Pilates by Meghan, 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 11162-15
AGENCY DKT. NO. 15-005

Issued: August 23, 2016

The appeal of Pilates by Meghan, LLC ("Pilates," "Pilates by Meghan," or petitioner) concerning an assessment by 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 2011 through 2014 ("the audit period") was heard by Administrative Law Judge Sarah G. Crowley (ALJ). In her initial decision, the ALJ concluded with regard to the Pilates instructors and one clerical/administrative assistant engaged by petitioner during the audit period that none were employees, but rather, were all independent contractors. Meghan McIntyre Bubnis, the owner of Pilates by Meghan, testified that among the functions performed by the clerical/administrative assistant was compiling a list of physicians to whom petitioner could market its services. Based on her finding that all of the subject individuals were independent contractors, rather than employees, the ALJ ordered the reversal of the Department's determination regarding petitioner's tax liability. [1]

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[1] The ALJ reached conclusions within her initial decision relative to "petitioner's subcontractors," which one would presume includes all of those individuals covered by the Department's audit; that is, the Pilates instructors and the individual

The issue to be decided is whether the subject individuals, whose services were engaged during the audit period by petitioner, were employees of petitioner and, therefore, whether petitioner 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 those individuals during the audit period.

Under N.J.S.A. 43:21-1 et seq. (the Unemployment Compensation Law or 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 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).

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clerical/administrative assistant, Lisa Szmborski. In fact, the ALJ acknowledged, within her summary of the testimony, the inclusion of Ms. Szmborski in the Department's audit when she referred to "the individual who provided marketing information," and "the individual who did some marketing for her (Ms. Bubnis)." However, the ALJ characterized as "the sole issue" to be resolved in this matter, "whether each of the Pilates instructors in question were covered employees within the meaning of the provisions of N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), or whether they were bona fide independent contractors." The ALJ then appeared to limit much if not all of her analysis to the question of the instructors' employment status; although, again, she often used the term "petitioner's subcontractors" or simply "subcontractors," which could be construed to include the clerical/administrative assistant, Ms. Szmborski. In any event, since the ALJ ultimately ordered that the Department's entire assessment against petitioner be reversed, including the assessment against petitioner for tax liability related to the services performed by Ms. Szmborski, I am going to assume that when she refers within her findings and conclusions to "petitioner's subcontractors" or "subcontractors," except where the context clearly indicates otherwise, that she is also referring to Ms. Szmborski. Furthermore, I have conducted a full and independent review of the record and my conclusions based on that review are contained within the body of this decision.

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.

At the conclusion of the hearing before the ALJ, both petitioner and respondent submitted written summations. Petitioner's summation focused largely on its assertion that the Department had failed to satisfy its threshold burden of establishing "employment;" that is, according to petitioner, the Department had failed to establish that a service had been performed for remuneration or under any contract of hire, written or oral, express or implied. Specifically, petitioner argued that by virtue of an oral agreement between petitioner and each of its Pilates instructors that the instructor would earn 50 percent of the fee charged by petitioner for each class taught by the instructor at petitioner's studio, each instructor had participated in a "joint venture" with petitioner, rather than having been employed by petitioner. This, according to petitioner, brings its arrangement with its Pilates instructors within the ambit of the opinion in Koza v. New Jersey Department of Labor, 307 N.J. Super. 439, 704 A.2d 1310 (App. Div. 1998), wherein the court found that the relationship between a band leader and the band members was one of "a joint venture where petitioner (the band leader) merely was the conduit for the payment of the group's earnings, net of expenses, to be shared by all." Petitioner explained further that, "[w]hile she [Meghan Bubnis] admitted that she was a novice in running of a business and acted pursuant to her accountant's advice to use Form 1099 to pay the instructors as independent contractors, the facts of the arrangement she made with the instructors established a joint venture under Koza whether Meghan knew it at the time or not," adding, "Koza makes it clear that the ABC test applied by the auditor is not applicable to this case." Finally, petitioner asserted the following:

