

THE ANALYSIS OF SECTION 802(H) AND 753(L)(2)(B) OF
UNEMPLOYMENT COMPENSATION LAW: *QUALITY CARE
OPTIONS V. UNEMPLOYMENT COMPENSATION BOARD OF
REVIEW* SHEDS LIGHT ON HOW TO ANALYZE AND APPLY
THE TWO-PRONG TEST OF 753(L)(2)(B)

I. INTRODUCTION

The disbursement of unemployment compensation can be a very painstaking burden for an employer, and yet, life-saving for an unemployed individual. Based on this paradox, it is necessary to make sure that a fair resolution is furnished for both parties when dealing with this area of law, and *Quality Care Options v. Unemployment Compensation Board of Review*¹ not only analyzes, but sheds light on, how to interpret the statutes involving unemployment compensation. Section 802(h) of the Pennsylvania Statutes Annotated gives the broad definition of who cannot receive compensation,² and section 753(l)(2)(B) breaks down how the term employee is defined.³ In *Quality Care Options*, the Commonwealth Court of Pennsylvania held that the Unemployment Compensation Board of Review (Board) erred in determining that the claimant was an employee of Quality Care Options.⁴

This survey will explain in detail how the unemployment compensation statutes are interpreted by both the Board, as well as the Commonwealth Court of Pennsylvania. First, this survey will provide a thorough background of section 753(l)(2)(B) and the recent development of how to interpret the statute; most notably, the second prong of the statute, involving whether the individual was customarily engaged in an independently established trade, occupation, profession, or business. Next, this survey will examine *Quality Care Options* in detail, including a thorough analysis of

¹ *Quality Care Options v. Unemployment Comp. Bd. of Review*, 57 A.3d 655 (Pa. Commw. Ct. 2012).

² 43 PA. STAT. ANN. § 802(h) (West 2009).

³ *Id.* § 753(l)(2)(B).

⁴ *Quality Care Options*, 57 A.3d at 663.

the procedural history, facts, majority holding and rationale, and the dissenting rationale. Following this section, this survey will provide an assessment of the court's decision, including the effect on unemployment law moving forward. Lastly, this survey will contain a brief conclusion.

II. BACKGROUND

Considering the amount of claims and importance of unemployment compensation, the Board and courts are not simply guided by common law to address the issue, but rather, have multiple statutes which have been interpreted with some difficulty over time. In 1936, to provide some guidance in the area of unemployment compensation, the Unemployment Compensation Statute was formally promulgated and passed.⁵ When the Board and prior courts looked to the statute to determine whether or not an individual would be entitled to unemployment compensation under section 802(h), they quickly found that all the statute provided was that an employee is ineligible for benefits for any week in which he is engaged in "self-employment."⁶ Because the law does not define what the term self-employment means, courts looked to the definition of "employment" under section 753(1)(2) to discern whether someone was still employed and, therefore, could not receive unemployment compensation.⁷ Under the statute, the definition of employment is:

⁵ Act of Dec. 5, 1937, P.L. 458, Act 1937-2897.

⁶ tit. 43, § 802(h). Section 802(h) provides that:

An employe shall be ineligible for compensation for any week . . . In which he is engaged in self-employment: Provided, however, That an employe who is able and available for full-time work shall be deemed not engaged in self-employment by reason of continued participation without substantial change during a period of unemployment in any activity . . . undertaken while customarily employed by an employer in full-time work whether or not such work is in "employment" as defined in this act and continued subsequent to separation from such work when such activity is not engaged in as a primary source of livelihood.

Id. § 802(h).

⁷ *Id.* § 753(1)(2).

Services performed by an individual for wages shall be deemed to be employment subject to this act, unless and until it is shown to the satisfaction of the department that – (a) such individual has been and will continue to be free from control or direction over the performance of such services both under his contract of service and in fact; and (b) as to such services such individual is customarily engaged in an independently established trade, occupation, profession or business.⁸

The first step in determining whether an individual is, in fact, an employee and entitled to compensation under the act, is a determination by the Board based on its findings of fact.⁹ After the Board makes its decision and determinations regarding its own factual findings, the court then reviews the Board's decision, if appealed.¹⁰ A determination as to the existence of an employer-employee relationship is a "question of law that depends on the unique facts of each case."¹¹ As to questions of law, the court's scope of review is plenary, and the standard of review is *de novo*.¹²

Although there has been an abundance of case law throughout the years, the most prevalent slew of cases decided in the past two years carry the most importance in the analysis of the law leading up to the current standard.

