



ZJN, LLC,
Petitioner,

**STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT**

v.

**New Jersey Department of Labor
and Workforce Development,**
Respondent.

**FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER**

**OAL DKT. NO LID 10145-22
AGENCY DKT. NO. DOL 22-022**

Issued: July 12, 2024

The appeal of ZJN, LLC (ZJN 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 the State disability benefits fund for the period from 2015 through 2019 (“the audit period”) was heard by Administrative Law Judge Kathleen M. Calemno (ALJ). ZJN is a Limited Liability Company (LLC), created by its sole member, Stewart Rosenzweig, to provide Disc Jockey (DJ) services for weddings, proms, and other events. Mr. Rosenzweig is, himself, a DJ who performs services for ZJN’s customers. ZJN also engages the services of other DJs to perform services at the events hosted by ZJN’s customers. ZJN advertises the availability of its DJ services, including the services of those other than Mr. Rosenzweig, it sets the rates of payment for its DJ services, it solicits all of the DJ “gigs,” it accepts payment from its customers and it pays the DJs directly, issuing each a Form 1099 for the purpose of reporting the DJ’s earnings. In her initial decision, the ALJ concluded that ZJN had failed to present sufficient proofs to establish that all but two of the individuals who had been engaged by ZJN during the audit period to perform DJ services were genuine independent contractors exempt from coverage under the New Jersey Unemployment Compensation Law (UC), N.J.S.A. 43:21-1 et seq., applying the test for independent contractor status set forth at

N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), commonly referred to as the “ABC test.” However, regarding the remaining two DJs engaged by ZJN during the audit period – Keenan Clemmons and Thomas Geist – the ALJ concluded that ZJN had met its burden under the ABC test to establish that each was an independent contractor. Therefore, the ALJ upheld the amounts assessed by the Department against ZJN for unpaid contributions to the unemployment compensation fund and State disability benefits fund on behalf of each of the DJs with respect to which she found that ZJN had failed to meet its burden under the ABC test. However, the ALJ ordered the reversal of the Department’s assessment against ZJN for unpaid contributions on behalf of Clemmons and Geist.¹

The issue to be decided is whether the DJs engaged by ZJN during the audit period were employees of ZJN and, therefore, whether ZJN 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 UCL, 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

(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

¹ There are others listed in the Department’s audit as “casual labor.” It is undisputed that these individuals performed services for ZJN, were paid by ZJN and were issued Form 1099s by ZJN. The assessment for unpaid contributions issued by the Department against ZJN includes unpaid contributions on behalf of these other Form 1099 recipients. No evidence was presented by ZJN during the hearing regarding those who performed “casual labor.” Thus, the ALJ concluded that “ZJN [had] not shown by a preponderance of the legally competent evidence that its relationship with any other [non-DJ] 1099 recipient or casual laborer meets the [ABC test].” Petitioner filed no exception to this conclusion of the ALJ. Thus, the liability of ZJN for contributions on behalf of these individuals does not appear to be in dispute. Accordingly, no mention will be made within the body of this decision, until the Order, of any services performed for ZJN by “any other [non-DJ] 1099 recipient or casual laborer.”

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

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 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.

Relative to Prong “A” of the ABC test, the ALJ concluded that ZJN had met its burden to establish that the DJs were free from control or direction by ZJN. In support of this conclusion, the ALJ found the following:

[A]fter a DJ accepts the job, ZJN has no further involvement over how the DJ will perform. The DJ performs under his own name or trade name, does not represent ZJN at the event, and is even free to solicit work during the event. These are all indications that ZJN does not control the performance of the service.

Relative to Prong “B” of the ABC test, the ALJ found the following:

It is not disputed that none of the DJ entertainers report to the petitioner’s place of business [his home]. The DJ entertainers perform in the venues selected by the clients of ZJN. ZJN cannot satisfy the first alternative of the B standard, because providing DJ entertainment services is its usual course of business. However,...the venues where the DJs perform are not an integral part of ZJN’s business. Consequently, I CONCLUDE that ZJN has satisfied part B of the ABC test.

Relative to Prong “C” of the ABC test, the ALJ found the following:

As the Supreme Court reiterated in East Bay Drywall v. Dep’t of Labor and Workforce Dev., 251 N.J. 477, 498 (2022), it is incumbent upon the employer to provide sufficient information to prove the entities’ independence. In this instance ZJN failed. Most of its 1099 recipients failed to return the questionnaires [that had been sent to them by the Department] and failed to provide their Schedule C tax filings.... ZJN bears the responsibility for this non-compliance. The information provided at the eleventh hour did not hold the weight of signed documents.

