DLG Construction, LLC,
Petitioner,

v.

New Jersey Department of Labor and Workforce Development,
Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT

FINAL ADMINISTRATIVE ACTION OF THE COMMISSIONER

OAL DKT. NO LID 16964-19
AGENCY DKT. NO. DOL 19-021

Issued: November 14, 2022

The appeal of DLG Construction, LLC (DLG or petitioner) concerning an unemployment and temporary disability assessment of the New Jersey Department of Labor and Workforce Development (Department or respondent) for unpaid contributions by petitioner to the unemployment compensation fund and State disability benefits fund for the period from 2014 through 2018 ("the audit period") was heard by Administrative Law Judge Jude-Anthony Tiscornia (ALJ). In his initial decision, the ALJ concluded that none of the individuals engaged by DLG during the audit period to perform work on the installation of drywall (hereafter referred to as "Drywall Installers") or the one individual engaged by DLG during the audit period to perform waste removal work (hereafter referred to as "Waste Remover"), had been employees of DLG, but rather, all had been independent contractors.[1] Based on this conclusion, the ALJ ordered the reversal of the

[1] Actually, the ALJ concluded that the Drywall Installers and Waste Remover were "***sub-contractors*** under applicable law" (emphasis added), rather than employees of DLG. The ALJ also used the term "sub-contractor," as opposed to "independent contractor," throughout his initial decision, including framing the issue before him as whether "the alleged employees identified by the Department [were] employees or were they, in fact, ***sub-contractors*** as DLG represents they were" (emphasis added). The term "sub-

Department's determination regarding petitioner's unemployment compensation and State disability benefits fund liability relative to the work performed for DLG by the Drywall Installers and the Waste Remover.

The issue to be decided is whether the Drywall Installers and Waste Remover engaged by DLG during the audit period were employees of DLG and, therefore, whether DLG was responsible under N.J.S.A. 43:21-7 for making contributions to the unemployment compensation fund and the State disability benefits fund with respect to the work performed by those individuals.

Under the New Jersey Unemployment Compensation Law (UCL), N.J.S.A. 43:21-1 et seq., the term "employment" is defined broadly to include any 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). Once it is established that a service has been performed for remuneration, that service is deemed to be employment and the individual who performed the service an employee subject to the UCL, unless and until it is shown to the satisfaction of the Department that:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
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> (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
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> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
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> N.J.S.A. 43:21-19(i)(6).

This statutory criteria, commonly referred to as the "ABC test," is written in the conjunctive. Therefore, where a putative employer fails to meet any one of the three criteria listed above with regard to an individual who has performed a service for remuneration, that individual is considered to be an employee and the service performed

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contractor" has no legal significance under the New Jersey Unemployment Compensation Law (UCL). Rather, as is explained in detail within the body of this decision, the issue that was before the ALJ and that is before me now is whether under the UCL the Drywall Installers and Waste Remover engaged by DLG during the audit period were independent contractors or employees. Again, because the term "sub-contractor" has no legal significance under the UCL, I have substituted the term "independent contractor" here, and use the correct term, "independent contractor," rather than the incorrect term, "sub-contractor," throughout the remainder of this decision, except when directly quoting the ALJ or petitioner.

is considered to be employment subject to the requirements of the UCL; in particular, subject to N.J.S.A. 43:21-7, which requires an employer to make contributions to the unemployment compensation fund and the State disability benefits fund with respect to its employees.

In his initial decision, the ALJ explained that DLG's business is to perform commercial "cleanouts," which means transforming a commercial space from one tenant's specifications to the successor tenant's specifications. According to the ALJ, commercial property owners would contact Gusztay Aspirany (Aspirany), the owner of DLG, with potential jobs, providing blueprints and before-and-after specifications. Relative to the drywall installation needed for a job, Aspirany would review the blueprints, determine how many sheets of drywall were required and order them. Aspirany would then pay each Drywall Installer a set rate per drywall board hung and spackled. Aspirany would also arrange and pay for waste removal.

Within the ALJ's legal analysis and conclusions, he opened with the following statement:

> "In the case at bar, the Department insists that this statute [the Unemployment Compensation Law, N.J.S.A. 43:21-1 et seq.] establishes that the burden of proof is on the petitioner to provide all relevant documents, including sub-contractors' tax returns, in order to establish that the 'individuals' listed in the audit were bona-fide sub-contractors.
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> . . .
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> The Department stresses that the petitioner has the burden of producing the relevant information that would satisfy the three-pronged text outlined in the [Unemployment Compensation Law]. The Department repeatedly asserted, both at the hearing via its witness testimony and in its closing brief, that DLG has a duty to produce a copy of any past alleged sub-contractor's tax return for Department review, even in instances where DLG has not done business with that business entity for several years. This position seems to imply that it is DLG's duty to obtain and keep tax returns of any sub-contractor it does business with. The Department has provided no body of law that establishes such a duty and I CONCLUDE no such duty exists."

