SUPREME COURT OF NEW JERSEY
DOCKET NO. 085770

EAST BAY DRYWALL, LLC, Petitioner-Respondent, v. NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, Respondent-Appellant.	Civil Action On Certification from Final Judgment of the Superior Court of New Jersey Appellate Division DOCKET NO. A-2467-19 Sat Below: Hon. Jack M. Sabatino, P.J.A.D. Hon. Heidi W. Currier, J.A.D. Hon. Greta Gooden Brown, J.A.D.

BRIEF AND APPENDIX OF AMICUS CURIAE NEW JERSEY CIVIL JUSTICE INSTITUTE IN SUPPORT OF PETITIONER-RESPONDENT EAST BAY DRYWALL, LLC

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TABLE OF CONTENTS

TABLE OF CONTENTS TO APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES & REGULATIONS

STATEMENT OF INTEREST OF AMICUS CURIAE

The New Jersey Civil Justice Institute ("NJCJI") advocates for a civil justice system that treats all parties fairly. NJCJI has a strong interest in the clear, predictable, and fair application of the law and is concerned with the broader civil justice implications that cases, such as this one, may have on businesses small and large throughout this State.

Founded in 2007 as the New Jersey Lawsuit Reform Alliance, NJCJI is a bipartisan, statewide group comprised of small businesses, individuals, not-for-profit groups, and many of the State's largest business associations and professional organizations. In that capacity, NJCJI monitors New Jersey legislation to assess its impact on issues related to civil justice, offers comments on proposed amendments to New Jersey's Rules of Court, and participates as amicus curiae in matters of interest to its membership. In recent years, NJCJI has appeared as amicus curiae before this Court in important consumer and tort litigation, including Walfish v. Northwestern Mutual Life Ins. Co., Dkt. No. 084836 (cert. dismissed following settlement); Dugan v. TGI Fridays, Inc., 231 N.J. 24 (2017); Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173 (2012); Allen v. V&A Bros., Inc., 208 N.J. 114 (2011); and Bosland v. Warnock Dodge, Inc., 197 N.J. 543 (2009). NJCJI and its members believe that a fair civil justice system resolves disputes expeditiously, without bias, and based

solely upon application of the law to the facts of each case. Such a system fosters public trust and motivates businesses to provide safe and reliable products and services, while ensuring that injured individuals are compensated fairly for their losses.

NJCJI's interest in the instant case stems from its efforts to ensure the fair interpretation of statutes enacted by our Legislature. To further its members' interest in the clear and predictable application of the law, NJCJI seeks leave to participate as amicus curiae in this matter in light of the significance of the certified question to its members, and submits this brief in support of that application.

PRELIMINARY STATEMENT

This case implicates the "B" and "C" prongs of the statutory "ABC" Test used to determine whether one is an employee or an independent contractor for purposes of the Unemployment Compensation Law ("UCL"). The arguments advanced by the Department of Labor and Workforce Development ("DOL") with respect to the "B" Prong directly conflict with precedent from this Court and would effectively make the prong impossible to satisfy. The DOL's arguments with respect to the "C" Prong similarly would impose such a high burden of proof on businesses as to make it nearly impossible to challenge any misclassification determination by the DOL. Because this case potentially may affect many enterprises throughout New Jersey that engage independent contractors, NJCJI respectfully urges this Court to affirm the Appellate Division's comprehensive and thoughtful decision.

An enterprise satisfies Prong "B" by showing that its putative contractor performed services "outside of all the places of business of the enterprise for which such service is performed." N.J.S.A. 43:21-19(i)(6)(B). In Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor, 125 N.J. 567 (1991), this Court held that this means what it says: "places of business" are the enterprise's offices, not the premises outside its control to which it sends contractors to perform services. As this Court noted, a contrary interpretation would make it "practically impossible" to

satisfy the "B" Prong. Id. at 592. The instant case involves "comparable locational facts [to] Carpet Remnant," so the Appellate Division properly followed this Court's controlling guidance. (Pa20.)[1] The DOL disagrees, contending that because the petitioner in Carpet Remnant had a retail showroom, while the petitioner here does not sell drywall at retail, this Court should consider all the places where contractors installed drywall to be "places of business" of East Bay. That is not a proper basis to distinguish Carpet Remnant and would yield exactly the impossible-to-satisfy result about which this Court warned.

Prong "C" requires businesses to show that putative contractors are "customarily engaged in an independently established trade, occupation, profession or business." N.J.S.A. 43:21-19(i)(6)(C). This case implicates the burden of proof for businesses and the DOL when fighting over Prong "C," especially when the contractors no longer operate and do not respond to the DOL's information requests, and after an Administrative Law Judge ("ALJ") has weighed the available evidence in an inherently fact-intensive inquiry. Here, East Bay provided what it could: certificates of insurance from the out-of-business contractors at issue here and credible testimony explaining why East Bay believed them to have been independently established businesses. The DOL

[1] "Pb" and "Pa" refer to the DOL's Brief and Appendix submitted in support of its Petition for Certification.

had no evidence to the contrary. The ALJ found that East Bay met its burden, but the DOL Commissioner disagreed.

The Appellate Division reversed, and the DOL characterizes that decision as requiring the Commissioner "to address each worker with particularity to find that those employees were misclassified." (Pb13.) Respectfully, that is not a fair reading of the decision. The Appellate Division left ample room for the Commissioner to find, based on evidence, that a business is engaged in a sham to evade UCL contributions. (See Pa22.) But here, the DOL neither attempted to prove nor even made such an assertion. The Commissioner rejected the record evidence of the contractors' independence, but offered no evidence at all to the contrary. The Appellate Division correctly held that "[w]hen an agency head strays from the factual findings of an ALJ, we need not accord the agency the high level of deference [courts] ordinarily apply in reviewing administrative decisions." (Pa22.) Little deference should be owed, either, to a determination the DOL made without satisfying any burden of proof at all.

STATEMENT OF FACTS

NJCJI relies upon the parties' Statements of Facts.

LEGAL STANDARD

As a friend of the Court, NJCJI begins with what should be common ground. It is a "well-established principle" that a reviewing court will "defer to [an] agency's fact-findings if

supported by the record." Carpet Remnant, 125 N.J. at 587. That "if" is an important limiter. It preserves the role of New Jersey's courts as a check on unbounded executive decision-making.

"Judicial review of administrative agency action is a constitutional right." Silviera-Francisco v. Bd. of Educ. of Elizabeth, 224 N.J. 126, 136 (2016), citing N.J. Const. art. VI, § 5, ¶ 4. Constitutional protection even "immunizes [judicial review] from legislative curbs." In re Senior Appeals Exam'rs, 60 N.J. 356, 363 (1972). "One of the core values of judicial review of administrative action is the furtherance of accountability." In re Dep't of Ins.'s Order Nos. A89-119 & A90-125, 129 N.J. 365, 383 (1992). Accordingly, administrative agency discretion "is not unbounded and must be exercised in a manner that will facilitate judicial review." In re Vey, 124 N.J. 534, 543-44 (1991). "A state agency rendering a final agency decision must explain the specific reasons for its determination." In re Thomas Orban/Square Props., LLC, 461 N.J. Super. 57, 77 (App. Div. 2019). "[A]gencies must 'articulate the standards and principles that govern their discretionary decisions in as much detail as possible.'" Vey, 124 N.J. at 543-44, quoting Van Holten Grp. v. Elizabethtown Water Co., 121 N.J. 48, 67 (1990).

Courts premise the wide but still carefully cabined deference they afford to final agency decisions on "confidence that there has been a careful consideration of the facts in issue and

appropriate findings addressing the critical issues in dispute." Thomas Orban, 461 N.J. Super. at 77 (internal quotation omitted). "Courts are not to act simply as a rubber-stamp of an agency's decision," Phila. Newspapers, Inc. v. Bd. of Rev., 397 N.J. Super. 309, 318 (App. Div. 2007), and need not defer to a decision that is unjustified by the record, see Vey, 124 N.J. at 544.

ARGUMENT

With respect to the "B" Prong of the ABC Test, the DOL should abide by this Court's decision in Carpet Remnant. When an enterprise sends installers to job sites all over the state, those job sites simply are not the "*usual* place or places at which the employer performs its business." Hargrove v. Sleepy's, LLC, 220 N.J. 289, 314 (2015) (emphasis added). With respect to the "C" Prong, New Jersey businesses would benefit from clear judicial guidance regarding (1) what evidence an enterprise should obtain from contractors so that it can establish their independence later, in the event the DOL conducts an audit after those contractors may have ceased to operate; and (2) the circumstances under which the DOL Commissioner can disregard an ALJ's findings of fact with respect to issues of contractor independence.

I. THIS COURT'S DECISION IN CARPET REMNANT RIGHTLY HAS LIMITS, BUT EAST BAY DID NOT TRANSGRESS THEM.

An employer satisfies Prong "B" of the "ABC" test when it demonstrates that the putative contractor performed the services

either outside the usual course of business or outside its "places of business." N.J.S.A. 43:21-19(i)(6)(B). Satisfying either alternative suffices. See Carpet Remnant, 125 N.J. at 584. As this Court stated more recently, "places of business" means "the *usual* place or places at which the employer performs its business." Hargrove, 220 N.J. at 314 (emphasis added).

Carpet Remnant, as the parties' briefing reflects, involved a carpet retailer that sold carpet at retail showrooms and hired contractors to install carpets at its customers' homes. See 125 N.J. at 573. The Commissioner concluded in Carpet Remnant that each customer's home was a "place of business" for the enterprise. See id. at 591-92. This Court rejected the DOL's expansive view, which would have made it "practically impossible" for "a person to satisfy the B standard's second alternative." Id. at 592. The Court concluded that the term "places of business" refers "only to those locations where the enterprise has a physical plant or conducts an integral part of its business," and therefore did not include the homes in which carpets were installed. Ibid.

A. Remote work sites constitute "places of business" only when they are recurrently used to carry out the entity's business.

The principles of Carpet Remnant have reasonable limits, as later cases have shown, such that an enterprise's "places of business" can include remote work sites. For example, in MKI Associates, LLC v. New Jersey Department of Labor & Workforce

Development, a business placed therapists in certain facilities. No. A-4508-17T3, 2019 WL 5078715 (N.J. Super. Ct. App. Div. Oct. 10, 2019). MKI had exclusive "Staffing Contracts" with each of the few facilities, including non-compete and non-solicitation clauses. Id. at *1-2. MKI negotiated the therapists' rates of pay, and the fees it derived from these exclusive-arrangement facilities were MKI's sole source of income. Id. at *1, *5.

In applying the "B" Prong, the Appellate Division agreed with the DOL that because "the principal part of MKI's business enterprise is providing therapeutic services pursuant to the staffing contracts that MKI maintains with its [facility] clients," the under-contract facilities in which MKI placed therapists were "locations where MKI conducts an 'integral part of its business.'" Ibid. That distinguished MKI from an earlier case where "the nature of the business was not providing health care, but rather 'brokering nursing personnel to hospitals.'" Ibid., quoting Trauma Nurses, Inc. v. Bd. of Rev., N.J. Dep't of Lab., 242 N.J. Super. 135, 147 (App. Div. 1990). "[U]nlike Trauma Nurses, MKI exclusively held itself out as a provider of therapists to facilities as an integral part of its business." Ibid.

Similarly, in Devereux Foundation v. New Jersey Department of Labor & Workforce Development, the Appellate Division determined that an enterprise did not satisfy Prong "B" where it contracted with foster parents to provide services at remote locations. No.