In 2010, the Commonwealth Court of Pennsylvania, in *Resource Staffing, Inc. v. Unemployment Compensation Board of Review*,¹³ ruled that when determining whether or not an individual is engaged in an independently established trade, the court should look to: "(1) whether the individual [is] capable of performing the activities . . . to anyone . . . ; and (2) whether the nature of the

⁸ *Id.* § 753(l)(2)(B).

⁹ *See* *Res. Staffing, Inc. v. Unemployment Comp. Bd. of Review*, 961 A.2d 261, 263 (Pa. Commw. Ct. 2008).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Tech One Assocs. v. Bd. of Prop. Assessment, Appeals & Review of Allegheny Cnty.*, 53 A.3d 685, 696 (Pa. 2012).

¹³ *Res. Staffing, Inc. v. Unemployment Comp. Bd. of Review*, 995 A.2d 887 (Pa. Commw. Ct. 2010).

business" only allows the individual to look to a single employer.¹⁴ In *Resource Staffing*, Resource Staffing, Inc. (RSI) was petitioning for review of a Board order affirming the referee's decision that the company failed to establish that the individual worked independently.¹⁵ The claimant was "an experienced Microsoft systems engineer" who signed a six-month contract agreement with the employer.¹⁶ The claimant then subsequently signed a contractor agreement and worked for the client, at its facility, for almost a year.¹⁷ The Board concluded that RSI exercised control over the claimant's work because they required him to work a set schedule, made him notify them before taking sick leave, admitted they directly supervised him, made him attend meetings about his work, and required him to submit timesheets.¹⁸ In addition, the Board found that the company failed to establish the claimant worked by himself because he performed work only for them, did not have time to perform work for others, and he was "limited in his ability to seek additional work [based on] the Contractor Agreement."¹⁹

The court, when reviewing the Board's decision, first determined that the company actually did show that the individual was free from its control or direction because the individual's hours and work locations were decided by the client, and the supervision of the individual only dealt with payroll matters and general assurances of project completion.²⁰ Next, the court laid out the following factors, which are relevant in determining whether the claimant was engaged in an independently established trade: "(1) whether the individual was capable of performing the activities in question to anyone who wished to avail themselves of the services; and (2) whether the nature of the business compelled the individual to look to only a single employer for the continuation of such

¹⁴ *Id.* at 892 (citing *Krum v. Unemployment Comp. Bd. of Review*, 689 A.2d 330, 333 (Pa. Commw. Ct. 1997)).

¹⁵ *Id.* at 889.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Res. Staffing*, 995 A.2d at 890.

²⁰ *Id.* at 891-92.

services."²¹ The court determined that, although the individual spent a lot of time at the client's premises, the individual himself stated his schedule was flexible and that he could provide his services to others.²² Therefore, the court was convinced that the company satisfied its burden of showing the individual operated independently.²³

In 2011, the Commonwealth Court of Pennsylvania, in *Kurbatov v. Department of Labor and Industry, Office of Unemployment Compensation*,²⁴ set out certain non-dispositive factors in determining whether a company exercised control or direction over the individual.²⁵ Once again, the court found that when looking to see if the individual engaged in an independently established business, the court looks to "whether the individual was capable of performing the activities in question for anyone who wished to avail themselves of the services and whether the nature of the business compelled the individual to look to only a single employer for the continuation of such services."²⁶ In *Kurbatov*, the employer appealed the Board's decision that its workers were employees and the Board's assessment of compensation taxes against the company.²⁷ Kurbatov was the sole proprietor of PBK Construction, which hired individuals to complete work on projects, compensating each based on square footage of insulation installed.²⁸ PBK Construction did not provide protective gear or tools, but did provide "necessary equipment and materials to complete the work," and required "each worker to sign an independent contractor agreement . . . for each project."²⁹ These agreements determined the hours individuals worked, did not allow the individuals to leave the job without permission, and did not

²¹ *Id.* at 892 (citing *Krum v. Unemployment Comp. Bd. of Review*, 689 A.2d 330, 333 (Pa. Commw. Ct. 1997)).

²² *Id.*

²³ *Id.*

²⁴ *Kurbatov v. Dep't of Labor & Indus., Office of Unemployment Comp.*, 29 A.3d 66 (Pa. Commw. Ct. 2011).

