Quality-Care Pediatrix, Inc.
Petitioner,
v.
New Jersey Department of Labor and Workforce Development,
Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT

AFFIRMED, IN PART
REVERSED, IN PART

OAL DKT. NO. LID 15163-13
AGENCY REF. NO. DOL 13-059

ISSUED: November 24, 2014

The appeal of Quality-Care Pediatrix, Inc. (petitioner or Pediatrix), a medical practice specializing in pediatric care, operated by Ibolola Ighama-Amegor, M.D. (Dr. Amegor), concerning an unemployment and temporary disability assessment of the New Jersey Department of Labor and Workforce Development (respondent or DLWD) was heard by Administrative Law Judge Gail M. Cookson (ALJ). In her Initial Decision, dated August 25, 2014, the ALJ concluded that Pediatrix had failed to present sufficient proofs to establish that the four individuals whose services were the basis for the DLWD's assessment - Iyare Amegor, Alice Omoregie, Le-Shonda Wallace-Easterling, and Eurema Mickel – were genuine independent contractors exempt from coverage under the New Jersey Unemployment Compensation Law (UCL), 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 Alice Omoregie, the mother of Dr. Amegor, the ALJ concluded that the janitorial services she provided to her daughter's medical practice fall within the statutory exemption from covered employment found at N.J.S.A. 43:21-19(i)(7)(C) for services performed by an individual in the employ of his or her son, daughter or spouse, and services performed by a child under the age of 18 in the employ of his or her father or mother; provided that such services are also exempt under the Federal Unemployment Tax Act (FUTA) or that contributions with respect to such services are not required to be paid in to a state unemployment fund as a condition for a tax offset credit against the tax imposed by FUTA. Therefore, the ALJ upheld the amounts assessed by the DLWD against Pediatrix for unpaid contributions to the unemployment compensation fund and the State disability benefits fund on behalf of Iyare Amegor, Le-Shonda Wallace-Easterling and Eurema Mickel. However, the ALJ ordered the reversal of the DLWD's assessment against Pediatrix for unpaid contributions to the unemployment compensation fund and the State disability benefits fund on behalf of Alice Omoregie, the mother of Dr. Amegor.

Regarding the services provided to Pediatrix during the audit period by the above-listed individuals, the issue to be decided is whether those individuals were employees of Pediatrix and, therefore, whether Pediatrix 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 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 determined 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 DLWD 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, again, 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.

The ALJ determined that the DLWD had satisfied its initial burden of proving that all four individuals - Iyare Amegor, Alice Omoregie, Le-Shonda Wallace-Easterling, and Eurema Mickel – had performed a service for remuneration. The burden of proof then having shifted to Pediatrix to rebut the resulting presumption of an employer/employee relationship, the ALJ concluded that Pediatrix had failed to meet that burden. However, again, as indicated earlier, relative to Alice Omoregie, the ALJ concluded that because she is the mother of Dr. Amegor, the services she performed for Pediatrix during the audit period are exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7)(C). Consequently, the ALJ reduced the DLWD's total assessment by the amount assessed against Pediatrix for services performed by Alice Omoregie. Exceptions were filed by respondent.

In its exceptions to the Initial Decision of the ALJ, the DLWD asserts the following:

> The Department agrees with Judge Cookson's determination of the workers under N.J.S.A. 43:21-19(i)(6)(A)(B)(C) as it pertains to all of the workers from the audit period. The Department believes the judge may have erred in her interpretation

and application of N.J.S.A. 43:21-19(i)(7)(C). This exclusion was intended for sole proprietors and LLC-sole members and not corporations. Corporations are considered a separated entity from its officers and cannot have a parent-child relationship. Based on this, the Department respectfully requests the Commissioner reevaluate Judge Cookson's decision on this case and reinstate the audited contributions for Alice Omoregie for all of the audited periods.