A-0936-19, 2021 WL 2099851, at *10 (N.J. Super. Ct. App. Div. May 25, 2021). Devereux did not own the homes; it contracted with families who provided their private homes and agreed to serve as therapeutic foster parents following Devereux's procedures. Ibid.

The families in Devereux provided more than just a home. They were viewed by Devereux as "member[s] of the care team for each child," and were required by contract with Devereux to provide specialized therapeutic services. Id. at *4-5. Contracted foster caregivers promised not to take placements from any other foster organization while they were under contract with Devereux. Id. at *3. Devereux oversaw the homes, always had a staff member on call, ensured that contractors adhered to regulations, and visited the homes weekly. Id. at *1. Devereux also hired and deployed repair teams to maintain the homes and medical service providers to treat the children during their placement in the homes. Id. at *1-2.

The Appellate Division agreed with the Commissioner's finding that Devereux did not satisfy Prong "B," so the foster parents were employees. Id. at *9-10. Citing Carpet Remnant's "places of business" definition, the court concluded that "the essence of Devereux's mission is to place children in therapeutic foster homes." Id. at *10. The nature of that business required Devereux to exercise a degree of control at the homes where these placements occurred. That oversight caused the foster homes to be extensions of Devereux's business.

These cases demonstrate what it should take for remote work sites to become "an integral part of the business." In both MKI and Devereux, the workers were performing services in fixed geographical locations based on contracts with the owners of those remote sites. In MKI, the employer contracted with particular healthcare facilities, supplied workers, and oversaw what they did there. See 2019 WL 5078715, at *1-2. In Devereux, the employer superintended the operations of specific therapeutic foster homes in which it placed children and treated them. See 2021 WL 2099851, at *1, *4-5. In both cases, the scrutinized businesses used the same remote work sites recurrently to carry out core functions. Those recurrent work sites, over which they exercised control, logically became extensions of their businesses.

Unlike MKI and Devereux, the facts of the instant case cannot be squared with Carpet Remnant. The DOL asserts, as it did in Carpet Remnant, that a company's business extends everywhere to which it dispatches installers. Were the Court to reverse or to carve out such a large loophole from Carpet Remnant, there would simply be no way for such an enterprise ever to satisfy the "B" Prong. There are many reasons, including seasonably variable demand and shifting geographical demand, why businesses like this engage contractors rather than hire a fixed employee workforce. The Legislature set forth the "ABC" Test to separate lawful contractors from misclassified employees, and the Legislature

could not have intended to adopt a test that is impossible to meet. This Court should reaffirm the principles it announced in Carpet Remnant and again reject the DOL's expansive application of Prong B's "places of business" alternative.

B. When an employer sends contractors to continually changing work sites, such work sites do not constitute the employer's "*usual* places of business."

When businesses like the one scrutinized in this case supply installers at ever-changing locations, such locations cannot constitute the "usual place or places at which the employer performs its business." Hargrove, 220 N.J. at 314.

In Garden State Fireworks, Inc. v. New Jersey Department of Labor & Workforce Development, for example, the Appellate Division concluded that pyrotechnicians hired to put on fireworks displays were not employees of the corporation that facilitated the shows. No. A-1581-15T2, 2017 WL 4320819, at *6 (N.J. Super. Ct. App. Div. Sept. 29, 2017). The company had employees who worked at its facilities and assisted with manufacturing, assembling, sorting, and packing fireworks. Id. at *1. When a customer contracted to put on a fireworks display, the company would hire a contract pyrotechnician to conduct the show. The contractor would come to the facility, pick up a truck onto which the company's employees had loaded the fireworks, drive it to the site, and later return the empty truck to the facility. Ibid. The company deployed these contractor-technicians all over the State. See id. at *2.

The Appellate Division rejected the DOL Commissioner's conclusion that the fireworks enterprise's places of business included everywhere that it conducted fireworks shows. Id. at *5. That definition was precisely what Carpet Remnant rejected and "would render a person's ability to satisfy the alternative standard of prong 'B' 'practically impossible.'" Ibid., quoting Carpet Remnant, 125 N.J. at 592. The court concluded that this "broad interpretation of 'place of business' . . . would render this required prong meaningless as the standard could never be met." Ibid.

In the instant case, the DOL argues that the Appellate Division stretched Carpet Remnant beyond this Court's intentions. (See Pb15.) Specifically, the DOL claims that the Appellate Division "fail[ed] to account for the key factual differences between this matter and Carpet Remnant," including that the business at issue in Carpet Remnant was "primarily engaged in the sale of carpet" and that carpet installation was "merely an additional service offered." (Ibid.) Leaving aside that the DOL's recitation of the facts at issue in Carpet Remnant has some key inaccuracies,[2] the distinctions on which the DOL focuses should not make any difference for purposes of applying the "B" Prong.

[2] It should be noted that "[a]pproximately sixty percent of [Carpet Remnant's] sales include[d] installation." See Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Lab., 125 N.J. 567, 573 (1991). Thus, to characterize carpet installation as a mere additional

The scrutinized business here does not have retail locations or a warehouse, as the businesses in Carpet Remnant and Garden State Fireworks did, but that should not be relevant to the "B" Prong. The business here *does not* have contracts at recurrent premises over which it exercises control, as in MKI and Devereux. When a company provides seasonably variable services at customer locations based on a continually shifting series of individual deals, those myriad locations cannot constitute the company's "usual place or places at which [it] performs its business." See Hargrove, 220 N.J. at 314. A contrary ruling from this Court would render Carpet Remnant a nullity and make it "practically impossible," as this Court held in that case, for employers engaged in such businesses to ever meet Prong "B." Carpet Remnant has fostered predictability in the law for twenty years. This Court should reaffirm that standard.

II. THE COURT SHOULD CLARIFY THE PRONG-C TEST AND ISSUE GUIDANCE ON RELATED EVIDENTIARY ISSUES.

Twelve entities with which the scrutinized enterprise in this case contracted are at issue. "All twelve . . . had ceased operations prior to the [DOL's] audit" and did not respond to the DOL's informal letters requesting information. (Pa11.) The auditor "did not issue any subpoenas" after receiving no response

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service when that service accompanied sixty percent of the carpet sales – sales that, according to the DOL, were what Carpet Remnant was "primarily engaged in" – is misleading.

to the informal letters. (Pa12.) "Based on the lack of response" to the informal requests — but, apparently, not based on anything else — "the [DOL's] auditor concluded there was insufficient information to determine that any of those twelve business entities were bona fide subcontractors." (Pa11.)

The ALJ reached a different conclusion. After considering Certificates of Insurance that East Bay provided and East Bay's credible testimony, the ALJ "found East Bay had provided sufficient business entity information to demonstrate that . . . the[se] installers were all 'viable entities that existed independently of and apart from the particular service relationship with East Bay." (Pa13-14.) When the DOL Commissioner rejected this finding, the Commissioner did so solely because of the defunct business entities' lack of response. (See Pa14.) The DOL did not contend that East Bay or the contractors had engaged in deception or other misconduct. It did not put forward any evidence that the twelve businesses were *not* independent, and it did not say what more East Bay should have collected from each contractor at the time of the engagement in order to satisfy the "C" Prong in the event of an audit with which the contractors did not cooperate.

The problem this presents for other New Jersey enterprises in East Bay's position is clear. Independent contractors that an enterprise engages to perform installation or other services may not remain in operation and be able to cooperate with DOL audits

conducted years afterwards. The ALJ here considered the *available* evidence, including the *absence* of evidence of any misconduct, and found that East Bay met its burden. If the Court affirms the DOL's position in this case, enterprises in East Bay's position would have no idea how they must be able to prove in perpetuity, without future cooperation from the contractors themselves, that the contractors they hired operated separate established businesses.

The Appellate Division scored the DOL for not "individually discuss[ing]" each putative contractor while overruling the ALJ's factual determinations, (Pa21-22), but that was not the DOL's most serious error. The larger problem was not the DOL's failure to provide evidence supporting its conclusion as to each of the twelve entities individually, but the DOL's inability to provide any evidence at all in support of its overarching position. Had the DOL come forward with evidence that East Bay appeared to be engaging in sham transactions to evade its UCL obligations, the DOL's inability to establish misconduct as to each individual contractor may not have been fatal. But that is not what happened.

A. The Court Should Adopt the Fact-Sensitive Analysis Mandated by Carpet Remnant.

Carpet Remnant is as relevant to the "C" Prong inquiry in this case as it is to the "B" Prong, but for a different reason. With respect to the "B" Prong, Carpet Remnant clearly told the DOL what it may *not* do, but the DOL disregarded that command. With

respect to the "C" Prong, by contrast, this Court set forth in Carpet Remnant a series of questions that made sense in the context of that dispute but did not appear to be exhaustive or universally applicable. Those questions concerned "the duration and strength" of the business, "the number of customers and their respective volume of business, the number of employees," the use of the worker's own tools, and the remuneration received relative to that of other customers. See 125 N.J. at 592-93. The Court did not say, and likely did not intend, that courts should ask those same questions in every future "C" Prong dispute, regardless of context.

This case provides an excellent example of one where courts *should not* ask the same questions as in Carpet Remnant. There is no dispute that (1) each contractor East Bay engaged used its own tools, (see Pa10), and (2) East Bay treated all of the putative contractors similarly "from an operational standpoint [as] those the auditor deemed bona fide," (Pa13.) That, however, is where the usability of the Carpet Remnant factors ceases. The Appellate Division could not have weighed the other factors because, given the contractors' lack of response to the DOL's informal information requests, no evidence is in the record of each contractor's duration in business, number of customers, or number of employees.

The different context of this case calls for different questions. This Court was clear in Carpet Remnant that the determination under the "C" Prong "is fact-sensitive, requiring an

evaluation in each case of the substance, not the form, of the relationship." 125 N.J. at 581. Perhaps for that reason, in this case and in others applying the "C" Prong, the Appellate Division has considered different factors relevant to the specific disputes before it, rather than trying to fit each dispute's facts into the pegs set forth in Carpet Remnant.

For example, in Koza v. New Jersey Department of Labor, the Appellate Division considered whether the petitioner, a member of a music band, had met his burden with respect to Prong "C" and remanded to allow the petitioner the opportunity to satisfy that element, "as suggested by the Supreme Court in Carpet Remnant Warehouse." 282 N.J. Super. 560, 567-69 (App. Div. 1995). That opinion echoed the broad command from Carpet Remnant that there must be shown "an enterprise that exists and can continue to exist independently" and must be "one that will survive the termination of the relationship." Id. at 567, quoting Carpet Remnant, 125 N.J. at 585. The opinion did not, however, apply the factors listed in Carpet Remnant to the music band. Id. at 567-68.

In Philadelphia Newspapers, the Appellate Division quoted Carpet Remnant but did not analyze any of its specifically enumerated factors, either. See 327 N.J. Super. at 322-23. Rather, it found that that the employer failed to establish Prong "C" because its worker "never engaged in delivery services prior to commencing" employment and did not engage in similar services

after termination. Id. at 323. In other words, upon termination, the worker "joined the ranks of the unemployed." Ibid.

Just this year, the Appellate Division cited Carpet Remnant and the ABC Test when considering an appeal from the Department. See Devereux, 2021 WL 2099851, at *10. There, the panel based its decision on the fact that the workers "earned the majority, if not all, of their income" from the employer, without reference to the other Carpet Remnant factors. Ibid. The Appellate Division did not, in Devereux, consider all the Carpet Remnant factors.

In the case at bar, even the DOL Commissioner did not apply all of the Carpet Remnant Prong "C" factors to each entity. (See Pa34-35.) The Appellate Division faulted the Commissioner for not conducting an installer-by-installer analysis, but it did not say that the Commissioner had to judge each contractor's case using all of the Carpet Remnant factors. (See Pa21-23.)