²⁵ *Id.* at 70.

²⁶ *Id.* (quoting *Venango Newspapers v. Unemployment Comp. Bd. of Review*, 631 A.2d 1384, 1388 (Pa. Commw. Ct. 1993)).

²⁷ *Id.* at 67.

²⁸ *Id.* at 68.

²⁹ *Id.*

permit the distribution of their names or services while working for the company.³⁰ As to the first prong, the court elicited numerous factors that should be used in determining whether the employer exercised control or direction over the individual.³¹ The factors which should be considered by the courts include:

Control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one employed is engaged in a distinct occupation or business; which party supplies the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer, and also the right to terminate the employment at any time.³²

The court further explained that because every case is fact specific, no factors are dispositive, and it is not necessary for an employer to show every element.³³ The most important of the factors is whether the " 'employer has the *right* to control the work to be done and the manner in which it was performed.' "³⁴ It was necessary for the court to explain in detail that this means an employer does not actually need to control the individual, but just needs the ability.³⁵ The court concluded that because the "Employer dictated the time, place and manner for performance [of duties], and required permission to deviate from [its] schedules," PBK Construction exercised sufficient control.³⁶

As to the second prong of the two-part test, the court once again stated it must look to "whether the individual was capable of

³⁰ *Kurbatov*, 29 A.3d at 68.

³¹ *Id.* at 70.

³² *Id.* (quoting *Hammermill Paper Co. v. Rust Eng'g Co.*, 243 A.2d 389, 392 (Pa. 1968)).

³³ *Id.*

³⁴ *Id.* (emphasis in original) (quoting *York Newspaper Co. v. Unemployment Comp. Bd. of Review*, 635 A.2d 251, 253 (Pa. Commw. Ct. 1993)).

³⁵ *Id.*

³⁶ *Kurbatov*, 29 A.3d at 72.

performing the activities in question for anyone who wished to avail themselves of the services and whether the nature of the business compelled the individual to look to only a single employer for the continuation of such services."³⁷ Although the court once again laid out the second prong of the test, it refused to address it because the first element was not established by the employer.³⁸

The Commonwealth Court of Pennsylvania deviated from the prior interpretation of the second prong two months later in *Silver v. Unemployment Compensation Board of Review*.³⁹ In *Silver*, the claimant provided telephone consultations on a sporadic, as-needed basis with Gerson Lehrman Group, Inc.⁴⁰ The claimant further set her own hours and pay rate and "was under no obligation to accept any assignments."⁴¹ Furthermore, the Board found that the "Claimant accepted a total of four consultation assignments" over a three month period.⁴² The Board concluded that the employer had demonstrated sufficiently that the individual was both free from control and direction, and that she was engaged in an independent trade or business.⁴³

The Commonwealth Court of Pennsylvania agreed with the Board that the employer sufficiently met its burden of showing the individual was free from direction or control, but, did not satisfy its second burden of proving the individual was engaged in an independent trade or business.⁴⁴ The court applied the same factors as in *Kurbatov* regarding the first prong of the two-part test, and found that the employer sufficiently proved that the claimant was free to decline referrals, set her own hours and pay rate, and "perform identical services for others."⁴⁵ The court, however, departed from its prior case law in the second prong of the

³⁷ *Id.* at 70.

³⁸ *Id.* at 72.

³⁹ *Silver v. Unemployment Comp. Bd. of Review*, 34 A.3d 893 (Pa. Commw. Ct. 2011).

⁴⁰ *Id.* at 894.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 895.

⁴⁴ *Id.* at 899.

⁴⁵ *Silver*, 34 A.3d at 897.

employment test. The court stated, "the fact that an unemployed person agrees to accept . . . an occasional offer of work is simply not enough to demonstrate that said individual is customarily engaged in an independently established . . . profession."⁴⁶ The court further stated that there is no "either/or" test when making this second determination, and that courts should not look to whether or not the individual separated from the employer.⁴⁷ Similar to the Commonwealth Court of Pennsylvania's ruling in *Buchanan v. Unemployment Compensation Board of Review*,⁴⁸ the court in *Silver* determined that the claimant's conduct did not reflect positive steps in embarking on an independent trade or business venture because she only participated in "three hours of work involving several phone calls over the course of five months."⁴⁹ Therefore, the court's analysis of what constituted sufficient grounds for an independently established business or profession (and unemployment compensation) shifted, requiring an in-depth determination of the facts of the case instead of the either/or test established in both *Resource Staffing, Inc.* and *Kurbatov*.⁵⁰