> [E]ven if this Court believes that the Department has satisfied its burden, same then shifts to Meghan to show that the instructors were independent contractors under the statutory ABC test. Clearly, Mr. Fallucca (the Department auditor, who testified during the hearing) is incorrect in concluding that Meghan had satisfied none of these three prongs. Meghan easily satisfies "A" and "C". Meghan had absolutely no control of the instructors as her testimony and all of the exhibits reveal. Each one of these people operated an independent business and such business; namely: the independent fitness instructor business, is recognized in the custom, usage and trade for the State of New Jersey. In regard to prong "B," the services rendered by the instructors were not rendered to Meghan, but to the instructors' own clients, and these services were not rendered in the normal course of Meghan's licensed physical therapy business, nor could they have been, since none of the instructors had the license, skill, or

> training to treat physical therapy patients. Meghan's arrangement with the instructors was not part of her licensed business, but an additional business, so that it cannot be found that the instructors' work was done in the usual course of business.

Relative to petitioner's assertion that the Department had failed to satisfy its threshold burden of establishing "employment," because petitioner's arrangement with its Pilates instructors was akin to the "joint venture" found to have existed in Koza, the ALJ found the following:

> In Koza, the court found that the relationship between a band leader and the band members was one of a joint venture, since they split the proceeds of a show after the leader had booked shows at various nightclubs. The court in Koza found that there was no remuneration because the leader was merely acting as a conduit in distributing the money which was paid after a show. The court held that 'the fact that the group has authorized the leader to pay their expenses off the top and share only the net amount with them did not change the relationship from a conduit to an employer.' Unlike the situation in Koza, the services in this matter are performed at a studio, which was rented by the petitioner, and she collected and distributed the money to all the instructors. None of them had anything to do with the others, and thus, I find that this relationship is not one of a joint venture. It is clear that remuneration is in fact paid by the petitioner to the individual instructors, and thus, an analysis under the ABC test is necessary.

Relative to Prong "A" of the ABC test, the ALJ stated the following:

> [T]he petitioner in this case had no control over the instructors. She was never present during their classes, she did not set the hours or direct how or what they taught. Moreover, no one told the instructors when, how or for home [sic] to tech [sic] their classes to. There was clearly no control in this case. The testimony of Ms. Bubnis was undisputed that the individuals were not required to teach a course at a certain time, and they were not told how to teach their classes. All the instructors had their own key, and were not required to be there at any particular time, and could teach as many or as few classes as they wanted. The instructors were paid not by the hour or by salary, but were paid fifty percent of whatever their clients paid. Finally, all of the instructors were free to teach classes at other sites or out of their home.
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> ...
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> Therefore, I CONCLUDE that Pilates by Meghan, LLC established that the subcontractors were at all times "free from control or direction over the performance of such service." N.J.S.A. 43:21-19(i)(6)(A).

With regard to Prong "B" of the ABC test, the ALJ concluded that petitioner had met its burden in that it had established that its Pilates instructors perform their services outside of all the places of business of the enterprise for which such services are performed; that is, outside of all the places of business of Pilates by Meghan. The ALJ explained:

> [T]he majority of the instructors at issue worked in other studios and out of their home. The mere fact that they worked out of the studio rented by the petitioner, does not render the subcontractors employees. Further, although none of the individuals testified, the undisputed testimony of Ms. Bubnis revealed that these individual workers perform different services at other sites.

As to Prong "C" of the ABC test, the ALJ concluded that petitioner's "subcontractors" are "customarily engaged in an independently established trade, occupation, profession or business," because they "are employed full-time and part-time in other industries and professions." The ALJ also concluded that petitioner had satisfied Prong "C" of the ABC test relative to the work performed by the Pilates instructors, because "if the subcontractors were to suffer a loss of income from petitioner it would not significantly impact their financial situation or necessitate an application for unemployment benefits." Thus, the ALJ concluded that none of the "subcontractors" who had performed work for petitioner during the audit period had been employees, but rather, had all been independent contractors. Respondent filed exceptions to the ALJ's initial decision. Petitioner also filed exceptions to the ALJ's initial decision.