Not every Prong "C" case should turn on the same factors listed in Carpet Remnant. Clearly, the Prong "C" inquiry always demands a "fact-sensitive" analysis, "in each case" analyzing the substance of the relationship. Carpet Remnant, 125 N.J. at 581. Carpet Remnant was "the first case in this state concerning whether carpet installers should be classified as employees or independent contractors," and on that specific question, this Court sought guidance from principles developed in other jurisdictions. Id. at 586-87. The Court noted, in doing so, that Prong "C" is "inherited

from the common law" and that the analysis broadly "calls for an enterprise that exists and can continue to exist independently of and apart from the particular service relationship. The enterprise must be one that is stable and lasting—one that will survive the termination of the relationship." Id. at 585, quoting Gilchrist v. Div. of Empl. Sec., 48 N.J. Super. 147, 158 (App. Div. 1957). That general guidance seems much more important and capable of relation to any future dispute than the specific questions the Court asked and answered in the context of carpet installation.

Whether this Court intended the specific factors it listed in Carpet Remnant to control in every "C" Prong inquiry is not a question answered in Carpet Remnant. The Appellate Division seems not to have interpreted the Carpet Remnant factors as exhaustive or even necessarily instructive when looking at other kinds of businesses or at situations like this one, where the contractors no longer operate. The Appellate Division instead has conducted context-specific analyses, in each case looking to the purpose of the "C" Prong rather than an inflexible test for satisfying it. NJCJI submits that this is both what the Court likely intended in Carpet Remnant and the appropriate way to approach the "C" Prong:

> [T]he C standard provides the closest connection between the obligation to pay taxes and the eligibility for benefits. An independent contractor whose business or trade continues to provide an adequate income despite the loss of a major customer will neither need unemployment benefits nor be eligible to receive them. But the

> contractor's prior relationship with the lost customer may preclude the contractor from satisfying the A or B standard of the ABC test, rendering the contractor liable for unemployment contributions even though the contractor will never benefit from those payments. That result is imposed because of the statutory A and B standards, which are not necessarily consistent with a person's realistic eligibility for benefits. Resolution of that potentially anomalous result of the ABC test's application is for the Legislature, and is not the function of this Court. We note, however, that in cases in which satisfaction of the C standard convincingly demonstrates a person's ineligibility for unemployment benefits, it would be inappropriate for the Commissioner to apply the A or B tests restrictively and mechanically if their applicability is otherwise uncertain.
>
> [Carpet Remnant, 125 N.J. at 589-90.]

B. The Court Should Issue Guidance on the Evidentiary Standard for Prong C.

In addition to providing an opportunity for this Court to explain the factors to consider when examining the "C" Prong, this case also allows the Court to issue guidance on the evidentiary issues implicated by the "C" Prong.

1. *The Court should determine the quantum of evidence necessary to satisfy Prong C.*

The evidence here included contractors' certificates of insurance, (Pa31-32), which the Appellate Division considered "significant, albeit not necessarily dispositive, indicia of their independent business status," (Pa21). In addition, the managing member of the scrutinized business credibly testified before the ALJ about "the nature of East Bay's operations" and that his

practice was to "verify that the installer was an independent business entity by obtaining and reviewing" those certificates. (Pa12.) Both the ALJ and the Appellate Division were satisfied with that quantum of evidence, especially given the absence of evidence that East Bay treated the twelve entities at issue here any differently from those that even the DOL acknowledges were contractors and not employees.

Carpet Remnant offers only minimal guidance about whether the DOL Commissioner can reject an ALJ's evidentiary findings without evidence of its own. This Court stated in Carpet Remnant that "[a]lthough the record contains testimony that carpet installers generally provide services for several retailers and are not financially dependent on one retailer, that evidence is not sufficient to satisfy the C criterion." 125 N.J. at 592. The ALJ in the present matter credited the evidence of each worker's entity status, irrespective of industry practice. (See Pa21-22.) The DOL Commissioner, however, found the same evidence to be "woefully" insufficient as a matter of law. (Pa35.)

2. ***The Court should determine whether to require an individualized analysis of workers under Prong C.***

The DOL Commissioner analyzed the evidence related to only two of the relevant companies and found that they did not satisfy Prong "C." (Pa32-33, 35.) But the Commissioner then found that the evidence related to *all* the other business entities told "a

similar story," and thus reversed the ALJ's decision regarding Prong "C" as to all twelve. (Pa33, 35.) The Appellate Division also focused on the two corporations discussed by the DOL and found that the DOL's decision conflicted with the evidence before the ALJ. (Pa21-22.) Accordingly, neither the DOL nor the Appellate Division considered separately each of the twelve entities' satisfaction of Prong "C." Yet, while the DOL considered itself free to extrapolate from the two businesses it examined a conclusion with respect to all twelve businesses at issue, the Commissioner stated that "in order to satisfy Prong 'C' . . . East Bay must demonstrate that each" worker was independent. (Pa34.) In other words, the DOL seeks for itself the right to generalize, but seeks to deny that ability to the enterprises it audits.

The law should permit *both* the DOL and scrutinized businesses to extrapolate from available evidence when appropriate. Indeed, the DOL and businesses seem to have agreed on that point in the past. In Koza, for example, the band leader appealed the DOL's decision holding him "responsible for unemployment compensation payments" for nearly two dozen persons he allegedly employed. 307 N.J. Super. at 441. As in this case, "[m]any band members were not contacted." Id. at 451. Only four former band members testified, who spoke to their experiences and those of others. Id. at 447. Even though there was no individualized evidence as to each band member, the Appellate Division nevertheless found "a

sufficient basis to assume" that the petitioner was not their employer. Ibid. In Garden State Fireworks, too, the court found that Prong "C" was satisfied where "[a]lthough only three of the more than one hundred pyrotechnicians testified, *the parties agreed* that their testimony constituted a wholly representative sample of the technicians." 2017 WL 4320819, at *1 (emphasis added).

From the above, the judicial consensus appears to be that representative evidence may be considered, so long as it is either agreed to or shown that such evidence is demonstrative of the group. NJCJI agrees with this consensus. Here, the business gave the ALJ certificates of insurance for each entity, as well as testimony about its customary practices of employing drywall installers. (Pa12, 26.) That should have sufficed.

If the DOL has evidence of sham transactions, then the DOL, too, should be able to extrapolate from that evidence to challenge other relationships involving the same enterprise. That is not what happened here. East Bay handled all of its contractor relationships in the same manner. There was no dispute that some of those businesses were independently established, but some had gone out of business, leaving East Bay with limited evidence to prove that they, too, had been independently established. The DOL sought to extrapolate *not* from evidence of wrongdoing, but from the *absence* of evidence relating to defunct former contractors.

That should not be a sufficient basis for the DOL to challenge an ALJ's findings with respect to the "C" Prong.

CONCLUSION

For the reasons set forth above, NJCJI urges this Court to affirm the decision of the Appellate Division. With respect to the "B" Prong, this Court should reaffirm its decision in Carpet Remnant that when an enterprise dispatches installers to customer premises around the state over which it has neither ownership nor control, those premises are not the enterprise's "usual places of business." With respect to the "C" Prong, the Court should hold that (1) courts should engage in a fact-specific inquiry that considers factors relevant to the specific dispute before it, and (2) the DOL may not disregard an ALJ's factual findings without its own evidentiary basis.

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Dated: November 17, 2021

2021 WL 2099851
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

The DEVEREUX FOUNDATION,
Petitioner-Appellant,
v.
NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, Respondent-Respondent.

DOCKET NO. A-0936-19
|
Argued April 27, 2021
|
Decided May 25, 2021

On appeal from the New Jersey Department of Labor and Workforce Development, Docket. No. 13-053.

Attorneys and Law Firms

Peter L. Frattarelli argued the cause for appellant (Archer & Greiner, PC, attorneys; Peter L. Frattarelli and Daniel J. DeFiglio, on the briefs).

Rimma Razhba, Deputy Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Jane C. Schuster, Assistant Attorney General, of counsel; Rimma Razhba, on the brief).

Before Judges Haas, Mawla, and Natali.

Opinion

PER CURIAM

***1** Petitioner the Devereux Foundation (Devereux) appeals from a September 26, 2019 Final Administrative Action of the Commissioner of the Department of Workforce and Labor (the Department), finding Devereux responsible for contributions under the New Jersey Unemployment Compensation Act, N.J.S.A. 43:21-1 to -24.4, (UCL), between 2002 and 2005. We affirm.

We take the following facts from the record, which includes a hearing before an administrative law judge (ALJ), whose decision the Department reversed. Devereux is self-described as a "national non-[ ]profit agency that provides treatment services to individuals, children, families, adolescents, and adults with special needs, behavioral health, mental health, and developmental disabilities." Devereux places children in therapeutic foster homes which serve as short-term living solutions for minors. The homes are owned and occupied by families who contract with it to serve as therapeutic foster parents.

New Jersey received a federal grant, and beginning in 1999, contracted with Devereux to develop a pilot program for Devereux "to recruit families and to train them and to ... provide oversight to work with kids who were referred through the System of Care to the ... program." The program works with children and adolescents with "a history of aggression, ... trauma, ... abuse and neglect, ... substance abuse[,] ... suicidal behavior, ... [or running] away from home." After a child is placed in a home, Devereux "provide[s] oversight, ... support, ... always ha[s] a staff member on call seven days a week, [twenty-four] hours a day[ ] in case there [is] an emergency[,] and ... ensure[s] that the family [is] adhering to the State regulations ...." As part of the oversight process, Devereux staff visit the homes once per week. According to Devereux, during placement, it has " 'no right of control' over the therapeutic foster parents, other than to ensure compliance with State regulations."

Devereux "bills the State on a 'fee for service' basis, and receives a non-negotiable ... amount of money 'based on the number of children' placed with therapeutic foster parents." Fifty percent of that is paid to the parents on a "[p]er diem, per child" basis "[t]o reimburse them for costs associated with caring for the kids." The reimbursement pays for the child's "allowance," food, utilities, and other expenses for the home, all of which is set by State regulations. The rest of the money is used for Devereux's overhead.

Devereux cannot compel a parent to accept a placement. A foster family can "reject a placement for any reason, including that the family is not equipped to handle that child's behavior." During the 2002 to 2005 audit period, Devereux issued therapeutic foster parents Internal Revenue Service 1099 forms (1099s).

Devereux utilized "contractors" to repair and maintain its group homes because it did not have a maintenance crew and issued these repairpersons 1099s. The number of repairpersons hired fluctuated from year-to-year as did

the compensation Devereux paid. Between 2002 and 2005, Devereux issued approximately fifty-five 1099s, twelve of which reflected compensation exceeding $5,000, and twenty-two for less than $1,000.

***2** Devereux also hired medical service providers, including mental health professionals, to treat children during their placement. These individuals signed "Independent Contractor Agreements" and their compensation was reflected in 1099s issued by Devereux. The number of medical providers paid by Devereux fluctuated as did their compensation.