III. ANALYSIS: *QUALITY CARE OPTIONS V. UNEMPLOYMENT BOARD OF REVIEW*

The Commonwealth Court of Pennsylvania shifted its interpretation of the second prong of the employment analysis once again in *Quality Care Options*.⁵¹ In *Quality Care Options*, the court held that, because the individual was able to accept or reject assignments and could provide services through another agency, the employer sufficiently established that the individual was engaged in an independent trade or business.⁵²

⁴⁶ *Id.* at 898.

⁴⁷ *Id.* at 899.

⁴⁸ *Buchanan v. Unemployment Comp. Bd. of Review*, 581 A.2d 1005 (Pa. Commw. Ct. 1990).

⁴⁹ *Silver*, 34 A.3d at 897.

⁵⁰ *Id.* at 899.

⁵¹ *Quality Care Options v. Unemployment Comp. Bd. of Review*, 57 A.3d 655, 663 (Pa. Commw. Ct. 2012).

⁵² *Id.*

A. Procedural History

This case arose from a Board decision regarding the employment status of the claimant, Jamal Mack.⁵³ The main issue in the case was whether the claimant performed services as an employee or independent contractor.⁵⁴ After the Board affirmed the referee's findings that the individual was, indeed, an employee and entitled to unemployment compensation, Quality Care Options (Quality) appealed the determination to the Commonwealth Court of Pennsylvania, questioning whether the record supported this conclusion.⁵⁵ The determination of whether or not an employer/employee relationship exists "is a question of law that depends on the unique facts of each case."⁵⁶ As to those questions of law, the court's review power is plenary, and the standard of review is *de novo*.⁵⁷

B. Facts

The company involved in the case was Quality, which is a "healthcare staffing agency that matches healthcare workers with [certain] clients."⁵⁸ Mack began his involvement with Quality in May 2005 and continued working as a direct care worker through the start of this case.⁵⁹ Quality has numerous clients who occasionally require direct care workers, such as Mack.⁶⁰ When a client of Quality needs a direct care worker, the company contacts an individual on its independent contractor list and offers work to the individual.⁶¹ At that point, the individual is free to accept or reject the offer from Quality, and if the individual does reject the offer, there are no repercussions, nor must he or she provide any reasoning for the decision to decline.⁶² If the individual accepts the

⁵³ *Id.* at 657.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 660 (citing *Res. Staffing, Inc. v. Unemployment Comp. Bd. of Review*, 961 A.2d 261, 263 (Pa. Commw. Ct. 2008)).

⁵⁷ *Quality Care Options*, 57 A.3d at 660.

⁵⁸ *Id.* at 657.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 658.

offer, he or she reports to work at the location of the client and performs the direct care services as instructed by the client.⁶³ The direct care workers are "required to carry and maintain their own certifications."⁶⁴ Individuals in this capacity are paid by the hour, and it is the client and the individual who confirm the number of hours to be worked, and subsequently, submit this to the employer.⁶⁵ Also, individuals, such as Mack, perform their duties as instructed by the client and are "free to register with Quality or any of its competitors."⁶⁶ According to the referee's findings, it is common in the industry "for individuals to be registered with Quality and . . . other companies."⁶⁷ In the current case, Mack signed an independent contractor agreement with the company, which conflicts with the referee's determination that direct care workers are typically not independent.⁶⁸

C. Mack's Arguments

The essential argument advanced by Mack was that he was, in fact, an employee for Quality and should be entitled to unemployment compensation.⁶⁹ The referee laid out the arguments that weighed in favor of him being an employee, including "that direct care worker[s] are] subject to the orders of the client," they are paid by the hour, and the business model is extremely similar to a "traditional temporary employment agency model."⁷⁰ These factors combined all favored Mack being found to be an employee in regards to section 753(1)(2)(B).⁷¹

D. Quality's Arguments

Quality argued that the individual, Mack, was not under the direction or control of the company and was customarily engaged

⁶³ *Quality Care Options*, 57 A.3d at 657-58.

⁶⁴ *Id.* at 657.

⁶⁵ *Id.* at 658.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Quality Care Options*, 57 A.3d at 657.