The ALJ then proceeded with his analysis under the ABC test of the services performed by each of the Drywall Installers and the Waste Remover. Following is the ALJ's analysis and related legal conclusions in their entirety:

> **<u>Prong "A"</u>**
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> "The Department…argues that, because DLG construction would communicate the timeframe wherein the various sub-contractors would

> need to complete their portion of the job, DLG, then, had 'control or direction' over the sub-contractors, and thereby DLG would fail prong 'A' of N.J.S.A. 43:21-19(i)(6). I disagree, and I CONCLUDE that the mere act of a general contractor informing a sub-contractor of a timeframe does not prove that the general contractor has 'control or direction' over the sub-contractor as per N.J.S.A. 43:21-19(i)(6)(A).
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> **<u>Prong "B"</u>**
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> The Department goes on to argue that installing drywall is an integral part of DLG's business, and therefore not 'outside the usual course of the business,' and so DLG fails prong 'B' of N.J.S.A. 43:21-19(i)(6). Notwithstanding Aspirany's constant and consistent representation that he is a commercial framer by trade and not a commercial drywall installer, the Department insists that he is, in fact, a commercial drywall installer. The Department produced no evidence or testimony that DLG routinely performs commercial drywall installation to rebut DLG's position, and I thus CONCLUDE that DLG has satisfied prong 'B"' of N.J.S.A. 43:21-19(i)(6).
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> **<u>Prong "C"</u>**
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> Finally, the Department argues that DLG has not proven to the Department's satisfaction that the sub-contractors in question were 'customarily engaged in an independently established trade, occupation, profession or business' as per prong 'C' of N.J.S.A. 43:21-19(i)(6). The Department argues that DLG has a duty to maintain or otherwise produce a subcontractor's business documents, such as the sub-contractor's tax returns, in order to provide same to the Department upon the Department's request. The Department asserts that, because DLG was unable to procure said tax returns for the sub-contractor's in question, DLG fails prong 'C,' and the sub-contractors are, thus, employees. As discussed above, I CONCLUDE that DLG does not have a duty to keep or obtain tax returns of any sub-contractor it does business with, and I further CONCLUDE that DLG's inability to recover any such documents from a given sub-contractor upon the Department's request does not tend to show that said sub-contractor is DLG's employee.

Based on the foregoing, the ALJ concluded that the three individual Drywall Installers who had performed services for DLG during the audit period and who were paid by DLG in the name of their respective LLCs (Do Construction, LLC; Baazs Orosz, LLC, and Ludras, LLC), and the one Waste Remover who had performed services for DLG during the audit period and who was paid by DLG in the name of "Fairmount Industries," were "sub-contractors under appliable law." Therefore, the ALJ granted DLG's appeal and reversed the Department's assessment against DLG for unpaid contributions to the

unemployment compensation and State disability benefits funds. Respondent filed exceptions. Petitioner filed a reply to exceptions.

In its exceptions, respondent takes issue with the ALJ's conclusions regarding the burden of proof, explaining that under the UCL once it is established that a putative employer has paid remuneration for the performance of a service, that service is deemed to be covered "employment," unless and until the putative employer is able to meet its burden of proof to establish that the service performed and the individual who performed the service satisfy each of the three prongs of the statutory test for independent contractor status – the ABC test. In support of this principle, respondent cites to the UCL itself at N.J.S.A. 43:21-19(i)(1), where the statute defines "employment" to mean services performed for remuneration under any contract for hire, written or oral, express or implied; N.J.S.A. 43:21-19(p), where the statute defines "remuneration" to mean all compensation for personal services, including commissions and bonuses and the cash value of all compensation in any medium other than cash; and, finally, N.J.S.A. 43:21-19(i)(6), where it states that "[s]ervices performed by an individual for remuneration shall be deemed to be employment subject to [Chapter 21 of Title 43 of the New Jersey Statutes, including the Unemployment Compensation Law], unless and until it is shown to the satisfaction of the division that" the services and the individual providing the services meet each of the three prongs of the statutory ABC test. (emphasis added by respondent). In addition, respondent cites to supporting case law; specifically, the Opinion of the New Jersey Supreme Court in Carpet Remnant Warehouse, Inc. v. Department of Labor, 125 N.J. 567, 581 (1991), where the Court held in pertinent part that if the Department determines a relationship of worker to putative employer to have met the UCL definition of "employment" – services for remuneration – "then the party challenging the Department's classification must establish the existence of all three criteria of the ABC test." See also, Schomp v. Fuller Brush Co., 124 N.J.L. 487 (Sup. Ct. 1940), aff'd, 126 N.J.L. 368 (E. & A. 1941); Philadelphia Newspapers, Inc., v. Board of Review, 397 N.J. Super. 309 (App. Div. 2007); Trauma Nurses v. Board of Review, 242 N.J. Super. 135 (App. Div. 1990); William H. Goldberg & Co. v. Div. of Employment Sec., 21 N.J. 107 (1956); Blume v. Div. of Employment Sec., 69 N.J. Super. 175 (App. Div. 1961); Electrolux Corp. v. Board of Review, 129 N.J.L. 157 (E. & A. 1942); and Gilchrist v. Division of Employment Security, 48 N.J. Super. 147 (App. Div. 1957).