Michael Bartholomew conducted the relevant audits on behalf of the Department. Because Bartholomew subsequently retired, Alan Handler, a Redetermination Auditor, testified in this matter on behalf of the Department. The audit was triggered when Evangeline Edwards, an agent of Devereux, "issued a 1099 to [Dennis Guyton] who [then] tried to collect [d]isability benefits." According to Bartholomew's review of Guyton's tax returns [1], he earned between ninety-six and one hundred percent of his income from Edwards between 2002 and 2004. Bartholomew's audit expanded to numerous other individuals, whom he noted were "foster care helper[s]" who "help[ed] the foster care parents handle the children in their home." Bartholomew concluded as follows:

> Examination and documentation disclosed the following ...:
>
> 1. The individuals are under the direction and control of the employer. The employer hires the individuals, schedules their work hours and is responsible for the quality of their work.
>
> 2. The individuals perform their services at the employer[']s location and they perform services which are in the usual course of business.
>
> 3. The individuals do not have an established business providing these services to the public. They did not advertise, have a business telephone listing or a permanent place of business.
>
> Based on the above[,] the individuals are deemed to be in covered employment as they did not meet the provisions of [N.J.S.A. 43:21-]19(i)(6)(A)[,](B)[, and] (C).

Following the Edwards audit, Bartholomew audited Devereux itself and concluded as follows:

> Employer is a Not-For-Profit Corporation that provides treatment programs for emotional, behavioral[,] and developmental disabilities. The employer paid individuals as subcontractors to provide the following services[:] repair and maintenance, foster care[,] and mental health services.
>
> ....
>
> ... Examination and documentation disclosed the following....
>
> 1. The individuals providing maintenance services and mental health services were under the direction and control of the employer. They were instructed as to when and where to perform the services. The individuals who were paid as foster care parents were assigned a consultant to oversee compliance with established criteria.
>
> 2. The individuals who provided services as foster care parents and mental health workers were performing services which are in the usual course of business. The employer is in the business of providing mental health services.
>
> 3. The individuals did not have established businesses providing these services to the public. They did not advertise[,] have a business telephone listing[,] or a permanent place of business. Foster care parents are restricted from taking any placement from any other foster care organization while they are under contract with Devereux.
>
> Based on the above[,] the individuals are deemed to be in covered employment as they did not meet the provisions of [N.J.S.A. 43:21-]19(i)(6)(A)[,](B)[, and] (C).

***3** Bartholomew concluded Devereux underreported contributions per N.J.S.A. 43:21-19(g) and (i)(6) for the second quarters of 2002 through 2005, resulting in a deficit of $77,561.95, which the Department assessed to Devereux. Handler testified his independent review of the audit led him to the same conclusion.

In a written decision, the ALJ reversed the Department's assessment, finding N.J.S.A. 43:21-19(i)(6)(A), (B) and (C) did "not apply to Devereux's foster care providers, mental health personnel[,] and repair[persons]" because Devereux did not pay remuneration to the foster parents. The ALJ

also predicated the decision on the conclusion "Bartholomew, his supervising auditor or either of the referring agencies" did not testify, and therefore Bartholomew's report was hearsay. The ALJ rejected Handler's testimony because he "did not oversee [t]he Bartholomew audit ... [and] merely reviewed the documents included in Bartholomew's reports ... [and he] did not know what books or records Bartholomew reviewed in preparation of his report" and Handler never met with Bartholomew or his supervisor to discuss the report. "Furthermore, Handler admitted that the spreadsheets included with Bartholomew's reports were not the New Jersey Department of Labor (NJDOL) standard forms and he did not know who created them."

The balance of the ALJ's opinion, which we need not discuss in detail here, applied N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), known as the ABC test, to the foster parents and concluded Devereux had met all three prongs of the test and was not responsible for the assessment. The ALJ did not conduct a similar analysis for the repairpersons or the mental health providers.

The Department filed exceptions to the ALJ's decision. The matter was heard by the Commissioner of the Department who issued the September 26, 2019 final agency decision reversing the ALJ and upholding the assessment. The Commissioner rejected the ALJ's finding the audit report was hearsay, noting "administrative proceedings do not follow the stricter evidentiary rules of [the] Superior Court," and the ALJ had "ignored several important indicia of reliability." The Commissioner found as follows: the audit conducted and the records gathered by Bartholomew were in the normal course of the auditing process; the records were provided by Devereux and the audited providers who did not question their reliability; Handler had gathered his own information and conducted his own review of Bartholomew's audit, drawing his own conclusions; the spreadsheets prepared by Bartholomew were self-explanatory and the fact they were not on the Department forms "should not rob them of their obvious probative value."

Contrary to the ALJ's findings, the Commissioner concluded the payments made by Devereux to the foster parents constituted remuneration under the UCL. At the outset, the Commissioner noted the facts of Lester A. Drenk Behavioral Health Center v. New Jersey Department of Labor and Workforce Development, No. DOL 06-002, 2007 N.J. AGEN LEXIS 592 (May 25, 2007), a case in which an ALJ found an employment relationship between a non-profit behavioral health center and therapeutic foster care parents, was similar to Devereux's case.

For example, both programs operated "through a contract with the State[,] with the company then entering into a subcontract with families" which "passe[d] State requirements on to the providers"; the therapeutic foster care parents were "primary caregivers, with intensive supervision plans established by a care management team,"; and the parents "utilize[d] some independent judgment and must exercise independent judgment as a parent, nevertheless they were not free of direction and control by" the programs because of similar agreements. The Drenk ALJ found it was " 'clear' that the therapeutic foster care providers 'were paid by Drenk for services rendered in performing therapeutic foster parenting services to children in need' " plus basic expenses of raising a child.

***4** The Commissioner differentiated the Devereux therapeutic foster homes from typical foster homes by citing the following: Devereux's website; a treatment home contract; an independent contractor agreement; a handbook for a treatment home program; and an advertisement for a family care program—all of which touted or explained the therapeutic services provided in the foster homes. The Commissioner concluded the "therapeutic foster care providers were doing far more than just providing children with a safe and nurturing environment ... [and] actively provided critical therapeutic services to children and adolescents with medical, psychological, social, and emotional needs," such as "helping to create a care plan; implementing a broad training curriculum to help the children develop skills[,] ... and teaching the children these skills directly and by example ...."

The Commissioner described six examples of the therapeutic model in the record as follows:

> For example, an item from the Devereux website explains that therapeutic foster care providers "actually serve as primary treatment facilitators, teaching directly and by example" and "incorporate individual, group and milieu therapies, as well as psychiatric services, speech therapy, medical and nutritional interventions, and pre-vocational training" to "help these youth modify their behavior so they can return to their own communities or independent living." In the therapeutic foster care provider agreement between Devereux and the Edwards family, it is specified that the family "provide a therapeutic family environment for child/adolescent clients placed by Devereux to help

the clients to achieve their individualized treatment goals." The key concept here is "therapeutic" family environment – the therapeutic foster care providers are doing more than just ensuring that the children are fed and clothed properly, they are teaching the children "directly and by example ... to modify their behavior." To this end, the Edwards family was required to "document observations of the client's behavior and the therapeutic responses to the behavior on a daily basis." The family was also required to "implement the home-based treatment strategies of the client's ISP [Individualized Service Plan] and/or JCR [Joint Care Review]."

As another example, in the 2006-2007 Devereux treatment home contract, it states that therapeutic foster care providers function as a team "to provide services for individuals in the home," including "elements from a variety of different positive behavioral health based treatment models." The contract further states that therapeutic foster care providers, acting as teachers, "will implement a broad curriculum of skill training that will enable the individuals to develop in many areas so they may achieve their maximum potential and become productive members of society." These skills include "self-care, family living, independent living, academic skills, social skills, pre-vocational and vocational skills, self-control, [and] recreation."

As a third example, in an addendum to the 2003 independent contractor agreement between Devereux and Joan Perry, it states that therapeutic foster care providers "provide services utilizing the treatment methods of the Devereux Family Care Program" and "will teach the children a broad curriculum of skills that will enable the children to achieve their maximum potential and be reunited with their families in as short a time as possible." Pursuant to an individualized service plan, Perry was required to "teach the child social, academic, and daily living skills," "improve the child's ability to cope with problems in socially acceptable ways," and "improve the child's ability to develop positive relationships with adults and peers." Perry was further required to "implement a broad curriculum designed to teach the child new skills" in the areas of self-care, pre-vocational and vocational skills, academic skills, social skills, independent living, recreation and leisure, family living, self-control, and problem solving skills. Substantially similar requirements are included in Perry's 2004 and 2005 independent contractor agreement as well.

***5** As a fourth example, in Devereux's handbook for its treatment home program, it instructs therapeutic foster care providers to "provide a family style living environment and teach the youth a broad curriculum of skills that will enable the youth to achieve their maximum potential." These skills include "concepts of personal space and appropriate boundaries;" social, academic, vocational, and self-care skills; and "alternatives to inappropriate behaviors and how to manage challenging behaviors." Therapeutic foster care providers become a member of the care team for each child, and must develop a treatment plan which "identifies strengths and needs and goals and objectives" as well as "delineating each service the youth will receive in order to help them achieve their goals."

As a fifth example, in an undated advertisement for its Family Care program, Devereux indicated that it was "seeking caring adults to provide specialized services to children in the adults' own homes." As a sixth example, an undated press release announcing the opening of Devereux's Family Cam program stated that "the emphasis of the program is on teaching children the skills necessary for them to function effectively in their home and community."

The Commissioner concluded the ALJ "did not adequately consider the therapeutic services provided by therapeutic foster care providers to the children [and that t]he payments received from Devereux were clearly for both these therapeutic services as well as to cover the costs of housing the children." The Commissioner therefore concluded "the payments to the therapeutic foster care providers constituted remuneration under the UCL."

The Commissioner also found the repair persons and mental health professionals retained by Devereux received remuneration. He noted Devereux hired forty-six repairpersons "to perform maintenance and repairs on [Devereux's wholly owned or rented facilities throughout the State] during the audit period, and paid each of them via a 1099." Devereux also hired fourteen mental health professionals and similarly paid them via 1099s.

Next, the Commissioner applied the ABC test to the foster parents, the repairpersons, and the mental health providers.

The Commissioner found the therapeutic foster parents followed State guidelines, provided a stable home with food and clothing, and "provided therapeutic services as needed in

accordance with the goals and objectives set forth in the care management plan." Therefore, the Commissioner concluded Devereux did not meet part A of the ABC test and failed to establish the foster parent homes operated free from its control or direction.

The Commissioner found Devereux failed to meet part B of the ABC test. Relying on Drenk, the Commissioner found "the services provided by Devereux's therapeutic foster care providers are not outside of Devereux's usual course of business" because the parents' "private homes ... [were] extensions of [Devereux's] place of business." Quoting Transworld Systems, Inc. v. New Jersey Department of Labor, the Commissioner found the "analysis of [part] B ... must consider not only 'locations where the enterprise has a physical plant,' but also where the employer 'conducts an integral part of the business.' " No. DOL 96-039, 1998 N.J. AGEN LEXIS 661 at 6 (June 17, 1998). The Commissioner concluded "the essence of Devereux's business is to deliver therapeutic services in this way" and "[t]o hold otherwise would be to take an unduly restrictive view of the realities of the relationship between Devereux and its therapeutic foster care providers."

The Commissioner found the ALJ "erroneous[ly] read[ ]" part C by holding the therapeutic foster parents have an "enterprise that exists and can continue to exist independently of and apart from the particular service relationship" merely because they must demonstrate another source of income separate from reimbursements as part of the licensing process. The Commissioner concluded outside sources of income are "not relevant" to part C, and the relevant inquiry was whether "they have outside sources of income from providing therapeutic services." He concluded Devereux failed to meet part C because there is "no evidence in the record to demonstrate [the foster parents] 'have an outside relationship with other entities to provide therapeutic foster-parenting services,' or were 'conducting their own independently established enterprises as providers.' "

***6** Because the ALJ made no findings regarding the repairpersons, the Commissioner found the following facts: Devereux hired repairpersons because it did not have a maintenance crew; Devereux did not control the tools they used or the other individuals the repairpersons hired to help; Devereux verified they had insurance but did not sign subcontractor agreements because they "had gotten burned several years ago with a litigation case on that"; Devereux did not "advance business expenses" to the repairpersons and did not "withhold any taxes or unemployment/disability contributions."