In its exceptions, respondent takes issue with the findings and conclusions of the ALJ with respect to each prong of the ABC test. Specifically, with regard to Prong "A" of the ABC test, respondent notes that the Court in Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor, 125 N.J. 567 (1991), listed specific factors as indicative of control, including whether the worker is required to work any set hours or jobs, whether the enterprise has the right to control the details and means by which the services are performed, and whether the services must be rendered personally. Respondent adds, citing Carpet Remnant, supra, and Schomp v. Fuller Brush Co., 124 N.J.L. 487, 490 (Sup. Ct. 1940), that "an employer need not control every facet of a person's responsibilities for that person to be deemed an employee." Applying the factors enumerated in Carpet Remnant to the case at hand, respondent asserts the following:

> The record reveals that an individual client looking for a Pilates class contracts with Pilates (petitioner) via a software program called Mind and Body. All of these classes listed on the mind body software program are conducted at the business location of Pilates. As explained by Meghan Bubnis, Pilates pays and maintains the subscription for the software. The Mind and Body software lists the class and fee schedule at Pilates. The

> client pays the fee via the software program. The agreement is between the client and Pilates.
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> Pilates used the services of Pilates instructors to perform instructional classes for Pilates clients. After applying for a position to work for Pilates, the instructors are given a key to the facilities. The instructors must use the Mind and Body software to sign up to teach a specific class. On any given day an instructor can change their schedule without notification to the class participants.
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> Pilates controls rate of compensation the instructors receive and the pay structure is such that Ms. Bubnis receives all money from the clients and distributes a portion to the instructors only when the services are completed.
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> As shown through the testimony of the Auditor Thomas Fallucca and the petitioner's sole witness Ms. Bubnis, Pilates controls all aspects of the relationship between the two parties and thus does not meet the "A" prong of the ABC test.

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 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. Respondent then asserts the following:

> The principal business activities performed at Pilates is a Pilates based physical therapy program with a fully equipped Pilates studio. Ms. Bubnis holds both a physical therapy degree and is a certified Pilates instructor. As such she performs physical therapy for her clients and on occasion conducts group Pilates classes. The instructors who perform services for Ms. Bubnis and Pilates do so at the business location and are considered an integral part of the Pilates business. The instructors do not perform the services for Pilates clients off premises as stated by Ms. Bubnis during her testimony. She did speculate the instructors had their own business operated at their individual house [sic]. She did not however have any evidence, other than her testimony that proves this assumption. As per the Department's testimony and audit, there were instructors' business income was [sic] 100% of what was paid by Pilates. Thus, demonstrating the individuals [sic] work was at Pilates [sic] place of business exclusively.

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., 48 N.J. Super. 147 (App. Div. 1957), wherein the court stated the following:

> The double requirement 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.

In addition, respondent cites to the holding in Schomp, supra, wherein the court stated that "it is an analysis of the facts surrounding each employee that determines whether an alleged employee is an independent contractor according to the ABC test." Thus, respondent asserts that in order to satisfy Prong "C" of the ABC test, petitioner must demonstrate that each Pilates instructor was engaged in a viable, independently established, business providing Pilates instruction at the time that he or she rendered that service to petitioner. Respondent states that, "there is no evidence in the record demonstrating that any of the alleged independent contractors had an outside business relationship with other fitness studios or held themselves out to the general public performing said services," adding, "[s]ome of the instructors had activites that qualify as multiple employment as reflected in their federal tax returns," and, "[i]ndeed, the record demonstrates that most if not all of the income earned by the alleged independent contractors related to Pilates instruction came from Pilates."

