d 1029, 1030 (3d Dep't 2008)
- Matter of Choto v. Consolidated Lbr. Transp., Inc., 82 A.D.3d 1369, 1370 (3d Dep't 2011)
- Matter of Philip [Brody — Commissioner of Labor], 120 A.D.3d 1470, 1471 (3d Dep't 2014)
- Matter of Ward [Commissioner of Labor], 256 A.D.2d 773, 774 (3d Dep't 1998)
- Matter of Box [Commissioner of Labor], 249 A.D.2d 608, 608 (3d Dep't 1998)

OPINION

GARRY, J.

Garry, J. Appeals from two decisions of the Unemployment Insurance Appeal Board, filed September 11, 2014, which ruled, among other things, that Medical Delivery Services was liable for unemployment insurance contributions based upon remuneration paid to claimant and others similarly situated. Medical Delivery Services (hereinafter MDS) is a company engaged in the business of transporting time-sensitive radioactive medicine, or radiopharmaceuticals, to medical facilities and pharmacies.

To accomplish this task, MDS retained the services of delivery drivers such as claimant for pick up and delivery of the radiopharmaceuticals to MDS's clients. Claimant filed an application for unemployment insurance benefits after his relationship with MDS ended.

The Department of Labor issued an initial determination finding that claimant was an employee of MDS and that MDS was liable for unemployment insurance contributions based on remuneration paid to claimant and other similarly situated delivery drivers. MDS objected on the ground that claimant was an independent contractor. Following a hearing, an Administrative Law Judge (hereinafter ALJ) sustained the Department's determination.

Upon administrative appeal, the Unemployment Insurance Appeal Board adopted the ALJ's findings of fact and opinion and subsequently denied MDS's applications for reconsideration. MDS appeals from the initial decisions of the Board. MDS argues, among other things, that the ALJ improperly prevented it from eliciting relevant testimony from one of its witnesses.

We agree. At the hearing, MDS attempted to question one of its witnesses, an expert in federal transportation regulations, for the purpose of establishing that any direction *1364and control

exercised by MDS over claimant was mandated by provisions of federal law. At the start of the expert's testimony, claimant's attorney interjected that he would agree to stipulate that any federal regulations that dictate "the mode, means and so forth [are] applicable to [claimant]" and that "anything that's required of [claimant] is required of [MDS], which is in turn required by the Department of Transportation."* A party in an unemployment insurance hearing has "the right to call, examine and cross-examine parties and witnesses" (12 NYCRR 461.4 [c]).

Here, the expert testimony that MDS sought to elicit was noncumulative (compare *Matter of Lombard* [SOH Distrib. Co., Inc. — Commissioner of Labor], 52 AD3d 981, 981-982 [2008]) and highly relevant to the determination of claimant's employment status.

We have held that an employment relationship cannot be premised solely upon controls mandated by government regulations (see *Matter of Scott* [CR England Inc. — Commissioner of Labor], 133 AD3d 935, 938 [2015]; *Matter of Leazard* [TestQuest, Inc. — Commissioner of Labor], 74 AD3d 1414, 1414-1415 [2010]; *Matter of Wannen* [Andrew Garrett Inc. — Commissioner of Labor], 57 AD3d 1029, 1030 [2008]; see also *Matter of Choto v Consolidated Lbr.*

Transp., Inc., 82 AD3d 1369, 1370 [2011]). The ALJ prohibited MDS from eliciting testimony on this point after determining that the parties' stipulation rendered such testimony unnecessary, but, thereafter, ultimately determined that MDS had purportedly exercised control beyond that required by federal regulations.

As MDS now argues, the employer was, in effect, thus deprived of both the benefit of the parties' broad stipulation and the opportunity to offer testimony to meet the underlying evidentiary purpose of the stipulation.

In view of this procedural irregularity, we find that due process requires that the decisions be reversed and the matter remitted for a new hearing (see 12 NYCRR 461.4 [c]; *Matter of Philip* [Brody— Commissioner of Labor], 120 AD3d 1470, 1471 [2014]; *Matter of Ward* [Commissioner of Labor], 256 AD2d 773, 774 [1998]; *Matter of Box* [Commissioner of Labor], 249 AD2d 608, 608 [1998]).

In light of this disposition, we need not address the parties' remaining arguments. McCarthy, J.P., Egan Jr., Devine and Aarons, JJ., concur. Ordered that the decisions are reversed, without costs, and matter remitted to the Unemployment Insurance Appeal Board for further proceedings not inconsistent with this Court's decision.

In response to a later question posed by claimant's attorney, the expert acknowledged that "this particular industry is one of the most highly regulated industries in the country."