Citing Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor, 125 N.J. 567, 583-84, 593 A.2d 1177 (1991), the Commissioner found Devereux failed to meet part A because it did not show the repairpersons were

> "free to choose where and when to work, including working for other brokers or independently;" that they were "not obligated to comply with any rules, practices, or procedures" set by Devereux; that the firm exercised no supervision over them; that the firm provided no training; that the firm provided no supplies, equipment, or uniforms; or that the firm provided no fringe benefits.

The Commissioner concluded Devereux met part B because "it [was] clear that the repair[persons] were not performing services in the usual course of Devereux's business, as the firm's business is not construction, maintenance, or repair." However, the Commissioner concluded part C was not met, and citing Carpet Remnant Warehouse, noted "a key element of the Part C analysis ... is whether the person providing services 'is dependent on the employer, and on termination of that relationship would join the ranks of the unemployed.' " He noted although the record contained only Schedule C tax forms "for a handful of the approximately [forty-six]" repairpersons, it showed they "received the vast majority of their income from Devereux, which strongly indicates that they were not truly independent contractors." The Commissioner found that as to the other repairpersons whose Schedule Cs were not included in the record, there was "no evidence ... to establish that they were customarily engaged in an independently established business, occupation or trade."

The Commissioner also made findings regarding the mental health providers. He noted the record contained only the independent contractor agreements between the mental health professionals and Devereux, which stated Devereux " 'shall have no right to control or direct the details, manner or means by which [c]ontractor accomplishes' the contracted services" and testimony that Devereux "believed" the providers "had other business interests outside" of Devereux. The Commissioner found "[t]he mere presence of a signed independent contractor agreement does not end the ABC analysis" and citing Carpet Remnant Warehouse, concluded Devereux failed to show it did not control the mental health providers and therefore did not meet part A.

The Commissioner found Devereux failed to meet part B because the testimony indicated the providers "provided psychological evaluations of 'mostly folks in the group homes,' which were directly owned by Devereux, rather than in the private homes of foster parents." Therefore, the Commissioner concluded the mental health providers worked in Devereux facilities. He also concluded "[b]ecause of Devereux's greater responsibilities in its group homes, including the need to provide relevant medical services, the services provided by these professionals would not be outside the usual course of business."

The Commissioner found "[t]he fact that these professionals had professional liability insurance, and may have had other business interests, [was] not enough to meet the [p]art C test." He noted the record contained only "a handful" of the fourteen mental health providers' Schedule Cs, all of which showed they "received the vast majority of their income from Devereux, which strongly indicates that they were not truly independent contractors." As to the Schedule Cs, which were not provided for the other providers, the Commissioner concluded there was "no evidence ... to establish that they were customarily engaged in an independently established business, occupation or trade."

***7** Devereux raises the following arguments on this appeal:

> [Point 1:] The Commissioner erroneously concluded that the ABC test applied to therapeutic foster parents.
>
> [Point 2:] Even if the ABC Test applies, the Commissioner's application of the ABC Test as the therapeutic foster parents was not supported by prior judicial decisions and would render existing judicial constraints meaningless.
>
> > [A.] The Commissioner's decision conflates State licensing requirements with "control."
> >
> > [B.] The Commissioner's finding that each therapeutic foster parent's privately-owned home was ... an extension of Devereux's business sets the "impossible standard" previously rejected in Carpet [Remnant] Warehouse.
> >
> > [C.] The Commissioner's conclusion that therapeutic parents must establish "outside sources of income from providing therapeutic services" is not an accurate statement of the law.
>
> [Point 3:] The State Has Failed to Prove Its Case With Respect To Repairs/Maintenance and Other Medical Providers.

I.

> Appellate courts have a limited role in reviewing the decisions of administrative agencies. We will not reverse an agency decision unless it is "arbitrary, capricious or unreasonable or is not supported by substantial credible evidence in the record as a whole." ... Moreover, decisions of administrative agencies carry with them a strong presumption of reasonableness particularly in the exercise of its statutorily-delegated responsibilities. ... We cannot substitute our judgment for that of the agency. ... The burden of showing the agency's action was arbitrary, unreasonable, or capricious rests upon the appellant. ... If we find sufficient credible, competent evidence in the record to support the agency's conclusion, then we will uphold the agency's findings.
>
> [Dep't of Ins. v. Universal Brokerage Corp., 303 N.J. Super. 405, 409-10, 697 A.2d 142 (App. Div. 1997) (citations omitted).]

Furthermore, "where there is substantial evidence in the record to support more than one regulatory conclusion, it is the agency's choice which governs." In re Adoption of Amends. to Ne., Upper Raritan, Sussex Cnty., 435 N.J. Super. 571, 583, 90 A.3d 642 (App Div. 2014) (internal quotation marks omitted) (quoting Murray v. State Health Benefits Comm'n, 337 N.J. Super. 435, 442, 767 A.2d 509 (App. Div. 2001)). "If the Appellate Division is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm even if the court feels that it would have reached a different result itself." Id. at 584, 90 A.3d 642 (quoting Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588, 538 A.2d 794 (1988)).

Our scope of review is essentially limited to three inquiries:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that

could not reasonably have been made on a showing of the relevant factors.

***8** [In re Adoption of Amends., 435 N.J. Super. at 584, 90 A.3d 642.]

II.

We note the general principles which inform our consideration of the arguments raised on this appeal. According to our Supreme Court,

the primary objective of the UCL is to provide a cushion for the workers of New Jersey "against the shocks and rigors of unemployment." ... Because the statute is remedial, its provisions have been construed liberally, permitting a statutory employer-employee relationship to be found even though that relationship may not satisfy common-law principles.

[Carpet Remnant Warehouse, Inc., 125 N.J. at 581, 593 A.2d 1177 (citations omitted).]

The factors of the ABC test are as follows as follows:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

[N.J.S.A. 43:21-19(i)(6)(A), (B), and (C).]

The Supreme Court has stated:

The ABC test becomes applicable only after a determination that the service provided constitutes "employment," which is defined as "service * * * performed for remuneration under any contract of hire, written or oral, express or implied." N.J.S.A. 43:21-19(i)(1)(A). If the Department determines that the relationship falls within that definition, and is not statutorily excluded, see N.J.S.A. 43:21-19(i)(7), then the party challenging the Department's classification must establish the existence of all three criteria of the ABC test. Conversely, the failure to satisfy any one of the three criteria results in an "employment" classification. That determination is fact-sensitive, requiring an evaluation in each case of the substance, not the form, of the relationship.

[Carpet Remnant Warehouse, Inc., 125 N.J. at 581, 593 A.2d 1177 (citations omitted).]

N.J.S.A. 43:21-19(p) defines remuneration broadly as "all compensation for personal services, including ... the cash value of all compensation in any medium other than cash." N.J.S.A. 43:21-19(o) defines wages as "remuneration paid by employers for employment." Therefore, wages constitute all compensation paid by an employer for personal services in any medium.

III.

Devereux argues the Commissioner's erred because Handler lacked the personal knowledge necessary to testify to the audits conducted by Bartholomew. It also asserts the payments to the foster parents were not remuneration but "for both therapeutic services as well as to cover the costs of housing the children." We reject these arguments because there was substantial evidence to support the Commissioner's findings.

N.J.A.C. 1:1-15.5 states "hearsay evidence shall be admissible in the trial of contested cases." However, "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." Ibid.

***9** At the outset, we note Devereux's reliance on the ALJ's factual findings and legal conclusions is misplaced because the ALJ's decision was not binding on the Commissioner. In re Adoption of Amends., 435 N.J. Super. at 587, 90 A.3d 642. Furthermore, as recited above, the Commissioner made detailed findings rejecting the ALJ's decision to assign no weight to the audits, articulated several reasons why the audits "should be given significant evidentiary weight[,]" and

explained why Handler's testimony regarding his review of Bartholomew's audits showed the audits were reliable.

The gravamen of Devereux's arguments regarding the Commissioner's remuneration findings asks us to second-guess what is a highly fact-sensitive analysis. We decline to do so because this is not our standard of review. Id. at 584, 90 A.3d 642. Moreover, the Commissioner's detailed remuneration determination explained why the therapeutic foster homes were not typical fostering environments, but delivered specialized services to meet the foster children's needs. Given the broad definition of remuneration, the Commissioner's finding was not plainly unreasonable and was based on substantial evidence in the record. Devereux's other arguments regarding remuneration, including its reliance on non-binding case law and the New Jersey Resource Family Parent Licensing Act[2], which Devereux conceded was inapplicable, lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

IV.

A.

Application of the ABC test to the foster homes.

Devereux argues the Commissioner's finding that the foster homes did not meet part A of the ABC test was error because it did not control the foster parents whom the ALJ found "enjoyed considerable autonomy regarding the details of day-to-day supervision of foster children in their home." Devereux also points to the therapeutic foster parent contracts, which stated Devereux was not permitted to "exercise control or direction over the manner or method" of parenting by the foster parents. Moreover, it asserts foster parents are not compelled to accept children and may terminate the foster relationship at any time. Devereux notes it does not provide the foster homes with equipment and only reimburses foster parents for their expenses. It argues the evidence presented by the Department showing "(1) certain important decisions regarding care for foster children, e.g., licensing, approval of 'alternate' care givers, etc. 'flow through' Devereux and (2) Devereux ensures that parents adhere to State regulations" was insufficient to prove it controlled the foster homes.

We are unconvinced the foster parents' alleged autonomy, or the contractual language proved Devereux did not control the placement of children in their homes. The therapeutic foster homes operated by Devereux are unlike traditional foster homes where a child's care after placement inside the home is controlled by the foster parent who may confer with the Division of Child Protection and Permanency (Division) to obtain services if needed. The facts here demonstrated Devereux controlled the placement by directing and implementing an intensive care program for the children during their placement.

Devereux argues the Commissioner's part B findings regarding the foster homes was incorrect because the private homes of therapeutic foster parents were extensions of Devereux's business. Citing Carpet Remnant Warehouse, Inc., Devereux argues the standard in part B should refer "only to those locations where the enterprise has a physical plant or conducts an integral part of its business."

***10** As the Commissioner noted, the analysis under part B "must consider 'not only locations where the enterprise has a physical plant,' but also where the employer conducts an integral part of the business." Clearly, the essence of Devereux's mission is to place children in therapeutic foster homes. Therefore, the Commissioner's finding the foster homes were extensions of Devereux's business was supported by the evidence in the record and Devereux's arguments to the contrary are unconvincing.

Devereux argues the Commissioner's finding it failed to meet part C of the ABC test was error because N.J.S.A. 43:21-19(i)(6)(C) states services provided for remuneration are employment unless it is shown the "individual is customarily engaged in an independently established trade, occupation, profession or business," not that the work must be of the "same nature." Devereux argues because the Legislature is currently considering this exact change, but has not yet adopted it, if we affirm the Commissioner's interpretation of the statute, it will violate legislative intent by inserting terms the Legislature intentionally excluded. Devereux also argues the Commissioner ignored the fact that, by regulation, the foster homes must be independent because N.J.A.C. 3A:51-5.1 requires a "resource family parent shall have sufficient income or other means of financial support prior to the placement of a child, so that the resource family parent is economically independent of board subsidy payments from the [Division]."

