MKI Associates, 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 01974-16
AGENCY DKT. NO. DOL 16-001

Issued: April 25, 2018

The appeal of MKI Associates, LLC ("MKI" 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 Kelly J. Kirk (ALJ). In her initial decision, the ALJ concluded with regard to the occupational therapists (OTs), occupational therapy assistants (OTAs), physical therapists (PTs) and physical therapy assistants (PTAs) (hereafter referred to collectively as "therapists") engaged by petitioner during the audit period that none were employees, but rather, were all independent contractors. Based on her finding that all of the therapists were independent contractors, rather than employees, the ALJ ordered the reversal of the Department's determination regarding petitioner's tax liability.

The issue to be decided is whether the therapists 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).

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 found that the therapists, "supplied by MKI" to the healthcare facilities and other entities with which MKI had entered into "staffing contracts," were free from control or direction by MKI. In support of this conclusion, the ALJ cited to the following findings of fact: the therapists were licensed as PTs, PTAs, OTs and OTAs; "although MKI paid the therapists," the therapists chose which facilities they wished to work at and which shifts they wished to work; the therapists could work as little or as much as they wished; the therapists could utilize the services of "other brokers" or seek work independently; the therapists were not required to comply with any rules, practices, or procedures of MKI in performing their duties, but rather had to comply with those set by the facility at which they worked; MKI exercised no supervisory responsibility over the therapists; MKI offered no training to therapists; MKI did not furnish supplies, equipment, or uniforms to therapists; and MKI provided no fringe benefits, and "required therapists to maintain their own insurance."

The "staffing contract" to which the ALJ referred in her initial decision (Exhibit R-1, pages 84 – 88) characterizes MKI as the "STAFFING FIRM" and the healthcare facility or other entity with which MKI is contracting as the "CLIENT." The staffing contract states, among other things, that MKI "will recruit, screen, and make a referral of its independent contractors ("Assigned Contractors") to perform the type of work described in Exhibit A[1];" that the client will "properly supervise Assigned Contractors performing its work" and will "properly supervise, control and safeguard its premises, processes, or systems, and not permit Assigned Contractors to operate any vehicle or mobile equipment;" that the client will "not change Assigned Contractor's job duties without STAFFING FIRM's express prior written approval;" and that the client will "exclude Assigned Contractors from CLIENT's benefit plans, policies, and practices, and not make any offer or promise relating to Assigned Contractors' compensation or benefits." The staffing contract also contains a section entitled, "Payment Terms, Bill Rates and Fees," which states that the client will pay MKI for "its performance" at the rates set forth in Exhibit A to the staffing contract and will also pay any additional costs or fees set forth in the staffing contract; that MKI "will invoice CLIENT for services provided under this Agreement on a bimonthly basis;" and that "payment is due on receipt of invoice within 75 days." The staffing contract describes a "late payment penalty," whereby the "CLIENT agrees to pay (to MKI) net upon receipt of invoices and to pay interest on any unpaid balances after 45 days, from the date of receipt," adding that, "if invoices are not paid in 45 days, there will be a monthly late charge of 1.5 % that will be calculated on the last day of each month." The staffing contract also contains a section entitled, "Non-Competition and Non-Solicitation," which states, among other things, that the, "CLIENT specifically agrees that an independent contractor therapist cannot be hired by CLIENT without a buyout agreement between CLIENT and STAFFING FIRM (MKI) or after a 1 year period has passed that the independent contractor was assigned under the direction of CLIENT;" that the "CLIENT agrees that a buyout agreement must be procured and finalized prior to any negotiations or engagements in any way, directly or indirectly, that induce or attempt to induce the independent contractor therapist to become an employee or enter into a direct business agreement with the client;" that, "if CLIENT uses the services of an Assigned Contractor as its direct employee in any capacity within 365 days after any assignment of the Assigned Contractor to CLIENT from STAFFING FIRM, CLIENT must notify STAFFING FIRM and pay STAFFING FIRM a fee in the amount of $6,000; and that "if CLIENT chooses to make an offer and STAFFING FIRM agrees to the dollar amount