ZJN presented probative evidence by way of testimony from only two entertainers, Clemmons and Geist. Clemmons' credible testimony showed his entertainment business was stable and long-lasting. He had substantial investment in his equipment and established a reputation in the industry aside from the work he received from ZJN.

...

The only other evidence provided by ZJN was the testimony of Geist.... Geist made significant income from ZJN in each of the audit years. However, Geist is a licensed home-inspector with a full-time job.... By becoming a licensed home inspector, Geist made a commitment to his home inspection occupation. Through his testimony, Geist established that his reliable income is from his home inspection full-time employment and performing [as a DJ] is something he does on the side as his schedule permits.

Based on the foregoing, the ALJ affirmed the Department's assessment for unpaid contributions to the unemployment compensation fund and State disability benefits fund; however, reduced the total assessment by the amount assessed against ZJN for services performed by Clemmons and Geist. Exceptions were filed by both petitioner and respondent.

In its exceptions, petitioner, ZJN, asserts that each of the DJs whose services ZJN engaged is "similarly situated" to Clemmons and Geist in that they share "characteristics that are common to and fall within the parameters found by [the ALJ] to cause DJ Entertainers Mr. Clemmons and Mr. Geist to satisfy the ABC test." Therefore, petitioner maintains that each of the DJs engaged by ZJN should be considered independent contractors.

In respondent's exceptions, it agrees with the ALJ's conclusion regarding the DJs other than Clemmons and Geist, that petitioner has failed to meet its burden under the ABC test and that, therefore, each of those individuals were employees of ZJN, rather than independent contractors. However, respondent disagrees with the ALJ's conclusion that ZJN has met its burden under the ABC test with regard to Clemmons and Geist. Specifically, 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, ZJN must demonstrate that it did not exercise control over the services performed by the DJs and that it did not reserve the right to control the individuals' performance of those services, adding that ZJN need not have controlled every facet of the DJs' services for those individuals to be deemed employees under the UCL. As to the relevant facts, respondent maintains that the testimony of ZJN's sole member, Stewart Rosenzweig, reveals the

following: (1) ZJN advertises the availability of its DJs to provide services at events, (2) ZJN receives calls or emails from prospective customers to provide DJ services, (3) ZJN contacts the prospective customers and negotiates all of the details of the “gig,” including the price, (4) ZJN contracts with its customers for the performance of the DJ services, (5) ZJN secures down payments and final payments from its customers, (6) ZJN decides which of its DJs to offer a “gig,” (7) ZJN provides a replacement if one of its DJs cannot make a “gig,” (8) ZJN pays its DJs directly for the performance of services, and finally, (9) Rosensweig testified that he vetted all prospective DJs before engaging them to work; that is, he conducted interviews, asked for references and went to events to ensure that their performance was up to his standards. Respondent concludes that, based on the foregoing, ZJN has failed to meet its burden under 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 the service is performed, or that such services 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 Warehouse, Inc. v. Department of Labor, 125 N.J. 567 (1991), 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 ZJN is in the DJ services business, as demonstrated by ZJN’s website (Exhibit R-1, p. 63-67) and its tax return (R-1, p. 62), and since those DJ services are provided to ZJN’s customers by ZJN’s DJs, including Mr. Rosenzweig (“DJ Stew”), the sole member of ZJN, pursuant to contracts between ZJN and its customers, the venues where those DJ services are performed (where the customers’ events occur) are locations where ZJN conducts an “integral part of its business.” Similarly, respondent maintains that since the principal part of petitioner’s business enterprise is providing DJ services, the performance of DJ services to satisfy petitioner’s obligations and responsibilities under the contracts between ZJN and its customers is a service performed within, not outside of, petitioner’s usual course of business. Consequently, respondent urges the Commissioner to reverse the ALJ’s conclusion that ZJN has met its burden under Prong “B” of the ABC test.