Respondent characterizes as inexplicable and "without regard for the relevant statutory provisions of the UCL," the ALJ's conclusion that evidence of full-time and part-time employment by Pilates instructors in other industries and professions demonstrates that the Pilates instructors were customarily engaged in an independently established trade, occupation, profession or business, thereby satisfying Prong "C" of the ABC test. Respondent explains, "the mere fact that an individual holds other simultaneous employment in an unrelated trade, occupation or profession does not support the conclusion that the individual is an independent contractor or that he/she is ineligible for unemployment compensation benefits," adding, "[t]he Unemployment Compensation Law (UCL) envisions multiple employment, N.J.S.A. 43:21-3(d)(B)(i)(ii), N.J.S.A. 43:21-6(b), N.J.S.A. 43:21-14.1, N.J.S.A. 43:21-19(u), and thus the fact that any of these alleged independent contractors could have been or were employed by others while working for Pilates does not preclude a finding that these individuals were also employees of Pilates."

Regarding the ALJ's apparent belief that the holding in Carpet Remnant stands for the principle that if one does not earn sufficient money from a given employer to result in a finding of monetary eligibility for unemployment benefits based solely on the wages earned by that individual from that employer, then the employer can incur no liability under N.J.S.A.. 43:21-7 with respect to that individual for contributions to the unemployment compensation fund and the State disability benefits fund, and the ALJ's consequent conclusion that petitioner had satisfied Prong "C" of the ABC test relative to

the work performed by the Pilates instructors and the clerical/administrative assistant, for among other reasons, because it had established that the those individuals had worked "limited hours" at petitioner's studio and because the resulting loss in income which would be suffered if any one's relationship with petitioner had been terminated would "not significantly impact [his or her] finances," respondent states the following:

> [A]lthough the alleged independent contractors may be unable to file a valid claim for benefits based upon earnings from Pilates alone, pursuant to N.J.S.A. 43:21-4(e)(4) their wages from all employment would be combined to establish a valid claim for benefits under the UCL. Thus, wages earned in employment are taxable without regard to whether at any given time an individual has sufficient earnings to establish a valid claim for benefits.

With specific regard to Lisa Szmborski "and her services as a marketing person[2] for the studio," respondent asserts:

> Here the ALJ judge explained that Ms. Szmborski was hired to [do] some advertising for the studio and received a one-time payment for the services. This classification of the services is incorrect as was the number of payments. Ms. Szmborski received 6 payments that spanned April 17, 2016 through September 1, 2016. The schedule was part of the audit paperwork and attached (exhibit 1).[3] As to the nature of the service performed, the auditor conducted a formal interview with Ms. Szmborski that he detailed in the audit report.
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>> 'Both the employer and Lisa Szmborski did not provide documentation for her services. Per interviews with Ms. Szmborski, she provided clerical and administrative services and does not have a business. She assembled marketing materials at the employer's business location to promote the business. She did not file a schedule C and the 1099 income was reported under her parents' tax return. She stated that she would send a statement indicating that she does not have a business. To date, it has not been received. She was WR30'd at an unrelated fitness center.' (R-3 page 5).

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[2] Respondent refers to Ms. Szmborski as a "marketing person." I refer to her throughout this decision as a clerical/administrative assistant. These are semantics; which is to say, there does not appear to be any dispute among the parties as to the nature of the services performed for petitioner by Ms. Szmborski.

[3] The exhibit lists the payments as having occurred during the year 2012, not 2016. The indication by respondent within its exceptions that these payments had occurred during 2016 appears to be a typographical error.

Following are petitioner's exceptions to the initial decision of the ALJ:

1. The ALJ disregarded evidence in failing to find that the Department auditor, although revising Petitioner's records from 2010 through 2014, failed to obtain any evidence from the instructors for the year 2014. (Page 2, Paragraph 3, Line 10) In fact, the clear testimony on cross-examination of the auditor and records submitted by the Department makes it clear that no records were reviewed for 2014.

2. The ALJ erred as a matter of fact in finding that the Department auditor determined whether "remuneration" was paid. (Page 2, Paragraph 3, Line 11) In fact, the cross examination of the auditor revealed that he was completely unfamiliar with the holding in Koza v. New Jersey Department of Labor, 307 N.J. 439, 704 A2d. 1310 (1998)[4], and, consequently, did no investigation other than to see if the Petitioner satisfied the New Jersey ABC test.