Upon de novo review of the record, and after consideration of the ALJ's Initial Decision, as well as the exceptions filed thereto, I hereby accept and adopt the findings of fact, conclusion and recommendation of the ALJ relative to the assessment by the DLWD against Pediatrix for unpaid contributions to the unemployment compensation fund and State disability benefits fund on behalf of Iyare Amegor, Le-Shonda Wallace-Easterling, and Eurema Mickel. I also adopt the ALJ's findings of fact relative to the services provided to Pediatrix by Alice Omoregie. I reject, however, the ALJ's conclusion that the services provided to Pediatrix by Alice Omoregie are exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7)(C). That is, in order to assert this exemption, Pediatrix must establish not only that the services performed by Ms. Omoregie were in the employ of her son, daughter, or spouse, or were services performed by a child under the age of 18 in the employ of his or her father or mother, but must also establish that such services are exempt under FUTA or that contributions with respect to such services are not required to be paid into a state unemployment fund as a condition for a tax offset credit against the tax imposed by FUTA. Department regulations – specifically, N.J.A.C. 12:16-23.2 – establish what constitutes evidence that services are exempt under FUTA. Specifically, the regulation states that evidence of FUTA exemption may include the following: (1) a private letter ruling from the Internal Revenue Service, (2) an employment tax audit conducted by the Internal Revenue Service after 1987 which determined that there was to be no assessment of employment taxes for the services in question (however, the determination must not have been the result of the application of Section 530 of the Revenue Act of 1978), (3) a determination letter from the Internal Revenue Service, and/or (4) documentation of responses to the 20 tests required by the Internal Revenue Service to meet its criteria for independence (these tests are enumerated in Internal Revenue Service Rule 87-41).

Separate and apart from the issue raised by respondent in its exceptions to the Initial Decision of the ALJ; namely, whether the incorporated status of Pediatrix, in and of itself, removes the services performed by Alice Omoregie from consideration for the UCL exemption set forth at N.J.S.A. 43:21-19(i)(7)(C)[1], petitioner has failed to produce any of the following with

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[1] In Lazar v. Board of Review, 77 N.J. Super. 251 (App. Div., 1962), an unemployment compensation eligibility case which is instructive, but not controlling, at issue was whether the evidence supported the Board of Review's finding that the Seashore Toy and Gift Shop, which had been incorporated and which William Lazar operated, was, in fact, his own individual business, and the services performed by the claimant, his wife, were rendered in his employ. The court found that since William Lazar was the sole owner of the Seashore company and its assets, and had ignored the corporate form; since the record was devoid of any corporate action at any time; since Lazar had managed the Seashore shop as though the corporation never existed; and since it was "apparent that the employment arrangement was made purely for the benefit of the Lazar family, and could arise only out of the husband-wife relationship," the Board of Review had been justified in ignoring the "corporate fiction" and holding that claimant's husband was the sole owner and operator of the Seashore Toy and Gift Shop business where she worked, and that she in fact performed services in his employ. The court in Lazar observed that, "[a]lthough, generally, a corporate entity may not be disregarded, our courts have not hesitated to pierce the corporate veil