Regarding the threshold test for "employment" – whether services have been performed for remuneration – respondent maintains that by Mr. Aspirany's own admission during his testimony before the ALJ, each Drywall Installer would hang and spackle drywall according to the blueprints provided to him by DLG and in return DLG would compensate the Drywall Installer for each drywall board hung and spackled. Furthermore, according to respondent, DLG's business records, which were examined by the Department's Auditor and which are part of the hearing record, disclose payments made by DLG to both the Drywall Installers and the Waste Remover in exchange for the performance of services; specifically, the services of drywall installation and waste removal. Thus, argues respondent, the burden of proof to establish independent contractor status under the UCL's ABC test, including the burden of establishing: (1) that each such individual was and will continue to be free from control or direction over the

performance of such services; (2) that such service was either outside the usual course of the business for which the services was performed, or that such service is performed outside of all the places of business of the enterprise for which such service was performed; and (3) that during the audit period each individual who performed services for remuneration was customarily engaged in an independently established business enterprise; falls squarely upon DLG, and any conclusion to the contrary contained within the ALJ's initial decision is erroneous.

Relative to each of the three prongs of the ABC test, respondent maintains the following:

Prong "A"

Respondent asserts that in order to satisfy Prong "A" of the ABC test, DLG must demonstrate that it did not exercise control over the services performed by the individuals listed in the audit report and that it did not reserve the right to control the individuals' performance of those services, adding that DLG need not have controlled every facet of the individuals' services for those individuals to be deemed employees under the UCL. See Carpet Remnant Warehouse v. New Jersey Dep't of Labor, supra. As to the relevant facts, respondent maintains that the testimony of Mr. Aspirany reveals the following: (1) Aspirany, not the individual Drywall Installers, assessed how many sheets of drywall would be needed for a specific job and would arrange for the delivery of the drywall to the jobsite for the Drywall Installers to hang and spackle; (2) DLG, not the individual Drywall Installers or the Waste Remover, negotiated and entered into contracts with the commercial property owners for the "cleanout" to be completed; (3) the contracts with the commercial property owners, negotiated by DLG, controlled the price, start date and duration of the project; (4) Aspirany controlled every facet of the "cleanout," including the scheduling of all craftworkers, such as Plumbers, Electricians and Drywall Installers, so as to avoid them working over each other; and (5) according to Aspirany, if a commercial property owner is unhappy with a Drywall Installer's work, the commercial property owner would complain to DLG and it would be DLG's responsibility to see that the deficiencies are corrected. Respondent concludes that based on the foregoing, DLG has failed to meet Prong "A" of the ABC test and the ALJ's conclusion to the contrary should be reversed.

Prong "B"

With regard to Prong "B" of the ABC test, which requires that in order to establish independent contractor status, one must prove that the service at issue is either outside the usual course of 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, respondent notes that the Court in Carpet Remnant, supra, defined the phrase "all places of business" to mean those locations where the enterprise has a physical plant or conducts an integral part of its business. Relative to the latter part of that definition, respondent maintains that since the principal part of DLG's business enterprise is the performing of "cleanouts" pursuant to contracts between DLG and

commercial property owners, and since those contracts all require the erection of walls, which in turn requires the installation of drywall, the work sites where the "cleanouts" are performed are locations where DLG conducts an "integral part of its business." Similarly, respondent maintains that since the principal part of DLG's business enterprise is performing "cleanouts," which by necessity, includes the installation of drywall, the performance of drywall installation to satisfy DLG's obligations and responsibilities under the contracts between DLG and its commercial property owner/clients is a service performed within, not outside of, DLG's usual course of business. Consequently, respondent urges the Commissioner to reverse the ALJ's conclusion that DLG has met its burden under Prong "B" of the ABC test.

Prong "C"

In support of its exceptions to the ALJ's conclusions regarding Prong "C" of the ABC test, respondent cites to the opinion in Gilchrist v. Division of Employment Sec., supra, wherein the court stated the following:

> The double requirement [within Prong "C"] that an individual must be customarily engaged and independently established calls for an enterprise that exists and can continue to exist independently and apart from a particular service relationship. The enterprise must be one that is stable and lasting – one that will survive the termination of the relationship.