In Carpet Remnant Warehouse, Inc., the Court held "if the person providing services is dependent on the employer, and on termination of that relationship would join the ranks of the unemployed, the [part] C standard is not satisfied." 125 N.J. at 585-86, 593 A.2d 1177. Here, the evidence in the record showed the foster parents earned the majority, if not all, of their income from Devereux. Indeed, due to the therapeutic services deployed inside the foster homes, Devereux's contracts with the foster homes stipulated a foster parent could not be employed outside of the home without Devereux's permission. For these reasons, the Commissioner's part C findings regarding the foster homes was not erroneous.

B.

Application of the ABC test to the Repairpersons and Medical Providers.

Devereux challenges the Commissioner's determination relating to the repairpersons and medical providers by re-asserting its evidentiary arguments relating to Bartholomew's audit and Handler's competency to testify about it. As noted, we have rejected these arguments.

Notwithstanding the evidentiary arguments, Devereux asserts the evidence the Commissioner did consider does not support his ruling. Devereux argues "Bartholomew's report is incomplete" because "it is based on little more than a review of 1099[ ]s" and includes no interviews, and "Schedule C tax forms from only eight individuals [are] identified in his report."

We reject Devereux's arguments because under the ABC test, Devereux bore the burden of proof. As we noted, the Commissioner found Devereux failed to meet parts A and C as to the repairpersons and failed to meet parts A, B, and C as to the mental health providers. The Commissioner explained his ruling in findings based on the evidence and we must defer to those findings because they are supported by the record. In re Adoption of Amends., 435 N.J. Super. 584.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2021 WL 2099851

Footnotes

1 Guyton's tax returns identified him as a "[t]eaching parent."
2 N.J.S.A. 30:4C-1.1.

End of Document

2017 WL 4320819
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

GARDEN STATE FIREWORKS,
INC., Petitioner–Appellant,
v.
NEW JERSEY DEPARTMENT
OF LABOR AND WORKFORCE
DEVELOPMENT, Respondent–Respondent.

DOCKET NO. A–1581–15T2
|
Argued September 14, 2017
|
Decided September 29, 2017

On appeal from the New Jersey Department of Labor and Workforce Development, Agency Docket No. 13–005.

Attorneys and Law Firms

August N. Santore, Jr., argued the cause for appellant.

Alan C. Stephens, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Mr. Stephens, on the brief).

Before Judges Alvarez, Currier, and Geiger.

Opinion

PER CURIAM

***1** Plaintiff Garden State Fireworks, Inc. is a New Jersey corporation that manufactures, stores and sells fireworks, and facilitates firework shows; pyrotechnicians are hired to conduct and shoot the fireworks at the shows or displays. The New Jersey Department of Labor and Workforce Development (the Department) conducted a routine audit of the company and determined that plaintiff had improperly classified some of the pyrotechnicians it hired to run fireworks displays as independent contractors rather than employees. As a result, the Department ordered plaintiff to pay unemployment compensation and disability contributions for these technicians. Plaintiff appealed, and the Department's order was reversed after trial in the Office of Administrative Law (OAL). However, in a final administrative action, the Commissioner of the Department reversed the Administrative Law Judge's (ALJ) order, finding that the pyrotechnicians should be classified as employees of the company, not independent contractors. After a review of plaintiff's arguments, in light of the record and applicable principles of law, we reverse.

Following a routine audit, the Department advised plaintiff that it owed $30,167.30 for unemployment compensation and disability contributions it had not paid for certain individuals it had classified as independent contractors and not employees of the company. After plaintiff requested a hearing, the matter was transferred to the OAL for further proceedings.

During the hearing, the Department presented its auditor, Carol Balfour. Balfour testified that she reviewed the business records of the company and noted that the pyrotechnicians hired by plaintiff to conduct the fireworks displays were listed on 1099 forms as "subcontractors." She sent out letters to the "subcontractors" requesting additional information. Balfour applied the statutory "ABC test" [1] and determined that the pyrotechnicians did not meet the requirements of the test. Specifically, the auditor concluded that plaintiff directly controlled the pyrotechnicians' activities, employed staff members who performed the same services, and offered no proof that the pyrotechnicians were in an independently established occupation or profession. As a result, Balfour categorized the pyrotechnicians as employees and found plaintiff liable for various unpaid contributions.

Nunzio Santore, Jr., one of plaintiff's co-owners, testified that the company has twenty-five to thirty-five full and part-time employees who work at its facility doing light manufacturing, sorting, assembling, and packing of fireworks. When a display is ordered for a specific show, the employees pack the selected fireworks onto trucks. A pyrotechnician is then hired for the specific show. The technician comes to the facility to pick up the packed truck and drives it to the site. The technician sets up the show, shoots off the fireworks and cleans up after the show, returning the empty truck to plaintiff's facility.

***2** Not surprisingly, plaintiff is busiest between Memorial Day and Labor Day, with eighty percent of its business taking place in the week surrounding July 4th. Several of the full-time employees of the company also perform fireworks

displays. Those individuals receive a W2 form and are paid on the payroll with the required tax contributions.

Santore described the pyrotechnicians who receive 1099s as individuals who only work one to three days a year for the company. Almost all of the pyrotechnicians are in a full-time occupation or business and come from a variety of backgrounds, including doctors, teachers, firefighters, and policemen. According to Santore, on July 4th, the company uses more than one hundred technicians in firework displays all over the State. Although he occasionally goes to a site to check on a crew, neither he nor anyone else at the company supervises the pyrotechnicians. They receive a flat fee for each show they perform.

Santore also informed the ALJ that plaintiff carries workers compensation and general liability insurance coverage for the pyrotechnicians as well as its W2 employees. In his experience of running the business for over forty years, Santore stated that he has never had a pyrotechnician file an unemployment claim.

Several pyrotechnicians also testified as witnesses for plaintiff. Daniel Papa, a full-time police officer, stated that he has set up and run fireworks displays for plaintiff. He advised that plaintiff's employees have never directed him as to how to set up the displays, which fireworks to launch, when to launch, or specified the length of the fireworks display. Papa denied ever seeking or expecting unemployment compensation from plaintiff.

Lawrence Neville, owner of a lawn care company, testified that he had performed three or four fireworks displays per year for plaintiff for the past ten to twelve years. He also stated that plaintiff has never directed him as how to perform the fireworks displays. He denied ever working in the plant. Neville added that he did not expect that he could file for unemployment compensation at the conclusion of a fireworks show.

Anthony Brown testified that he worked full time as a landscaper and performed several fireworks displays yearly for plaintiff. Like the other pyrotechnicians, Brown stated that if he ceased doing the fireworks displays, there would be no impact on his income or lifestyle.

Plaintiff's accountant, Generoso Romano, testified that he worked with plaintiff during an Internal Revenue Service (IRS) audit for the tax years of 2006 through 2010. The audit included a review of the 1099s that had been issued to the pyrotechnicians and their classification as "independent contractors." Following the completion of the audit, the IRS sent plaintiff a Form 886–A, advising that after reviewing plaintiff's 1099s, it "determined that we will not change the status of the pyrotechnicians you paid as independent contractors. These workers meet the safe harbor provisions of industry practice under Section 530 of the Revenue Act of 1978 based on the study done by the American Pyrotechnics Association." Based on the IRS's determination, Romano testified that plaintiff felt "comfortable ... in treating [the pyrotechnicians] as independent contractors[.]" The American Pyrotechnics Association study was admitted into evidence.

***3** In April 2015, ALJ Mumtaz Bari–Brown issued a written, comprehensive decision, finding that the pyrotechnicians hired by plaintiff were independent contractors, thus reversing the Department's determination. The ALJ informed that the matter was governed by the statutory "ABC test" under *N.J.S.A.* 43:21–19(i)(6)(A)–(C). She also relied on case law application of the statute, including *Carpet Remnant Warehouse, Inc. v. Dep't of Labor*, 125 *N.J.* 567 (1991). In that case, the Court was asked to determine whether carpet installers that performed services for a carpet distributor were independent contractors. *Carpet Remnant*, *supra*, 125 *N.J.* at 571. The Court confirmed that the ABC test was the governing statute. *Id.* at 582.

The ABC test becomes applicable only after a determination that the service provided constitutes "employment," which is defined as "service ... performed for remuneration or under any contract of hire, written or oral, express or implied." *N.J.S.A.* 43:21–19(i)(1)(A). "If the Department determines that the relationship falls within that definition, and is not statutorily excluded, *see* *N.J.S.A.* 43:21–19(i)(7), then the party challenging the Department's classification must establish the existence of all three criteria of the ABC test." *Carpet Remnant*, *supra*, 125 *N.J.* at 581. Those criteria are:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such

> service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
>
> [*N.J.S.A.* 43:21–19(i)(6)(A)–(C)].

The failure to satisfy any one of the three criteria results in an "employment" classification. That determination is fact-sensitive, requiring an evaluation in each case of the substance, not the form, of the relationship. *Carpet Remnant*, *supra*, 125 *N.J.* at 581. The ABC test determines whether employers and employees are obligated to pay unemployment compensation taxes as well as whether workers are eligible to receive unemployment benefits. *Id.* at 582.

The ALJ addressed each prong of the test individually. Regarding prong "A," the judge found:

> The credible evidence supports that Garden State's subcontractors are free from control or direction over the performance of their services. The subcontractors have discretion to determine the duration and pattern of fireworks displays, they are paid by the show, they are free to work as much or as little as each subcontractor chooses, they are generally not supervised by Garden State, and they are free to work for Garden State's competitors. Therefore, I CONCLUDE that Garden State established that the subcontractors have "been and will continue to be free from control or direction over the performance of such service." *N.J.S.A.* 43:21–19(i)(6)(A).

The ALJ also found that the pyrotechnicians satisfied prong "B" of the ABC test. Unlike plaintiff's full-time workers, the technicians did not work at plaintiff's factory. All three technicians who testified said that their only contact with plaintiff was picking up materials and filling out some initial paperwork for their fireworks displays. Furthermore, plaintiff's factory workers performed different services than the technicians' services at the fireworks display site. The judge concluded:

> ***4** I am persuaded by the credible evidence presented by Garden State that the subcontractors perform services outside of all the employer's places of business. Therefore, I CONCLUDE that Garden State satisfied Prong B, and established that the services are "performed outside of all the places of business of the enterprise for which said service[s] [are] performed."

In addressing prong "C," the ALJ pointed out that none of the contractors relied on plaintiff for their income, nor had any of them ever applied for unemployment or disability benefits. The judge found it irrelevant that the technicians did not maintain independent pyrotechnic companies. She explained that the statute only requires that the contractor be "customarily engaged in an independently established trade, occupation, profession or business[;]" it does not require that the independently established business be part of the same industry. Based on the technicians' testimony, the judge also concluded that it would not have been practical for any of the individuals to form an independent business to display fireworks only once or twice per year. Therefore, the judge found:

> Garden State's subcontractors are customarily engaged in an independently established trade, occupation, profession or business. Indeed, they are employed full-time and part-time in other industries and professions. Moreover, I am persuaded by the credible evidence presented by petitioner that if the subcontractors were to suffer a loss of income from Garden State it would not significantly impact their financial situation or necessitate an application for unemployment benefits.

As plaintiff met its burden of providing evidence sufficient to meet all three prongs, the ALJ concluded that the pyrotechnicians were independent contractors, and she, therefore, reversed the Department's determination. [2]

In a final administrative action, the Department disagreed with the ALJ's conclusions. The Commissioner asserted that the ALJ misunderstood the holding in *Carpet Remnant* and incorrectly concluded that plaintiff met all three prongs of the ABC test, particularly prong "C." In discussing prong "C," the Commissioner stated that:

> [T]he requirement that a person be customarily engaged in an independently established trade, occupation, profession or business calls for an "enterprise" or "business" that exists and can continue to exist independently of and apart from the particular service relationship. Multiple employment, such as that relied upon by the ALJ in support of her conclusion relative to Prong "C" of the ABC test, does not equate to an independently established enterprise or business.