3. The ALJ erred as a matter of fact in finding that the monies paid by Petitioner to the instructors constituted "remuneration." (Page 7, Paragraph 2, Line 13) This finding is not supported by any evidence in the record, and, in fact, is made in disregard of the evidence presented by the Petitioner in her direct testimony, her exhibits "A" and "E" through "L," and in the cross-examination of the Department's auditor, who actually admitted that the payments represented in Petitioner's Exhibit "A" evidenced the joint venture situation to which Petitioner testified without contradiction.

4. The ALJ erred by failing to find as a fact that the Department had failed to satisfy its burden of proving that the monies paid by the Petitioner to the instructors constituted remuneration and not merely a division of the monies paid by the clients to the instructors for services rendered by the instructors to the Clients. See Koza v. New Jersey Department of Labor, 307 N.J. Super. 439, 704 A.2d 1310 (App. Div. 1998).

5. The ALJ erred in not finding that the services rendered by the instructors were rendered to their own clients and not to the Petitioner and, therefore, satisfied the second prong of the ABC test. See testimony of the Petitioner which made it clear that the instructors trained their own clients, who were separate and independent of the Petitioner's clients, and that there was no overlap between same.

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[4] This citation is incorrect. The correct citation is Koza v. New Jersey Department of Labor, 307 N.J. Super. 439, 704 A.2d 1310 (App. Div. 1998). So as to avoid confusion among those who may be reviewing this decision in the future, throughout the balance of this decision, even where I am quoting petitioner, I will be using the correct citation in place of the incorrect one.

6. The ALJ disregarded evidence in failing to find as a fact that the situation in the present case was a joint venture under the holding in Koza v. Department of Labor, 307 N.J. Super. 439, 704 A.2d 1310 (App. Div. 1998).

7. The ALJ erred as a matter of law in finding that the monies paid by the Petitioner to the instructors constituted "remuneration" and not merely a division of the monies paid by the clients to the instructors for services rendered by the instructors to the clients. See Koza v. New Jersey Department of Labor, 307 N.J. Super. 439, 704 A.2d 1310 (App. Div. 1998).

8. The ALJ erred as a matter of law in failing to find that the Department had failed to satisfy its burden of proving that the monies paid by the Petitioner to the instructors constituted remuneration and not merely a division of the monies paid by the clients to the instructors for services rendered by the instructors to the clients. See Koza v. New Jersey Department of Labor, 307 N.J. Super. 439, 704 A.2d 1310 (App. Div. 1998).

9. The ALJ erred as a matter of law in failing to find that the situation in the present case was a joint venture under the holding in Koza v. New Jersey Department of Labor, 307 N.J. Super. 439, 704 A.2d 1310 (App. Div. 1998).

10. The ALJ erred as a matter of law in not finding that the services rendered by the instructors were rendered to their own clients and not to the Petitioner and, therefore, the second prong of the ABC test was satisfied.

11. The ALJ erred as a matter of law in not finding that the services rendered by the instructors were outside the usual course of Petitioner's business as a licensed physical therapist and, therefore, the second prong of the ABC test was satisfied.

CONCLUSION

Upon de novo review of the record, and after consideration of the ALJ's initial decision, as well as the exceptions filed by both respondent and petitioner, I hereby reject the ALJ's reversal of the Department's determination that Pilates by Meghan had employed the Pilates instructors and the clerical/administrative assistant it engaged and, therefore, that petitioner is liable for unpaid contributions to the unemployment compensation fund and the State disability benefits fund on behalf of those employees for the audit period, 2011 through 2014.