Thus, according to respondent, to satisfy Prong "C" of the ABC test, petitioner must demonstrate that each Drywall Installer, and the Waste Remover, was engaged in a viable, independently established business at the time that he or she rendered that service to petitioner. Relative to the facts adduced during the DLG hearing, with an eye to addressing the above-cited standard, respondent observes the following:

> DLG produced no evidence whatsoever that any Drywall Installer [or] Waste [Remover] had an outside business relationship with other firms. Its proofs consisted of the wholly uncorroborated testimony of one witness, Gusztav Aspirany, single member of DLG, who believed that the workers had their own business. DLG offered no evidence of any worker having business cards or business stationary; advertisements in the yellow or white pages; advertisements in professional journals or trade magazines; billing statements, invoices or letterheads; business telephones; commercial premises; or evidence that any worker was in a partnership or incorporated. Most importantly, there was no evidence that any Installer [or Waste Remover] had income from a business outside his relationship with DLG.[2] [3]

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[2] Respondent notes in its exceptions that, "the Department and the court have long recognized that individuals performing drywall work are employees." In support of this assertion, respondent attaches to its exceptions the following decisions: L.W. Drywall, Inc. v. New Jersey Department of Labor, Initial Decision, OAL Dkt. No. LID 8875-88

In reply to the exceptions filed by respondent, petitioner maintains that Mr. Aspirany provided to the Department what documentation he had, "which was the workers' compensation insurance policy which he provided for each and every subcontractor," adding, "[h]e also provided filed copies of valid 1099 forms containing the name, address and EIN for each subcontracting company." Petitioner asserts that "[t]he fact that he (Mr. Aspirany) did not retain every business card or invoice from them should not be the determining factor in the application of Part C of the test as such information is readily available to the State of New Jersey on looking at tax records of these entities which would immediately reveal their gross income, how many employees they had, what type of tax returns did they filed (sic), and how many owners were in the company." Specifically, regarding the services provided to DLG by the Waste Remover, petitioner asserts the following:

> To show the absurdity of the total misapplication of the ABC test by the Auditor to this case, I bring up the example of Fairmount Industries, which is a container garbage pickup company that simply did not answer the Auditor's letter who then included the $775 paid for garbage pickup container in the 2015 audit and considered this company as the employee of petitioner. The company most certainly had other income to exist, certainly more than $775.

Regarding Prong "A" of the ABC test, petitioner states:

> [P]etitioner chose to provide the sheetrock, this way benefiting from the discount and controlling the number of drywall panels that are used for the job. Other than that, he does not control the subcontractors in any way as they work totally independently from him.
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> . . .
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> Compare this with the Auditor's application of the "A" portion of the test, where she considered a controlling of the subcontractors by telling them where the job is, making sure the job is done correctly, and it is completed in a timely manner. How could any subcontractor get the job done if he or

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(1989); L.W. Drywall, Incl. v. New Jersey Department of Labor, Final Administrative Decision of the Commissioner, OAL Dkt. No. LID 8875-88 (1990); and L.W. Drywall, Inc. v. N.J. Department of Labor, A-3627-89T2 (unpublished, App. Div. 1991).

[3] Respondent also asserts relative to the Drywall Installers, each of whom had formed LLCs, that under New Jersey and Federal law and regulations, single-member LLCs are treated as "disregarded" entities for the purpose of employment tax, which includes unemployment compensation and State disability benefits fund contribution obligations. As the issue is not central to the outcome in this case, I will not address it in the body of this decision.

> she does not even know where the place is where the job has to be performed? How could anybody use any subcontractor without telling them that the job has to be done correctly? That is certainly not exercising control over the subcontractor, but it is expected in general business practice of the trade. Finally, how on Earth could you do business with a subcontractor if you do not anticipate them to do the work in a timely manner? All of these are settled in our case at the time when the job is bid by the subcontractor to the petitioner. It is submitted that all of the subcontractors pass the "A" test as no control is exercised over them by the petitioner in performing their work.

As to Prong "B" of the ABC test, petitioner takes issue with respondent's assertion that since the principal part of DLG's business enterprise is the performing of "cleanouts" pursuant to contracts between DLG and commercial property owners, and since those contracts all require the installation of drywall, the work sites where the "cleanouts" are performed are locations where DLG conducts an "integral part of its business." Petitioner also disagrees with respondent that since the principal part of DLG's business enterprise is performing "cleanouts," which by necessity, includes the installation of drywall, the performance of drywall installation to satisfy DLG's obligations and responsibilities under the contracts between DLG and its commercial property owner/clients is a service performed within, not outside of, DLG's usual course of business. Instead, petitioner maintains that Mr. Aspirany is "a carpenter not a sheet rock installer," and that Mr. Aspirany "does not even know how to install sheet rock." Consequently, petitioner maintains that the services performed by the Drywall Installers could not have been performed in the usual course of DLG's business. As to whether the work performed by the Drywall Installers for DLG was performed outside of all of DLG's places of business, petitioner asserts the following:

> [I]f we accept the [Department's] interpretation of this second part of the B test by designating every place where work is done by the general contracting company to be an extension of his business, then no general contractor could ever have a sub, unless it passed the first part of B.
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> In the case at bar, we don't even get to the second part of the "B" test as the 1st part of the test did not fail. However, petitioner would pass the second part as well, as he worked all over New Jersey, Rochester, Albany, Pennsylvania, etc. These places were certainly not extended places of his business.