The Department also found that plaintiff had not met prongs "A" and "B" as plaintiff controlled all of the pyrotechnicians, and all of the sites of fireworks displays are integral parts of its business. The Commissioner rejected the ALJ's determination and ordered plaintiff to remit the unpaid unemployment and temporary disability contributions.

Plaintiff now appeals from the Department's determination, asserting that it erred in its application of the ABC test.

***5** We are mindful that we have a limited role in reviewing decisions of an administrative agency. *Philadelphia Newspapers, Inc. v. Bd. of Review*, 397 *N.J. Super.* 309, 317 (App. Div. 2007) (citing *Campbell v. Dep't of Civil Serv.*, 39 *N.J.* 556, 562 (1963)). "Therefore, if, in reviewing an agency decision, an appellate court finds sufficient, credible evidence in the record to support the agency's conclusions, that court must uphold those findings even if the court believes that it would have reached a different result." *Id.* at 318 (citing *Clowes v. Terminix Int'l, Inc.*, 109 *N.J.* 575, 588 (1988)).

"Conversely, a reviewing court is not bound to uphold an agency determination unsupported by sufficient evidence." *Ibid.* (citing *Henry v. Rahway State Prison*, 81 *N.J.* 571, 579–80 (1980)). We do not act simply as a rubber stamp of an agency's decision where it is not supported by substantial, credible evidence in the record as a whole or it is arbitrary, capricious or unreasonable. *Ibid.*

To satisfy prong "A," plaintiff must show that the "individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact[.]" *N.J.S.A.* 43:21–19(i)(6)(A). This prong requires a company to establish not only that it "has not exercised control in fact, but also that the employer has not reserved the right to control the individual's performance." *Carpet Remnant*, *supra*, 125 *N.J.* at 582. Factors indicative of control include: "whether the worker is required to work any set hours or jobs, whether the enterprise has the right to control the details and the means by which the services are performed, and whether the services must be rendered personally." *Philadelphia Newspapers*, *supra*, 397 *N.J. Super.* at 321 (quoting *Carpet Remnant*, *supra*, 125 *N.J.* at 590).

Here, plaintiff provided the technicians with the required supplies and then gave them virtually complete control over the performance of the fireworks displays. The technicians testified that none of plaintiff's employees directed them as to which fireworks to launch, when to launch, or how to set up the displays. The Department's determination that plaintiff controlled the technicians' performance lacks fair support in the evidence. *See* *Philadelphia Newspapers*, *supra*, 397 *N.J. Super.* at 323 (concluding "the record is devoid of evidence demonstrating that claimant was customarily engaged in an independently established trade or activity from the mere delivery of [the company's] newspapers 'at the time of rendering the service involved' ").

Prong "B" requires a showing that the services are outside of either the employer's usual course of business or all of the employer's places of business. *Carpet Remnant*, *supra*, 125 *N.J.* at 584. The Department concluded that plaintiff's places of business included everywhere it conducted a fireworks display. As the Court stated in *Carpet Remnant*, such a definition of "place of business" would render a person's ability to satisfy the alternative standard of prong "B" "practically impossible." *Id.* at 592. The Court, therefore, refined the standard to refer "only to those locations where the enterprise has a physical plant or conducts an integral part of its business." *Ibid.* The Court determined that the residences of all of the claimant's customers where carpet was

installed were "clearly 'outside of all [its] place of business.' " *Ibid.* (quoting *N.J.S.A.* 43:21–19(i)(6)(B)). Here, we can similarly conclude that the Department's broad interpretation of "place of business" was not supported by prior judicial considerations of the statute and would render this required prong meaningless as the standard could never be met. We are satisfied that the pyrotechnicians' work conducted entirely at locations outside of plaintiff's primary plant satisfied prong "B."

***6** In its discussion of the ALJ's determination of prong "C," the Department declared it to be "fatally flawed." We disagree. This prong is satisfied "when a person has a business, trade, occupation, or profession that will clearly continue despite termination of the challenged relationship." *Philadelphia Newspapers*, *supra*, 397 *N.J. Super.* at 323. If the person is so "dependent on the employer" that upon "termination of that relationship" he would "join the ranks of the unemployed," then the prong would not be satisfied. *Carpet Remnant*, *supra*, 125 *N.J.* at 585–86.

Here, the record revealed that the pyrotechnicians were all either retirees or full-time employees outside of their work for plaintiff. Although only three of the more than one hundred pyrotechnicians testified, the parties agreed that their testimony constituted a wholly representative sample of the technicians. All three of the technicians that testified stated that they did not rely on plaintiff as their primary source of income and would never have expected unemployment compensation from plaintiff. Santore testified that he had never had a pyrotechnician request or even inquire about receiving unemployment compensation after the fireworks shows were completed. The technicians only performed services for plaintiff during one or two weeks of each year, and none of them relied on plaintiff as the main source of their income. We are satisfied that the Department erroneously applied prong "C" as interpreted by the governing case law.

As we have stated, the ABC test is fact-sensitive. We look to the substance of the relationship, not solely its form. *See* *Carpet Remnant*, *supra*, 125 *N.J.* at 581. Here, it is difficult to conceive that an individual who does work for a company one to three days a year, while working full-time in another profession, could be reasonably considered an employee of that company. As the Court stated in *Carpet Remnant*, "in cases in which satisfaction of the C standard convincingly demonstrates a person's ineligibility for unemployment benefits, it would be inappropriate for the Commissioner to apply the A or B tests restrictively and mechanically if their applicability is otherwise uncertain." *Id.* at 590.

Based on our review of the record, we find insufficient evidence to support the Commissioner's determination that the pyrotechnicians did not meet the ABC test. We, therefore, reverse the Department's determination.

Reversed.

All Citations

Not Reported in Atl. Rptr., 2017 WL 4320819

Footnotes

1 *N.J.S.A.* 43:21–19(i)(6)(A)–(C) is the statute that governs the determination of whether an individual is classified as an employee or independent contractor. It is commonly referred to as the "ABC test."

2 The ALJ considered the IRS's classification of the pyrotechnicians as independent contractors. While recognizing the determination was neither "controlling [n]or dispositive," she found the determination could, however, suggest that her conclusion was not unreasonable.

2019 WL 5078715
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

MKI ASSOCIATES, LLC, Petitioner-Appellant,
v.
NEW JERSEY DEPARTMENT
OF LABOR AND WORKFORCE
DEVELOPMENT, Respondent-Respondent.

DOCKET NO. A-4508-17T3
|
Argued September 25, 2019
|
Decided October 10, 2019

On appeal from the New Jersey Department of Labor and Workforce Development, Docket No. 16-001.

Attorneys and Law Firms

Evan L. Goldman argued the cause for appellant (Law Offices of Goldman Davis, PC, attorneys; Evan L. Goldman and Kristen Ragon, on the briefs).

Emily Marie Bisnauth, Deputy Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Daniel Pierre, Deputy Attorney General, on the brief).

Before Judges Koblitz, Gooden Brown, and Mawla.

Opinion

PER CURIAM

***1** Appellant MKI Associates, LLC appeals from an April 25, 2018 final agency decision of respondent Commissioner, New Jersey Department of Labor and Workforce Development (Department), reversing the decision of an Administrative Law Judge (ALJ), finding therapists that MKI placed in work assignments with healthcare facilities were independent contractors. The Board determined the therapists were employees, and that MKI failed to meet its burden under N.J.S.A. 43:21-19(i)(6)(A)-(C) to prove otherwise. We affirm.

In 2015, the Department determined MKI owed $118,347.75 in unpaid contributions to the unemployment compensation fund and the State disability benefits fund, under the New Jersey Unemployment and Temporary Disability Laws (UCL), for the audit period between 2011 and 2014. MKI disputed the Department's findings and a hearing occurred before an ALJ.

We summarize the salient facts adduced at the hearing. MKI is owned and operated by Monica and Kevin Iula.[1] The company recruits, screens, and interviews therapists to work at healthcare facilities, and assigns therapists on a temporary basis to various facilities in northern New Jersey when there are openings.

MKI requires its therapists to sign a "Consulting Agreement" which states MKI agrees to engage the therapists to provide the facilities with rehabilitation services. MKI's therapist contract lasts for an indefinite term and can only terminate with a two-week written notice. The contract outlines the therapists' compensation and contains a non-compete clause stating:

> Other than with the express written consent of the [c]ustomers, which will not be unreasonably withheld, the [therapist] will not, during the continuance of this Agreement or within [one] year after the termination of this Agreement, be directly or indirectly involved with a business which is in direct competition with the particular business line of the [c]ustomers, divert or attempt to divert from the [c]ustomers any business the [c]ustomers ha[ve] enjoyed, solicited, or attempted to solicit, from other individuals or corporations, prior to termination of this Agreement.

The contract contains a non-solicitation clause, which prevents the therapists from interfering with MKI's

relationships with its other employees, consultants, and customers.

MKI also enters into a "Staffing Contract" with the facilities, which retain the services of its therapists. The staffing contract provides MKI must pay the therapists the wages it offers them. It also requires the therapists to keep their files and submit any "requisite monthly family notice and verification logs." It further provides the facilities cannot change the therapists' job responsibilities without first obtaining MKI's written approval. Similar to the consulting agreement, the staffing contract contains a non-compete and non-solicitation clause. The clause states the client

> ***2** specifically agrees that an independent contractor therapist cannot be hired by [the client] without a buyout agreement between [the client] and [MKI] or after a [one] year period has passed from the last day that the independent contractor was assigned under the direction of [the client]. [The client] agrees that a buyout agreement must be procured and finalized prior to any negotiations or engagements in any way, directly or indirectly, that induce or attempt to induce the independent contractor therapist to become an employer or enter into a direct business agreement with [the client] or violate the terms of his/her contract with [MKI].

The clause also states if the client facility uses the services of a therapist placed by MKI "as its direct employee in any capacity within 365 days starting from the period after the end of any assignment of the [therapist] to [the client] from [MKI], [the client] must notify [MKI] and pay [MKI] a fee ... of $5000."

Kevin testified the therapists are paid twice per month by MKI and never by the facilities. MKI requires the therapists to submit biweekly timesheets to MKI to receive their paychecks. MKI guarantees the therapists' wages, even when it does not receive payment from the facilities for the services rendered. Monica testified MKI often waited six months to a year to receive payment from the facilities. Kevin and Monica paid the therapists' wages directly from their personal bank accounts. MKI negotiates the rates of pay for the therapists' services.

MKI offered testimony of three therapists who stated they were paid exclusively by MKI, prohibited from negotiating their rate of pay directly with the facilities, and required to submit timesheets to MKI to be paid. Notwithstanding, the therapists testified they believed their relationship with MKI was that of an independent contractor and MKI did not control the manner of their work or their work schedule, provide training for the therapists, or prevent them from seeking work elsewhere. Notably, the therapists testified one-hundred percent of their business revenue was generated from income they received from MKI and their individual businesses had no employees. None of the therapists used their own business telephone, stationary, or advertisements.

The auditor who performed the audit of MKI, testified on behalf of the Department. She stated the audit was conducted as a result of a claim for disability benefits filed by a former MKI therapist. She concluded the therapists placed by MKI were employees, not independent contractors. She noted MKI paid the therapists' wages, required the therapists to submit timesheets, established and controlled the wages the therapists received, and were subject to non-compete and non-solicitation contractual obligations. She concluded MKI hired therapists to perform services in the usual course of MKI's business, which she determined was the provision of healthcare. She found the therapists hired provided therapeutic services at healthcare facilities, rendering such facilities quasi-offices of MKI. She determined most of the therapists hired by MKI did not have an independently established business, because the therapists relied predominantly on the income they received from MKI.