At the outset, I agree with the ALJ relative to the Department's threshold burden of establishing "employment;" that is, I agree with the ALJ that "[i]t is clear that remuneration is in fact paid by the petitioner to the individual instructors, and thus, an analysis under the ABC test is necessary." I also agree with the ALJ that the opinion in Koza v. New Jersey Department of Labor, 307 N.J. Super. 439, 704 A.2d 1310 (App. Div. 1998), which petitioner cites repeatedly, is entirely inapposite. See Special Care of New Jersey, Inc. v. Board of Review, 327 N.J. Super. 197, 212 (App. Div. 2000).

Turning to the ABC test, I agree with respondent that the ALJ's legal analysis relative to Prong "C" is fatally flawed. That is, the ALJ incorrectly concluded that because the Pilates instructors engaged by petitioner were also employed full-time and part-time in other industries and professions unrelated to Pilates instruction, such as, bartender at a country club, high school biology teacher, and engineer at Lockheed Martin, or were "just stay at home moms," they were customarily engaged in an independently established trade, occupation, profession or business, as that phrase is used within N.J.S.A. 43:21-19(i)(6)(C). I also disagree with the following conclusion of the ALJ contained within the body of the initial decision:

> The Department focuses on the fact that all of the subcontractors do not maintain independent businesses. However, the absence of other business [sic] is not dispositive, and it is not by any means indicative of an employee relationship in this case.

As reflected in the opinions in both Carpet Remnant and Gilchrist, 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 independent 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. In Carpet Remnant, 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.

In the instant matter, as asserted by respondent, the record reflects that "most if not all of the income earned by the alleged independent contractors related to Pilates instruction during the audit period came from petitioner." Furthermore, petitioner has

failed to meet its burden under the holding in Carpet Remnant to address the duration and strength of any Pilates instruction business independently operated by any of the instructors it engaged during the audit period, nor did it address the number of customers or number of employees of any such businesses. As to the extent of the instructors' "tools, equipment, vehicles, and similar resources," Ms. Bubnis testified during the hearing that all of the Pilates equipment used by the instructors at her studio was "leased to own" by Pilates by Meghan, LLC. Regarding the clerical/administrative services rendered by Ms. Szymborski, petitioner has provided no evidence whatsoever to indicate that this individual was customarily engaged in an independently established enterprise or business; which is to say, no evidence was provided by petitioner addressing the amount of remuneration received by Ms. Szymborski from Pilates by Meghan compared to that received from other such businesses, nor did petitioner provide any evidence as to the duration and strength of Ms. Szymborski's independently established business or enterprise, the number of customers or employees of any such business, or the extent of Ms. Szymborski's "tools, equipment, vehicles and similar resources."

As to the ALJ's conclusion that among the reasons petitioner had satisfied Prong "C" of the ABC test is that it had established that the Pilates instructors (and, presumably, the clerical/administrative assistant) had limited hours with petitioner and because the consequent loss in income which would be suffered by an instructor (or the clerical/administrative assistant) whose relationship with petitioner had been terminated would "not significantly impact [his or her] financial situation or necessitate an application for unemployment benefits," I agree with respondent that although these individuals may be unable to file a valid claim for benefits based upon earnings from petitioner alone, pursuant to N.J.S.A. 43:21-4(e), their wages from all employment would be combined to establish a valid claim for benefits under the UCL. Thus, wages earned in employment are taxable without regard to whether at any given time an individual has sufficient earnings to establish a valid claim for benefits.

Regarding both Prong "A" and Prong "B" of the ABC test, I also agree with respondent that petitioner has failed to meet its burden. Specifically, relative to Prong "A," by petitioner's own account, it controlled the scheduling and payment for services being provided by the Pilates instructors at its studio. That is, the instructors were required to schedule all classes being held and clients were required to enroll in such classes utilizing the software purchased by petitioner. Furthermore, all payments were made by clients directly to petitioner, not to the instructors; after which petitioner compensated the instructors from petitioner's proceeds. Petitioner's advertising materials; namely, its brochure and website (Exhibit R-2, Pages 105 through 114), are also instructive with regard to the issue of direction and control. That is, the brochure defines the limited scope of services provided by instructors at the studio. It states that Pilates by Meghan (dba "Core Vitality") is a "Pilates and core training studio," which offers "small group classes as well as semi-private and private sessions in Pilates Equipment, Pilates Mat, CoreAlign and TRX." The website instructs potential clients of Core Vitality: "Once you have visited our studio, completed brief registration paperwork, and have attended either an information session, intro class, or private session, you will be able to

utilize the online scheduler." The website contains a list of "Policies and Procedures for Fitness Sessions," which include the following:

- All participants are required to attend one information session, introductory class or private session before registering for group equipment classes (this is not required for participants signing up for a group class series or for Pilates Mat/Cardio Core classes) You may sign up for your first introductory class or first private session by calling or visiting our studio.
- It is highly recommended that participants who are new to Pilates attend at least 3 private sessions prior to signing up for group classes.
- All participants are required to complete medical history and consent to participate forms prior to attending group, duet or private sessions.
- Once the above requirements have been met, participants are welcome to register for sessions online through the MINDBODY scheduler and/or by signing up at the studio.
- Please note the following expiration for session packages:
- 10 session packages expire 90 days from date of purchase.
- 5 session packages expire 45 days from date of purchase.
- Individual sessions expire 30 days from date of purchase.
- Class packages and individual sessions are non-refundable and non-transferrable.
- Please provide a minimum of 24 hours notice for cancellations. If we do not receive at least 24 hours notice, you will be charged for that session. Each participant will have ONE "free pass" for emergency situations.

The website contains a page entitled "Pricing," which explains that each class in the "Group Equipment Class Series" is 55 minutes in length. It states that this is a five week class series, which meets twice per week for 10 sessions at a cost of $250 ($25 per class). It states that "Group Pilates Mat Classes and Cardio Core Classes" are 55 minutes in length; that an individual class costs $20; that the five class package, which expires in 45 days, costs $90; that the ten class package, which expires in 90 days, costs $160; that the 20 class package, which expires in 120 days, costs $280. It states that 30 minute classes cost $16; that five class packages for 30 minute classes, which expire in 45 days, cost $75; and that ten class packages for 30 minute classes, which expire in 90 days, cost $140. In fact, the only type of service listed under the heading "Pricing," for which there is not a set duration, a set price for different packages, a set expiration for those packages, etc., is the "Pilates Based Physical Therapy," which by Ms. Bubnis' own account, she alone among those working at her studio was qualified to perform as she was the only such individual licensed as a physical therapist. All of the foregoing speaks to a degree – in fact, a substantial degree – of direction and control by petitioner over the instructors who worked at her studio during the audit period. As to the services provided by Ms. Szymborski, petitioner has offered no evidence to indicate that she was free from

direction and control by petitioner. Consequently, I disagree with the ALJ that petitioner has met its burden under Prong "A" of the ABC test, and find instead that the overwhelming weight of the evidence in the record supports the opposite conclusion.

Under Prong "B" of the ABC test, the putative employer has the burden of establishing that the service at issue is performed outside the usual course of the business for which such service is performed, or outside of all the places of business of the enterprise for which such service is performed. The ALJ concluded that petitioner had met its burden under Prong "B," because "the majority of the instructors at issue worked in other studios and out of their home [sic]," adding, "[t]he mere fact that they work out of the studio rented by the petitioner does not render the subcontractors employees." In petitioner's post-hearing summation, it asserted the following:

> In regard to prong "B," the services rendered by the instructors were not rendered to Meghan, but to the instructors' own clients, and these services were not rendered in the normal course of Meghan's licensed physical therapy business, nor could they have been, since none of the instructors had the license, skill, or training to treat physical therapy patients. Meghan's arrangement with the instructors was not part of her licensed business, but an additional business, so that it cannot be found that the instructors' work was done in the usual course of business.