Following submission to the Commissioner of respondent's exceptions and petitioner's reply, the New Jersey Supreme Court issued its Opinion in East Bay Drywall, LLC v. Dep't of Labor and Workforce Dev., 251 N.J. 477 (2022). When that occurred, the parties were afforded an opportunity to submit letter briefs to the Commissioner addressing the impact of that Opinion on the instant matter. The facts in East Bay Drywall, supra, were summarized by the Court as follows:

> East Bay is a drywall installation business operating in Stone Harbor, Avalon and Sea Isle, New Jersey. East Bay's principal, Benjamin DeScala, testified before the ALJ. He explained that ninety percent of East Bay's work consists of drywalling residential homes. According to DeScala, East Bay gets its business by communicating with builders who are already in the process of constructing homes. East Bay thereafter hires workers to complete the drywall installation, taping, and finishing on a per-job basis.
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> Once a builder accepts East Bay's bid for a particular project, East Bay contacts workers – whom it alleges to be subcontractors – to see who is available. Workers are free to accept or decline East Bay's offer of employment, and some workers have left mid-installation if they found a better job.
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> . . .
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> DeScala testified that Eat Bay deals with and hires all its workers in the same manner. Before employing a worker, DeScala requests an up-to-date certificate of liability insurance and tax identification numbers (proof of business registration) to ensure the worker is an independent entity.
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> . . .
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> East Bay provides the workers with the raw materials necessary to complete the drywall installation. The workers perform the labor but must provide their own tools and arrange for their own transportation to the worksites. East Bay does not dictate who or how many laborers the workers must hire to complete the project. Although East Bay does not direct how the workers install drywall, DeScala made clear East Bay remains responsible for the finished product. DeScala testified that he inspects the drywalling after the workers are finished and "[i]f the work doesn't come out good [he has] to hire another subcontractor to come and fix it."
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> . . .

Applying the "C" Prong factors enumerated in <u>Carpet Remnant</u>, <u>supra</u>., <u>Gilchrist v. Div. of Emp. Sec</u>., 48 N.J. Super. 147 (App. Div. 1957), and <u>Trauma Nurses, Inc., v. Dep't of Lab</u>., 242 N.J. Super.135 (App. Div. 1990), the Court in <u>East Bay Drywall, supra,</u> concluded that notwithstanding each Drywall Installer's possession of a business registration and certificate of insurance, East Bay had failed to meet its burden under Prong "C," to establish that the Drywall Installers had been customarily engaged in an independently established business enterprise. For example, the Court noted that East Bay had not provided evidence that the entities maintained independent business locations, advertised, or had employees. Thus, the Court in <u>East Bay Drywall</u>, <u>supra</u>, concluded that all of the Drywall Installers engaged by East Bay had not been independent contractors, but rather, had all been employees of East Bay. In so concluding, the Court offered the following observation:

> A business practice that requires workers to assume the appearance of an independent business entity – a company in name only - could give rise to an inference that such a practice was intended to obscure the employer's responsibility to remit its fund contributions as mandated by the State's employee protections statutes. That type of subterfuge is particularly damaging in the construction context, where workers may be less likely to be familiar with the public policy protections afforded by the ABC test and consequently particularly vulnerable to the manipulation of the laws intended to protect all employees. Such a business practice also undermines the public policy codified in the [Unemployment Compensation Law].
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> East Bay Drywall, supra, at 477.

DLG submitted no letter brief addressing the impact of the Opinion in East Bay Drywall, supra, on the instant matter. Respondent, in its letter brief, states that, like in East Bay Drywall, supra, DLG has failed to prove that either the Drywall Installers or the Waste Remover met the criteria required under Part C, adding, "[t]he Petitioner did not have one Drywall Installer [or the Waste Remover] testify, nor did [Petitioner] have any documentation including contracts, invoice, business cards or any indicia of a business to demonstrate that these individuals were established in a business or trade that would survive the relationship with DLG or had income from a business outside his relationship with DLG."

CONCLUSION

Upon *de novo* review of the record, and after consideration of the ALJ"s initial decision, as well as the exceptions filed by respondent, the reply filed by petitioner and the letter brief submitted by respondent regarding the impact on the instant matter of the Opinion in East Bay Drywall, supra, I hereby reject the ALJ's reversal of the Department's determination that DLG had employed the Drywall Installers and Waste Remover during the audit period and I find that petitioner is liable for unpaid contributions to the unemployment compensation and State disability benefits funds on behalf of those Drywall Installers and that Waste Remover for the audit period, 2014 through 2018.