Prong “C”

Respondent does not object to the ALJ’s conclusion that ZJN failed to meet its burden under Prong “C” of the ABC test relative to the DJs other than Clemmons and Geist whose services it had engaged during the audit period. However, respondent *does* take issue with the ALJ’s conclusion relative to Clemmons and Geist, that ZJN has met its burden under Prong “C.” Specifically, regarding Geist, respondent characterizes as “incorrect” the ALJ’s conclusion that evidence of Geist’s “full-time job” as a Home Inspector demonstrates that Geist was customarily engaged in an independently established trade, occupation, profession or business, thereby satisfying Prong “C” of the ABC test. Respondent explains that the mere fact that an individual holds other

simultaneous employment in a related or unrelated trade, occupation or profession does not support the conclusion that the individual is an independent contractor or that he is ineligible for unemployment compensation benefits, adding that the UCL envisions multiple employment, N.J.S.A. 43:21-3(d)(B)(i), and thus the mere fact that Geist could have been or was employed by others while working for ZJN does not preclude a finding that Geist was an employee of ZJN. Similarly, with regard to Clemmons, respondent maintains that his full-time job at PARX casino as a Pit Manager, is evidence of multiple employment; not the existence of an independently established business enterprise. Finally, relative to both Geist and Clemmons, respondent maintains that ZJN has failed to present any evidence addressing the majority of the Prong “C” factors enumerated in Carpet Remnant Warehouse, *supra*; such as the duration and strength of the putative employee’s business, the number of customers and their respective volume of business, and the number of employees. Consequently, respondent urges the Commissioner to reverse the ALJ’s conclusion that ZJN has met its burden under Prong “C” of the ABC test relative to the DJ services performed for ZJN by Clemmons and Geist.

CONCLUSION

Upon *de novo* review of the record, and after consideration of the ALJ’s initial decision, as well as the exceptions filed by petitioner and respondent, I hereby accept the ALJ’s recommended order affirming the Department’s assessment and dismissing petitioner’s appeal regarding the DJs other than Keenan Clemmons and Thomas Geist who were engaged by ZJN during the audit period. However, I reject the ALJ’s reversal of the Department’s determination that ZJN had employed DJs Keenan Clemmons and Thomas Geist, 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 all DJs, including Clemmons and Geist, for the audit period, 2015 through 2019.

Regarding Prong “A” of the ABC test, I disagree with the ALJ that petitioner has successfully demonstrated that the DJs were free from control or direction over the performance of the services they had performed for ZJN. Rather, I find that the overwhelming weight of the evidence in the record supports the conclusion that the DJs 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. Rosenzweig, reflects a degree of control over the DJs that is consistent with an employment relationship and belies petitioner’s assertion that these individuals were free from direction and control by ZJN: (1) ZJN advertises the availability of its DJs to perform at events, (2) ZJN receives calls or emails from prospective customers to provide DJ services, (3) ZJN contacts the prospective customers and negotiates all of the details of the “gig,” including the price, (4) ZJN contracts with its customers for the performance of the DJ services, (5) ZJN secures down payments and final payments from its customers, (6) ZJN decides which of its DJs to offer a “gig,” (7) ZJN provides a replacement if one of its DJs cannot make a “gig,” (8) ZJN pays its DJs directly for the performance of services, and finally, (9) ZJN vets all prospective DJs before engaging them to work;

conducting interviews, asking for references and attending events to ensure that the prospective DJs' performances are up to ZJN's standards.

Regarding Prong "B" of the ABC test, I agree with respondent that relative to the DJs whose services ZJN engaged during the audit period petitioner has failed to meet its burden; which is to say, petitioner has failed to establish that the services at issue were either outside the usual course of business for which such services were performed, or that such services were performed outside of all the places of business of the enterprise for which such services were performed. In that regard, I would note, as did respondent in its exceptions, the Court in Carpet Remnant Warehouse, 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 petitioner's business enterprise is the performance of DJ services, pursuant to the contracts that ZJN maintains with its customers, the venues where those DJ services were performed are locations where ZJN conducts an "integral part of its business." Similarly, I agree with respondent that since the principal part of petitioner's business enterprise is the performance of DJ services, the performance of DJ services by the DJs engaged by ZJN to satisfy petitioner's obligations and responsibilities under the contracts with its customers were services performed within, not outside of, petitioner's usual course of business.