Both of these analyses are fundamentally flawed. As to the ALJ's finding, she seems not to understand that if the instructors performed services for petitioner at her studio, regardless of whether they may also have worked elsewhere, then petitioner cannot possibly establish that the subject services were performed "outside of <u>all the places of business</u> of the enterprise for which such services were performed" (emphasis added). By all accounts, including according to Ms. Bubnis' own testimony, each of the instructors did, in fact, perform services at her studio. As to petitioner's assertion that the services performed by the instructors were performed outside of the usual course of petitioner's business, that business, known as Pilates by Meghan, dba Core Vitality, traded as and held itself out as, "a fully equipped Pilates and core training studio as well as a Pilates based physical therapy clinic." Exhibit R-2, Page 105. In its two-page brochure, petitioner highlighted its "Fitness Services," explaining that it offered small group classes as well as semi-private and private sessions in Pilates Equipment (Reformer/ Tower/ Chair/Arcs/Barrels), Pilates Mat, CoreAlign and TRX. <u>Id</u>. Accordingly, petitioner's business was largely if not primarily to provide Pilates instruction.[5] The Pilates instructors at issue in this case were the individuals who delivered Pilates instruction services at the studio owned by Pilates by Meghan. One

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[5] As indicated earlier within this decision, petitioner's post-hearing summation states, "Meghan's arrangement with the instructors was not part of her licensed business, but <u>an additional business</u>, so that it cannot be found that the instructors' work was done in the usual course of business." (emphasis added) Thus, even by petitioner's own account during these proceedings, Ms. Bubnis operated a Pilates instruction business. Whether it was her "licensed business" or an "additional business," is not material.

simply cannot assert credibly that the services performed by the Pilates instructors working for Pilates by Meghan were outside of the usual course of business for which those services were performed. Consequently, I disagree with the ALJ that petitioner has met its burden under Prong "B" of the ABC test, and find instead that the overwhelming weight of the evidence in the record supports the opposite conclusion.[6]

ORDER

Therefore, the recommended order of the ALJ, which reversed the determination of the Department relative to the assessment against petitioner is hereby rejected and petitioner's appeal of the Department's assessment is hereby dismissed. Moreover, petitioner is hereby ordered to immediately remit to the Department, for the years 2011 through 2014, $7,338.10 in unpaid unemployment and temporary disability contributions, along with applicable interest and penalties.

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[6] Unrelated to the analysis under any specific prong of the ABC test, but more to the overall position taken by petitioner in this case, I feel compelled to add that I find particularly unsettling Ms. Bubnis' testimony as to how she came to consider the Pilates instructors who worked at her studio to be independent contractors. That is, Ms. Bubnis testified that she had worked as a fitness instructor in the past, "some of which I was paid as an employee and some of which I was paid as a subcontractor," (emphasis added), so she "was familiar that both were acceptable in the field." She said that it seemed to her that "larger corporations paid as employees, such as Bally's Total Fitness, Philadelphia Sports Club, things like that," (emphasis added) whereas, "smaller boutique fitness centers typically paid as subcontractors." (emphasis added). Ms. Bubnis indicated that four of her direct competitors, where she had worked before opening her own studio also "pay their Pilates instructors as subcontractors." When asked by her attorney, "Which way did you want to go," Ms. Bubnis responded, "I was small and I didn't think I would generate much from that business…so, to me it made sense to agree with what my accountant was recommending and bring them in as subcontractors." Ms. Bubnis' attorney then asked, "And pay them with 1099s," to which Ms. Bubnis responded, "You got it." Whether one who is performing work is considered an independent contractor, as opposed to an employee, is governed by law, based on facts. It is not a method of payment, as Ms. Bubnis and her accountant apparently believe. That is to say, one cannot convert into an independent contractor an individual who would otherwise be considered an employee simply by virtue of deciding to "pay them with 1099s." It does not matter which federal tax form one uses to report earnings. What matters are the facts surrounding the relationship between the putative employer and the individual and the application of the law to those facts.

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

Harold J. Wirths

Harold J. Wirths, Commissioner
Department of Labor and Workforce Development

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