In East Bay Drywall, supra., petitioner East Bay maintained that it had met its burden under Prong "C" of the ABC test to prove that the Drywall Installers it had engaged were customarily engaged in an independently established business enterprise, because for each of the Drywall Installers at issue in that case, East Bay had produced a certificate of liability and/or workers compensation insurance and a tax identification number, which it argued constituted proof of business registration. East Bay referred to this evidence as "business entity information." East Bay also urged the ALJ, the Commissioner and ultimately, the Court, to accept what it characterized as "best evidence" of the independent status of the Drywall Installers it had engaged; namely, owner Benjamin DeScala's testimony that sometimes a Drywall Installer would leave the

job before it was completed and that the Drywall Installers were "free to accept or decline work." A unanimous New Jersey Supreme Court expressly rejected East Bay's argument regarding Prong "C" of the ABC test in its entirety. First, the Court found wholly unpersuasive East Bay's supposed "best evidence" of independence in the form of DeScala's testimony that its Drywall Installers were free to accept or decline work, finding the "probative value of refusal to accept or complete work" to be "limited because, like an employee, even a bona-fide independent contractor is not free from the pressure to accept a job," adding, "[l]ogic dictates that a subcontractor who consistently declines the call to work will soon have a silent phone." Second, as to the significance of the "business entity information," relied upon almost exclusively by East Bay to establish that it had met Prong "C" of the ABC test, the Court found that a certificate of insurance and evidence of business registration, alone, "do not elucidate whether the disputed entities were engaged in independent businesses separate and apart from East Bay," adding that because the record in East Bay Drywall, supra, contained no information regarding "those hallmarks of independence" enumerated in Carpet Remnant Warehouse, supra; namely, the duration and strength of the business, the number of customers and their respective volume of business, the number of employees and the amount of remuneration each Drywall Installer received from East Bay compared to that received from others for the same services, East Bay had failed to meet its burden under Prong "C" of the ABC test. Because the ABC test is written in the conjunctive, explained the Court, meaning that where a putative employer fails to meet any one of the three criteria – A, B, or C – with regard to the individual who has performed a service for remuneration, that individual is considered to be an employee, East Bay's failure to meet its burden under Prong "C" of the ABC test meant that East Bay had failed to meet its burden under the ABC test as a whole, and therefore had failed to establish that the Drywall Installers it had engaged during the audit period were independent contractors.

In the instant matter, as in East Bay Drywall, supra, DLG relies exclusively on the following evidence to meet its burden of proof under Prong "C" of the ABC test relative to the Drywall Installers whose services it had engaged: (1) the testimony of its owner, Mr. Aspirany, that the Drywall Installers at issue were free to accept or decline work; (2) the testimony of Mr. Aspirany that he required each Drywall Installer to produce proof of insurance prior to engaging his services; and (3) a tax identification number included on each IRS Form 1099 that DLG issued to each Drywall Installer relative to payments made for work performed. As in East Bay Drywall, supra, DLG produced no evidence relative to either the Drywall Installers or the Waste Remover – not a scintilla of evidence – to address the "hallmarks of independence" enumerated in Carpet Remnant Warehouse, supra.; namely, the duration and strength of the putative employee's business, the number of customers and their respective volume of business, the number of employees and the extent of the putative employee's tools, equipment, vehicles, and similar resources, and finally, the amount of remuneration each putative employee received from DLG compared to that received from others. As noted by respondent in its exceptions and in its supplemental letter brief, DLG also offered no evidence of any Drywall Installer having business cards or business stationary; advertisements in the yellow or white pages; advertisements in professional journals or trade magazines; billing statements, invoices or letterheads; business telephones; or the existence of a commercial premises. The record

is similarly devoid of any such evidence regarding the services provided to DLG by the Waste Remover. Consequently, I conclude that under the principles announced by the New Jersey Supreme Court in Carpet Remnant Warehouse, supra, and recently reaffirmed by the Court in East Bay Drywall, supra, DLG has failed to demonstrate that the individual workers – the Drywall Installers and the Waste Remover – were engaged in businesses that could have continued to exist independently and apart from their relationships with DLG, and that DLG has therefore failed to meet its burden under Prong "C" of the ABC test.