⁷⁰ *Id.* at 658.

⁷¹ *Id.* at 661.

in an independently established trade, occupation, profession, or business.⁷² Quality argued the referee's factual findings were inaccurate and that the Board erred in failing to acknowledge that Mack was an independent contractor.⁷³ Quality further argued that "the testimony of its representative and its . . . evidence" were enough to support a conclusion that they did not control or direct Mack's performance of his duties.⁷⁴ Finally, Quality contended that because Mack was an independent contractor, he should not be entitled to unemployment compensation under section 802(h).⁷⁵

E. Majority Analysis

In analyzing the case at hand, the Commonwealth Court of Pennsylvania first laid out sections 802(h) and 753(l)(2)(B) and reiterated prior case law in stating that 753(l)(2)(B) creates a "presumption that an individual working for wages is an employee."⁷⁶ The court further stated that the employer must meet its burden of overcoming this "strong presumption."⁷⁷ The test the court laid out when reviewing the Board decision is that the employer must prove: (1) "the worker performed his job free from the employer's control and direction," and (2) "the worker, operating as an independent tradesman, professional or businessman, did or could perform the work for others, not just the employer."⁷⁸ The employer must satisfy both factors to meet its burden and avoid paying out unemployment compensation.⁷⁹ As to the first factor, the court once again laid out certain non-dispositive factors the court should look at in determining whether the employer exerted control or direction over the individual.⁸⁰ These factors included:

⁷² *Id.* at 659.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Quality Care Options*, 57 A.3d at 659.

⁷⁶ *Id.* at 660 (citing *Res. Staffing, Inc. v. Unemployment Comp. Bd. of Review*, 995 A.2d 887, 890 (Pa. Commw Ct. 2010)).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* (quoting *Kurbatov v. Dep't of Labor & Indus., Office of Unemployment Comp.*, 29 A.3d 66, 69 (Pa. Commw. Ct. 2011)).

⁸⁰ *Id.*

[W]hether there was a fixed rate of remuneration; whether taxes were withheld from the claimant's pay; whether the employer supplied the tools necessary to carry out the services; whether the employer provided on-the-job training; whether the employer set the time and location for work; and, whether the employer had the right to monitor the claimant's work and review performance.⁸¹

The court held that "the Board erred when it determined [the] Company failed to prove [the individual] performed services free from [the] Company's control or direction."⁸² The court based this decision on the fact that no taxes were withheld from Mack's pay, he was paid at an hourly rate, he and the client were the ones who confirmed the number of hours needed to be worked, he performed the services at the instruction of the client, and he was required to keep and carry his own certification.⁸³ The court stated that it was clear the client controlled "the time, place, and manner of services."⁸⁴ Furthermore, although the existence of an independent contractor agreement is not dispositive, the court considered it a significant factor.⁸⁵ In this case, the agreement showed that Mack would put forth his best efforts for the client and that Quality would not be supervising or evaluating his performance.⁸⁶

As to the second prong of the two-part test, the court illuminated two factors to be considered: "whether the individual was capable of performing the activities in question for anyone who wished to avail themselves of the services, and whether the nature of the business compelled the individual to look to only a single employer for the continuation of such services."⁸⁷ The court further cited precedent, stating "[w]here an employee is free to accept or reject an assignment, the individual generally is not considered to look to a single employer for the continuation of

⁸¹ *Quality Care Options*, 57 A.3d at 660.

⁸² *Id.* at 661.

⁸³ *Id.* at 660-61.

⁸⁴ *Id.* at 661.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Quality Care Options*, 57 A.3d at 662.

such services."⁸⁸ The court concluded that the Board, once again, erred when it determined Quality failed to meet its burden of proving the "Claimant was engaged in an independent trade."⁸⁹ The court reasoned that Mack was not barred from providing services through an agency other than Quality, could refuse any assignment, and was not dependent on the income received from Quality.⁹⁰ The court heavily relied on the testimony of the company representative, who testified that the majority of the direct care workers most likely have a full-time job somewhere else and that Mack worked for another employer.⁹¹

F. Dissent

The dissent disagreed with the way the majority analyzed the second prong of the test, claiming the court reverted back to the either/or test that *Silver* determined was inapplicable.⁹² The dissent claimed that the majority used this test notwithstanding the fact that Mack admitted he was laid off from his full-time employer.⁹³ The dissent then stated that the correct interpretation of the second prong of the two-part test requires a holding that the employee may still be eligible for compensation subsequent to a separation and not automatically be ineligible based on income earned as an independent contractor.⁹⁴ The dissent would take the approach that just because a claimant was found to be an independent contractor for a company does not automatically render the person self-employed under 802(h).⁹⁵ Based on this interpretation of the test, the dissent concluded that the evidence supported a determination that, although Mack was an independent contractor, Quality did not meet its burden of showing he was customarily engaged in an independent trade or profession and, therefore, Mack should have been eligible for unemployment compensation.⁹⁶

⁸⁸ *Id.* (internal citation omitted).