With regard to Prong "C," as reflected in the opinions in both Carpet Remnant, supra, and Gilchrist v. Division of Employment Sec., 48 N.J. Super. 147 (App. Div. 1957), the 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. In order to satisfy Prong "C" of the ABC test, ZJN must demonstrate that *each* of the DJs who performed services for ZJN during the audit period, including Clemmons and Geist, was engaged in a viable, independently established, business at the time that he or she rendered services to ZJN. See Gilchrist, supra, and Schomp v. Fuller Brush Co., 124 N.J.L. 487 (Sup. Ct. 1940).

In Carpet Remnant, supra, which concerned the work of carpet installers, the Court remanded the matter to the Department with the following direction as to how one should undertake the Prong "C" analysis:

That determination [whether Prong "C" has been satisfied] should take into account various factors relating to the installers ability to maintain an independent business or trade, including the duration and strength of the installers' business, the number of customers and their respective volume of business, the number of employees, and the extent of the installers' tools, equipment, vehicles, and similar resources. The Department should also consider the amount of remuneration each installer received from CRW [Carpet Remnant Warehouse, Inc.] compared to that received from other retailers.

Relative to the latter part of the Prong “C” analysis; that is, consideration of the amount of remuneration each individual received from the putative employer compared to that received from others, the holding in Spar Marketing, Inc. v. New Jersey Department of Labor and Workforce Development, 2013 N.J. Super. Unpub. LEXIS 549 (App. Div. 2013), certification denied, 215 N.J. 487 (2013), is instructive. In that case, the services of retail merchandisers were at issue and the court observed:

No proof that the merchandisers worked simultaneously for other merchandising companies was provided; Brown’s general claims to the contrary,² without documentary support, are not persuasive. As a result, petitioner failed to provide, by a preponderance of the credible evidence, proofs sufficient to satisfy subsection (C) of the ABC test.

Thus, in order to satisfy Prong “C” of the ABC test, ZJN must prove by a preponderance of the credible evidence with regard to each of the DJs whose services it engaged during the audit period, including Clemons and Geist, that he was during the audit period customarily engaged in an independently established business or enterprise. Under the holding in Carpet Remnant, supra., that means that relative to each of the DJs whose services ZJN engaged during the audit period, it must address the duration and strength of each individual’s business during that period, the number of customers and their respective volume of business during that period, the number of employees of the business or enterprise during that period, the extent of each individual’s business resources during that period, and the amount of remuneration each individual received from ZJN during that period compared to that received from others; which is to say, not a general claim that each DJ worked for or was free to work for others, but actual evidence reflecting the amount of remuneration that each DJ received from ZJN compared to that received from others for performance of the same service. I agree with the ALJ’s conclusion as to the DJs other than Clemmons and Geist, who were engaged by ZJN during the audit period that ZJN has failed to produce sufficient evidence to establish that they were customarily engaged in an independent business enterprise. However, I disagree with the ALJ’s conclusion that ZJN has met its burden under Prong “C” regarding Keenan Clemmons and Thomas Geist. That is, instead, I agree with respondent that the testimony of Thomas Geist that he has a “full-time job” as a Home Inspector and the testimony of Keenan Clemmons that he works full time for PARX Casino as a Pit Manager, in addition to the work that they perform for ZJN, is not evidence that either man was customarily engaged in an independently established business enterprise during the audit period, but rather, is evidence of multiple covered employment.³

² Brown was one of the merchandisers who had been engaged to perform services for Spar Marketing, Inc.

³ I feel compelled to add, with specific regard to the ALJ’s observation that, “[t]hrough his testimony, Geist established that his reliable income is from his home inspection full-time employment and performing is something he does on the side as his schedule permits,” the status of work as “part-time” or a “side gig,” has no bearing whatsoever on

ORDER

Therefore, with regard to all of the DJs and other non-DJ Form 1099 recipients or casual laborers who were engaged by ZJN during the audit period, petitioner’s appeal is hereby dismissed and ZJN is hereby ordered to immediately remit to the Department for the years 2015 through 2019 \$21,367.13 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.

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



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the question of whether it is covered “employment” under the UCL. That is, for example, an individual who works full-time with the State as an Investigator earning \$45,000 per year, and who also occasionally works, as his schedule permits, for a retail establishment as a salesperson earning on average \$2,000 per year, is no less an employee of the retail establishment, nor is the retail establishment any less responsible to remit UI/DI contributions on behalf of its part-time employee, simply because the individual holds full-time employment with the State. Each is employment under the UCL (one full-time and the other part-time) and each carries with it an obligation on the part of the employer to remit UI/DI contributions on behalf of its employee based on wages earned.