I need not address either Prong "A" or Prong "B" of the ABC test in this decision, because, as indicated earlier, the ABC test is written in the conjunctive and, therefore, DLG's failure to meet its burden of proving Prong "C" alone is sufficient to find that that the Drywall Installers and the Waste Remover are employees, rather than independent contractors. Nevertheless, I do feel compelled to express for the record my disagreement with the ALJ's conclusions regarding the "A" and "B" prongs. That is, regarding Prong "A," I disagree with the ALJ that petitioner successfully demonstrated that the Drywall Installers were free from control or direction over the performance of the services they had performed for DLG. Rather, I find that the overwhelming weight of the evidence in the record supports the conclusion that the Drywall Installers engaged by DLG during the audit period were ***not*** free from control or direction over the performance of their work. That is, I agree with respondent that the following, contained in the testimony of Mr. Aspirany, reflects a degree of control over the Drywall Installers that is consistent with an employment relationship and belies petitioner's assertion (and the ALJ's erroneous conclusion) that these individuals were free from control or direction by DLG: (1) Aspirany, not the individual Drywall Installers, assessed how many sheets of drywall would be needed for a specific job and would arrange for the delivery of the drywall to the jobsite for the Drywall Installers to hang and spackle[4]; (2) DLG, not the individual Drywall Installers negotiated and entered into contracts with the commercial property owners for the "cleanout" to be completed; (3) the contracts with the commercial property owners, negotiated by DLG, controlled the price, start date and duration of the project; (4) Aspirany controlled every facet of the "cleanout," including the scheduling of all craftworkers, such as Plumbers, Electricians and Drywall Installers, so as to avoid them working over each other; and (5) according to Aspirany, if a commercial property owner is unhappy with a Drywall Installer's work, the commercial property owner would

[4] DLG determining how many sheets of drywall are needed for a job is, in and of itself, evidence of control by DLG. Furthermore, it is important to note that DLG making the decision of how many sheets of drywall to purchase for a job also arguably forecloses the Drywall Installer from making other independent decisions, like how to cut and arrange the drywall sheets to cover a wall(s), taking into consideration irregular walls, doors, windows and the like. That is, if DLG decides to purchase 50 sheets of drywall for the job, and the Drywall Installer would need 60 sheets to cut and cover the wall(s) in the way he would prefer, DLG has now effectively exercised direction or control over the manner in which the Drywall Installer performs his job, because he must devise an approach, other than his preferred approach, to cover the wall(s) using 50, rather than 60 sheets of drywall.

complain to DLG and it would be DLG's responsibility to see that the deficiencies are corrected. Therefore, I find that DLG failed to meet its burden under Prong "A" of the ABC test relative to services performed by the Drywall Installers.

Regarding Prong "B" of the ABC test, I agree with respondent that relative to the Drywall Installers petitioner has failed to meet its burden; which is to say, petitioner has failed to establish that the service at issue is either outside the usual course of 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. In that regard, I would note, as did respondent in its exceptions, the Court in Carpet Remnant, supra, defined the phrase "all places of business" to mean those locations where the enterprise has a physical plant ***or conducts an integral part of its business***." (emphasis added). Relative to the latter part of that definition, I agree with respondent that since the principal part of DLG's business enterprise is the performance of "cleanouts" pursuant to the contracts that DLG maintains with the commercial property owners that are its clients, the work sites where those services are performed are locations where DLG conducts an "integral part of its business." Similarly, I agree with respondent that since the principal part of DLG's business enterprise is the performance of "cleanouts," which includes the installation of drywall, the performance of those services by the Drywall Installers engaged by East Bay to satisfy East Bay's obligations and responsibilities under the contracts with its commercial property owner/clients is a service performed within, not outside of, DLG's usual course of business.

Finally, in light of certain statements made by petitioner in its reply to exceptions, and certain other statements made and conclusions reached by the ALJ within the body of his initial decision, that touch on the question of where the burden of proof lies in this case and others like it, I also feel compelled to add for the record that the law is absolutely crystal clear on this point. That is, as noted by respondent in its exceptions to the initial decision of the ALJ, in addition to the unambiguous language of the UCL itself; in particular, N.J.S.A. 43:21-19(i)(6), which states that"[s]ervices performed by an individual for remuneration shall be deemed to be employment subject to [Chapter 21 of Title 43 of the New Jersey Statutes, including the Unemployment Compensation Law], unless and until it is shown to the satisfaction of the division that" the services and the individual providing the services meet each of the three prongs of the statutory ABC test," the New Jersey Supreme Court has ruled on three separate occasions over the past 30+ years, most recently in 2022, as have countless Appellate Division panels over that same period and beyond, that the burden of proof to establish independent contractor status lies with the putative employer. See Carpet Remnant Warehouse, supra., and East Bay Drywall, supra. (the party challenging the Department's employment classification must establish the existence of all three criteria of the ABC test); and Hargrove v. Sleepy's, LLC, 200 N.J. 289 (2015) (The ABC test "presumes that the claimant is an employee and **imposes the burden to prove otherwise on the employer**").