The ALJ found MKI satisfied all three prongs of N.J.S.A. 43:21-19(i)(6)(A)-(C) and reversed the Department's determination. The Department submitted exceptions to the Commissioner who issued a final agency decision reversing the ALJ.

The Commissioner concluded prong A was not satisfied because

> the documents governing the relationships between MKI and the therapists and between MKI and its

> clients, as well as the testimony of witnesses confirming the practices of MKI, reflect a degree of control over the therapist that is consistent with an employment relationship and belies [any] assertion ... that these individuals were free from control or direction by MKI.

***3** The Commissioner found "the 'staffing contract' between MKI and its clients contains a '[r]ate [s]chedule' listing the hourly rates to be charged for the services" of its therapists, and the rates the healthcare facilities paid MKI and that MKI paid its therapists were both set by MKI. He noted the therapists were not free to negotiate their own hourly rate with MKI's clients, and according to MKI's contracts,

> the client is prohibited from changing the "Assigned Contractor's" job duties without MKI's "express prior written approval" and contains a "non-compet[e] and non-solicitation" clause, ... that prohibits the client from employing any MKI therapist without first entering into a "buyout agreement" with MKI or after [one] year has passed from the last date on which the therapist performed services for the client on assignment from MKI.

The Commissioner concluded the terms of the contracts clearly showed MKI exerted or reserved the right to exert control over the therapists it placed, prevented the therapists from being involved with a competitor, and the ALJ incorrectly characterized these provisions as immaterial. According to the Commissioner, these clauses were contained in the staffing contracts presented by MKI to its clients and in the independent contractor consulting agreements presented by MKI to its therapists as a condition of engaging their services.

As to prong B, the Commissioner found the therapists' services were neither outside MKI's usual course of business, nor performed outside of MKI's places of business. He concluded MKI's course of business was providing therapeutic services and the facilities where the therapists worked were locations where MKI conducted an integral part of its business, namely, providing therapeutic services pursuant to the staffing contracts MKI maintained with its clients.

The Commissioner also found the Department failed to satisfy prong C. He concluded Trauma Nurses, Inc. v. N.J. Dep't. of Labor, 242 N.J. Super. 135 (App. Div. 1990), upon which the ALJ relied in reversing the Department's decision, was distinguishable. He noted MKI provided replacement staff in the event one of its therapists was unable to work and established the hourly rate and the rate the facility would pay, rather than the therapists themselves negotiating their hourly rates. Unlike Trauma Nurses, the contracts between MKI, its clients, and its therapists contained non-compete and non-solicitation clauses, which governed the manner of the therapists' work while under contract with MKI and up to one year after its termination.

The Commissioner concluded MKI failed to establish each therapist was engaged in a viable, independently-established business at the time he or she rendered the services to MKI. MKI failed to address the duration and strength of each therapist's business, the number of customers and the volume of business of each therapist, the extent of each therapist's business resources, and the remuneration each therapist received from MKI compared to other sources. By contrast, the Department auditor testified all of the documentary evidence she obtained in the form of Federal Form 1040 Schedule C's showed all of the business income of those individuals derived from services rendered for MKI.

I.

We "have 'a limited role' in the review of [agency] decisions." In re Stallworth, 208 N.J. 182, 194 (2011) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)). "[A] 'strong presumption of reasonableness attaches to [an agency decision].' " In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001) (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993)). "In order to reverse an agency's judgment, [we] must find the agency's decision to be 'arbitrary, capricious, or unreasonable, or ... not supported by substantial credible evidence in the record as a whole.' " Stallworth, 208 N.J. at 194 (quoting Henry, 81 N.J. at 579-80). The burden

of proving an agency action is "arbitrary, capricious, or unreasonable" is on the challenger. Bueno v. Bd. of Trs., 422 N.J. Super. 227, 234 (App. Div. 2011) (quoting Henry, 81 N.J. at 579-80).

***4** We "may not substitute [our] own judgment for the agency's, even though [we] might have reached a different result." Stallworth, 208 N.J. at 194 (quoting In re Carter, 191 N.J. 474, 483 (2007)). "It is settled that '[a]n administrative agency's interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to our deference.' " E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 355 (App. Div. 2010) (alteration in original) (quoting Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001)).

Under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, "[i]n reviewing the decision of an administrative law judge, the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so." N.J.S.A. 52:14B-10(c).

II.

Pursuant to N.J.S.A. 43:21-19(i)(6), "[s]ervices performed by an individual for remuneration shall be deemed to be employment" unless the putative employer proves each of three prongs:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
>
> [N.J.S.A. 43:21-19(i)(6)(A)-(C).]

If each element is not met, then the claimant is an employee, not an independent contractor. Hargrove v. Sleepy's, LLC, 220 N.J. 289, 305 (2015).

In Hargrove, the Court explained the considerations under each part as follows:

> In order to satisfy part A of the "ABC" test, the employer must show that it neither exercised control over the worker, nor had the ability to exercise control in terms of the completion of the work. In establishing control for purposes of part A of the test, it is not necessary that the employer control every aspect of the worker's trade; rather, some level of control may be sufficient.
>
> Part B of the statute requires the employer to show that the services provided were "either outside the usual course of the business ... or that such service is performed outside of all the places of business of the enterprise." N.J.S.A. 43:21-19(i)(6)(B). While the common law recognizes part B as a factor to consider, it is not outcome determinative within the confines of the "right to control" test.
>
> Part C of the statute is also derived from the common law. This part of the test "calls for an enterprise that exists and can continue to exist independently of and apart from the particular service relationship. The enterprise must be one that is stable and lasting—one that will survive the termination of the relationship." Therefore, part C of the "ABC" test is satisfied when an individual has a profession that will plainly persist despite the termination of the challenged relationship. When the relationship ends and the individual joins "the ranks of the unemployed," this element of the test is not satisfied.
>
> [220 N.J. at 305-06 (citations omitted).]

The ABC test's analysis is not limited to the terms of the contract between the parties. Whether an individual is an employee "should not be determined under the [a]greement alone, but rather on all facts surrounding [the individual's] relationship with [the employer], including the [a]greement." Phila. Newspapers, Inc. v. Bd. of Review, 397 N.J. Super. 309, 321 (App. Div. 2007).

***5** On appeal, MKI challenges the Commissioner's findings under all three prongs of the ABC test. Under prong A, MKI argues it did not exercise control over its therapists and the

Commissioner ignored the weight of the evidence and the relevant case law. MKI argues prong B was met because it had no offices and operated outside of the Iulas's residence, where no therapy was provided. It argues pursuant to Trauma Nurses, prong C was met because the therapists could choose the facilities and hours they worked, and had worked at other facilities outside of any contractual obligation to MKI.

A.

Prong A requires a company to establish not only that it "has not exercised control in fact, but also that the employer has not reserved the right to control the individual's performance." Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 582 (1991). Characteristics of control include: "whether the worker is required to work any set hours or jobs, whether the enterprise has the right to control the details and the means by which the services are performed, and whether the services must be rendered personally." Phila. Newspapers, 397 N.J. Super. at 321 (quoting Carpet Remnant Warehouse, 125 N.J. at 590).

MKI's arguments are unpersuasive. Its consultant agreements and staffing contracts contained provisions reserving MKI's right to control the place and manner in which the therapists conducted their business. The means of control were expressly set forth in the non-compete and non-solicitation clauses, the buy-out provision, and clauses restricting the ability of the facility and a therapist to engage in full-time employment without MKI's written approval.

Additionally, the evidence in the record established MKI paid therapists for the services performed at the healthcare facilities. Therapists were not permitted to contact or negotiate their wages directly with the facilities. Instead, the therapists' wages were negotiated with MKI and it separately negotiated the rates the facilities would pay. Therapists submitted timesheets to MKI, which then paid them and guaranteed their wages.

Contrary to MKI's argument on appeal, "it is not necessary that the employer control every aspect of the worker's trade; rather, some level of control may be sufficient." Hargrove, 220 N.J. at 305 (citing Schomp v. Fuller Brush Co., 124 N.J.L. 487, 491 (Sup. Ct. 1940)). For these reasons, the Commissioner's prong A findings did not constitute reversible error.

B.

Prong B requires a showing that the services are outside of either the employer's usual course of business or all of the employer's places of business. Carpet Remnant Warehouse, 125 N.J. at 584. Our Supreme Court stated the prong refers "only to those locations where the enterprise has a physical plant or conducts an integral part of its business." Id. at 592.

Contrary to MKI's argument, the facts here are distinguishable from Trauma Nurses. In Trauma Nurses, we concluded the nature of the business was not providing health care, but rather "brokering nursing personnel to hospitals." Trauma Nurses, 242 N.J. Super. at 147. Thus, the work of providing nurses to hospitals exceeded the usual course of the business. Id. at 147-48.

Here, the Commissioner found "the principal part of MKI's business enterprise is providing therapeutic services pursuant to the staffing contracts that MKI maintains with its clients, the facilities where those services are performed under the staffing contracts are locations where MKI conducts an 'integral part of its business.' " Indeed, the fees MKI derived from the facilities formed the sole source of its income. Moreover, as the respondent noted at oral argument, in MKI's public bidding documents it represented it would provide workers' compensation benefits to its employees, a benefit not conferred by a staffing agency. Also, MKI is registered as a provider of therapy, not as a placement agency. Therefore, unlike Trauma Nurses, MKI exclusively held itself out as a provider of therapists to facilities as an integral part of its business.

C.

***6** Part C of the statute ... "calls for an enterprise that exists and can continue to exist independently of and apart from the particular service relationship. The enterprise must be one that is stable and lasting—one that will survive the termination of the relationship." Gilchrist v. Div. of Emp't Sec., 48 N.J. Super. 147, 158 (App. Div. 1957).

> Therefore, part C of the "ABC" test is satisfied when an individual has a profession that will plainly persist despite the termination of the challenged relationship.... When the relationship ends and the individual joins "the ranks of the unemployed," this element of the test is not satisfied.
>
> Schomp, 124 N.J.L. at 491-92.
>
> [Hargrove, 220 N.J. at 306.]

In Carpet Remnant Warehouse, the Supreme Court explained the

> determination should take into account various factors relating to the [workers'] ability to maintain an independent business or trade, including the duration and strength of the [workers'] businesses, the number of customers and their respective volume of business, the number of employees, and the extent of the [workers'] tools, equipment, vehicles, and similar resources. The Department should also consider the amount of remuneration each [worker] received from [the putative employer] compared to that received from other [business entities]. Those who received a small proportion of compensation from [the putative employer] are more likely to be able to withstand losing [the putative employer's] business.
>
> [Id. at 592-93]

The Commissioner found MKI failed to address each of the factors enumerated by the Court in Carpet Remnant Warehouse, namely, the duration and strength of each therapist's business, the number of customers and the volume of business of each therapist, the extent of each therapist's business resources, and the amount of remuneration each therapist received from MKI compared with receipts from other employers. Further, crediting the testimony and findings of the Department auditor, the Commissioner concluded the objective evidence showed therapists who created LLCs received all of their business income from MKI. These findings were supported by the substantial credible evidence in the record and were not arbitrary, capricious, or unreasonable.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2019 WL 5078715

Footnotes

1 We utilize the Iulas's first names to differentiate them because they share a common surname. We intend no disrespect.