⁸⁹ *Id.* at 663.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 665 (McCullough, J., dissenting).

⁹³ *Quality Care Options*, 57 A.3d at 665 (McCullough, J., dissenting).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 666.

IV. EVALUATION

The Commonwealth Court of Pennsylvania seemed to choose administrability and a rigid rule over a more practical, fact-based inquiry. Instead of siding with its most recent decision in *Silver*, the court reverted back to its prior holdings in both *Resource Staffing, Inc.* and *Kurbatov*. Although this is not necessarily an incorrect analysis or interpretation of section 753(1)(2)(B), it may lead to complications in the future and an unfair result for some individuals deemed not to be employees.

As to the first factor, it seems that the court followed precedent and did not deviate at all from the slew of previous Pennsylvania court cases, which made decisions on whether the employer did, in fact, exert control or direction over the individual. The court used the same, or at least very similar, factors as previous courts in making its determination. It gave much deference to the findings of fact made by the referee and did not disturb these findings at all. Although this was true, the court gave almost no deference whatsoever to the Board on its conclusions that Quality did not meet its burden of proving it did not exercise control and direction over Mack. The court completely disregarded and rejected the weight that the Board gave to certain factors showing direction and control, as well as the reasoning behind the Board's affirmation of the referee's conclusions. The Board was more concerned about the rate of pay and mitigated the importance of the fact that the individual was performing services to the liking of the client, and the court illuminated its own factors it thought were of utmost importance. This shows that the Board gets very little deference in this area, and, essentially, the court can completely disregard the Board's conclusions based on its own interpretations of the facts in the case.

The second factor of the two-prong test is where the court's interpretation of the law may receive the most scrutiny, as it sacrificed reasonableness for a rigid rule. The court did not entirely disobey the law, but its interpretation of the second prong seemed to disregard its decision in *Silver*, decided just a year prior. The court's interpretation of whether an individual has customarily engaged in an established profession or business uses an either/or test, only requiring the employer to establish that the services

could have been provided to another company other than the employer itself. While this may seem reasonable in some aspects, it tends to allow for unfairness in a situation where a former employee is trying to obtain some minute income while waiting for an opportunity to be employed once again. The dissent illuminates numerous examples from previous cases.⁹⁷ The decision in *Silver*, in which the Board and court would look to a totality of the circumstances test to determine if the individual really took steps in establishing an independent trade or business, seems much more practical and fair towards the claimant. The rigid rule the majority adopts, while administrable, lacks the common sense and fairness necessary in a very important issue—unemployment compensation for individuals who may severely need this income.

Therefore, while the court's opinion may have been correct procedurally, as well as in following precedent, it lacks the practicality and reasonableness which was shown in *Silver*, as well as the dissent in *Quality Care Options*.

V. CONCLUSION

The second prong of the two-part test, which both the Board and courts use in determining whether an individual has established an independent trade, business, or profession, is, once again, based on an either/or test. *Quality Care Options* shows us that as long as the employer shows the individual could have provided services through another company and could refuse an assignment, the individual will not be entitled to unemployment compensation, provided that the employer also proves the individual was not under the control and direction of the employer. It is clear that, moving forward, employers will have an easier avenue of showing that an individual claiming unemployment compensation was engaged in an independent profession.

⁹⁷ See *id.* (describing prior cases in which courts have determined that trying to maintain some income does not satisfy the second prong).

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* Juris Doctor Candidate, Widener University School of Law (Harrisburg), May 2014; Temple University, B.A. 2011. This survey is dedicated to my family, friends, and loved ones. I would specifically like to thank my parents, Tom & Laura; the staff of the *Widener Law Journal*; and those professors from both Widener University School of Law and Temple University who have guided me throughout my education.