In its reply to exceptions, petitioner asserts, "The fact that he (Aspirany) did not retain every business card or invoice from them (the Drywall Installers and Waste Remover) should not be the determining factor in the application of part 'C' of the test as

all such information is readily available to the State of New Jersey on looking at tax records of these entities which would immediately reveal their gross income, how many employees they had, what type of tax returns did they filed (sic), and how many owners were in the company." This and other similar remarks contained within petitioner's reply to exceptions, and within the findings and conclusions of the ALJ in his initial decision, evince a failure to recognize the fundamental precept that it is ***petitioner*** who has the burden of establishing that the services at issue satisfy each of the three prongs of the ABC test. That is, again, by law once it has been established that services have been performed for remuneration, as is undisputed in this case, there arises a rebuttable presumption of employment. In order to successfully rebut that presumption of employment, it is petitioner's burden to establish that the services and the individuals providing those services satisfy each prong of the ABC test. Thus, in order for there to be employment the Department need not establish that the individual providing services was subject to control or direction by the putative employer, but rather, ***petitioner*** must establish that the individual has been and will continue to be ***free from*** control or direction in order to satisfy Prong "A." Similarly, under Prong "C" it is ***petitioner*** who must establish that the individual providing the services was customarily engaged in an independently established trade, occupation, profession or business. It is not the Department's burden to prove that the individual was ***not*** customarily engaged in an independently established trade, occupation, profession or business. Thus, the Department is under no statutory or other obligation to obtain the tax documents of the either the Drywall Installers or the Waste Remover engaged by DLG, as maintained by petitioner and petitioner's failure to produce any evidence addressing the Prong "C" factors is fatal to its claim of UCL-exempt status for the services performed during the audit period by the Drywall Installers and Waste Remover.[5]

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[5] It is also important to note for the record that the ALJ's description of the Department's position on the issue of burden of proof is inaccurate. That is, according to the ALJ, the Department's position is that for petitioner to meet its burden of proof under Prong "C" of the ABC test and, therefore, for petitioner to meet its burden under the ABC test as a whole, it "has a duty to produce a copy of any past alleged sub-contractor's tax return for Department review." This is not the Department's position. Rather, both during and after the hearing, including in its exceptions to the initial decision of the ALJ, respondent stated that (1) the UCL places the burden of proof to establish each element of the ABC test squarely on petitioner, (2) this includes the burden under Prong "C" of the ABC test to produce evidence that the alleged independent contractor is customarily engaged in an independently established business enterprise, (3) among the Prong "C" factors enumerated by the Court in Carpet Remnant Warehouse, supra, is the amount of remuneration each alleged independent contractor received from DLG compared to that received from others, and, finally, (4) tax records of an alleged independent contractor, which list for each relevant tax year the amount of remuneration the alleged independent contractor received and from which source(s), is persuasive evidence as to the amount of remuneration the alleged independent contractor received from DLG compared to that received from others. Consequently, according to respondent, if DLG had produced tax records of a particular Drywall Installer indicating that the Drywall Installer had received remuneration from multiple sources during the audit period for the installation of drywall,

ORDER

Therefore, petitioner's appeal is hereby dismissed and DLG is hereby ordered to immediately remit to the Department for the years 2014 through 2018 $13,154.15 in unpaid unemployment and temporary disability contributions, along with applicable interest and penalties.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

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only a fraction of which had come from DLG, the Department would have considered this evidence when evaluating whether DLG had met its burden under Prong "C" of the ABC test. There are multiple factors to consider under the holding in Carpet Remnant Warehouse, supra, and its progeny when undertaking the ABC test's "C" Prong analysis, and a multitude of different forms of evidence one may introduce to address those factors, only one of which is tax records of an alleged independent contractor listing the amount of remuneration the alleged independent contractor received and from which source(s). There are various books and records of a business other than tax records which can be used to establish the number of customers that an alleged independent contractor has and their respective volume of business, the number of employees of the alleged independent contractor, the extent of the alleged independent contractor's tools, equipment, vehicles and similar resources. There are even books and records other than tax records to establish the amount of remuneration an alleged independent contractor received from the putative employer compared to that received from others. As indicated earlier, there are also other indicia that an alleged independent contractor is truly engaged in an independently established business enterprise, such as business cards or business stationary; advertisements in the yellow or white pages or on the internet; advertisements in professional journals or trade magazines; billing statements, invoices or letterheads; business telephones; or the existence of a commercial premises. Any number of these forms of evidence or combination thereof could, absent tax records, potentially suffice to meet the burden under Prong "C" to establish that the alleged independent contractor is customarily engaged in an independently established business enterprise. DLG, however, has failed to produce either tax records ***or any other evidence*** to address the Prong "C" factors enumerated in Carpet Remnant Warehouse, supra. It is for this reason that DLG has failed to meet its burden under Prong "C" of the ABC test.

DECISION RENDERED BY
THE COMMISSIONER, DEPARTMENT
OF LABOR AND WORKFORCE DEVELOPMENT

Robert Asaro-Angelo, Commissioner
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