regard to the services provided to Pediatrix by Alice Omoregie: a private letter ruling from the Internal Revenue Service, an employment tax audit conducted by the Internal Revenue Service, or a determination letter from the Internal Revenue Service. Regarding the option under N.J.A.C. 12:16-23.2(a)4 to prove a FUTA exemption by documenting that the services provided meet the Internal Revenue Service's 20 factor test for determining whether an individual is an employee or an independent contractor, the evidence adduced during the hearing regarding Ms. Omoregie and the services she provided to Pediatrix, coupled with the evidence produced by petitioner in its July 14, 2014 post-hearing submission, fall woefully short of establishing that Ms. Omoregie was an independent contractor applying the Internal Revenue Service's 20 factor test. That is, as indicated by the ALJ in her Initial Decision, petitioner produced an independent contractor agreement between Pediatrix and Ms. Omoregie, which, in the absence of supporting facts, carries little or no evidentiary weight. Petitioner produced a trade name registration for "Alice Omoregie Cleaning Services" filed with Essex County on or about February 21, 2008, which is after the relevant period of the services she provided to Pediatrix. In that filing, the address listed was that of the Chancellor Avenue office location of Pediatrix and not an independent business location. Petitioner produced tax forms for Ms. Omoregie and invoices created under the name of "Alice Services" with an address of 15 Riddle Avenue, Hampton, New Jersey, where Ms. Omoregie lived with her other daughter Bose Ogbedor. As noted by the ALJ, Dr. Amegor claimed that her mother had other cleaning clients, but could produce no evidence of same. Finally, Ms. Omoregie was not produced by petitioner as a witness. Without having established that the services provided to Pediatrix by Aice Omoregie are exempt from coverage under FUTA, petitioner may not assert the exemption from UCL coverage found at N.J.S.A. 43:21-19(i)(7)(C). In the absence of the specialized exemption set forth at N.J.S.A. 43:21-19(i)(7)(C), petitioner must satisfy the ABC Test at N.J.S.A. 43:21-19(i)(6) in order to establish that Ms. Omoregie is an independent contractor, exempt from coverage under the UCL. As indicated earlier, I have adopted the ALJ's conclusion within her Initial Decision that petitioner had "failed in her proofs" that Alice Omoregie was a genuine independent contractor exempt from the UCL under the ABC Test.

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and determine the true factual situation in a proper case." Thus, it would appear that the statement made by respondent in its exceptions to the Initial Decision of the ALJ, namely, that by virtue of the incorporated status of Pediatrix,, alone, "the services Alice Omoregie provided would be to the corporation and not to Dr. Amegor individually hence rendering the parent-child relationship nonexistent" for purposes of evaluating whether Dr. Amegor may assert the exemption found at N.J.S.A. 43:21-19(i)(7)(C), is not entirely accurate. That is to say, notwithstanding the corporate status of Pediatrix, it may be appropriate in the presence of certain facts, to conclude that the services performed by Alice Omoregie were performed in the employ of her daughter, Dr. Amegor. In her Initial Decision, the ALJ concluded, without supporting facts of the sort evinced in Lazar, that Pediatrix may assert the parent/daughter exemption found at N.J.S.A. 43:21-19(i)(7)(C). Were it not for the petitioner's failure, discussed in more detail within the body of this decision, to produce sufficient evidence that the services provided by her mother to Pediatrix are exempt under FUTA, I may have considered remanding the matter, in part, to the ALJ for the taking of evidence and further findings regarding the "true factual situation" at play with Pediatrix and its corporate status, toward determining whether it would be appropriate in this particular case to pierce the corporate veil of Pediatrix in order to permit petitioner to assert the exemption at N.J.S.A. 43:21-19(i)(7)(C) relative to the services provided to Pediatrix by Alice Omoregie. However, for the reasons set forth within the body of this decision, I will not be ordering such a remand.

ORDER

Therefore, with regard to the services provided to Pediatrix during the audit period by Alice Omoregie, the recommended order of the ALJ which reversed the determination of the DLWD is hereby rejected. With regard to the services provided to Pediatrix during the audit period by Iyare Amegor, Le-Shonda Wallace-Easterling, and Eurema Mickel, the recommended order of the ALJ which affirmed the determination of the DLWD is hereby affirmed. Consequently, petitioner's appeal of the DLWD's assessment is hereby dismissed and petitioner is hereby ordered to pay the DLWD's entire assessment against Pediatrix pertaining to the unpaid contributions to the unemployment compensation fund and the State disability benefits fund by Pediatrix on behalf of Iyhare Amegor, Alice Omoregie, Le-Shonda Wallace-Easterling, and Aurema Mickel, for the audit period: years 2005 through 2008, plus interest and applicable 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

Harold J. Wirths, Commissioner
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