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[1] Exhibit A to the staffing contract (Exhibit R-1, page 88) contains a "Rate Schedule" with two columns: one entitled "Job Title or Description" and the other entitled "Hourly Bill Rate." The "Rate Schedule" lists the following hourly rates for the following job titles: Occupational Therapist, $65.00; Speech and Language Pathologist, $65.00; Physical Therapist, $65.00; Physical Therapist Assistant, $55.00; Occupational Therapist Assistant, $55.00. Following the "Rate Schedule," is the following statement: "A specific rate that differs from the above may be agreed upon by Client and Staffing Firm for an individual therapist and therefore must subsequently be written in the separate Assignment Confirmation Agreement and signed by CLIENT and STAFFING FIRM."

and the terms of the offer, CLIENT may buy out the contract or the independent contractor to be transferred to permanent staff at an agreed lump sum payment in a written buy out contract."[2]

With regard to the above-mentioned "Non-Competition and Non-Solicitation" clause contained within the staffing contract (and the corresponding "non-competition" and "non-solicitation" clauses of the "Independent Contractor Consulting Agreement"), the ALJ concluded the following:

> Although the contracts contain non-compete and non-solicitation language, the contracts were not drafted by a lawyer, and it appeared that the intention was to prevent the therapists from establishing a business like MKI's, or from establishing an employment relationship with the facility at which the individual was placed by MKI. From the record, the "non-compete" clause did not prevent therapists from utilizing the services of employment brokers or staffing companies or other companies like MKI, and some therapists did obtain work from other companies like MKI.

Relative to Prong "B" of the ABC test, the ALJ concluded that MKI had met its burden in that it had established that its therapists perform their services outside of all the places of business of the enterprise for which such services are performed; that is, the ALJ concluded that, "[t]he record clearly establishes that none of the therapists performed work at any MKI facility, as none existed," explaining, "MKI is not a healthcare facility, and it does not own or operate any healthcare facility," adding, "MKI's sole place of business is the residential home of Kevin and Monica Iula in Ridgewood, New Jersey." Furthermore, the ALJ found that MKI is in the business of "arranging connections between facilities and therapists (for the performance of healthcare services)," rather than the performing of healthcare services and, therefore, the services performed by MKI's therapists are outside MKI's usual course of business.

As to Prong "C" of the ABC test, the ALJ acknowledged the holding of the New Jersey Supreme Court in Carpet Remnant Warehouse v. New Jersey Dep't of Labor, 125 N.J. 567 (1991), which lists factors to be considered when determining an individual's ability to maintain an independent business or trade, such as the duration and strength of the business, the number of customers and their respective volume of business, the number of employees, the extent of the individual's tools, equipment, vehicles and similar resources and the amount of remuneration each individual received from the

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[2] The "Independent Contractor Consulting Agreement" between MKI and its therapists (Exhibit R-1, pages 89 – 92) contains corresponding "Non-Competition" and "Non-Solicitation" clauses, which state, among other things, that, "the Consultant will not, during the continuance of this Agreement or within 1 year after the termination of this Agreement, be directly or indirectly involved with a business which is in direct competition with the particular business line of the Customers." The Independent Contractor Consulting Agreement defines "Customer #1" to mean MKI and "Customer #2" to mean "Subacute Facilities/school system."

putative employer compared to that received from others. However, the ALJ distinguished Carpet Remnant, supra., from the current matter on the basis that, "unlike Carpet Remnant, supra., where Carpet Remnant Warehouse (the putative employer) was paid for the product and the installation, MKI does not receive any payment independent of the hours and days worked by the therapist, and may not receive any payment in the event a therapist is ultimately needed by the facility because the work is based upon need and availability and can be cancelled." Therefore, rather than apply the Prong "C" factors enumerated in Carpet Remnant, supra., the ALJ concluded that MKI's therapists had been "customarily engaged in an independently established trade, occupation, profession or business," based almost entirely upon her factual finding that "[e]ach of the individuals placed by MKI was a licensed therapist, which occupation would continue in the event the relationship between the licensed therapist and MKI was terminated." In reaching this conclusion, the ALJ relied heavily, if not exclusively, upon the holding in Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super. 135 (App. Div. 1990), wherein the court found that nurses who had been engaged by Trauma Nurses, Inc. (TNI), a supplier of hospitals with nurses on a temporary basis, had been customarily engaged in an independently established trade, occupation, profession or business, because the "independent nature" of their nursing profession would survive without the existence of TNI.

In its exceptions, respondent takes issue with the findings and conclusions of the ALJ with regard to each prong of the ABC test. Specifically, respondent notes that under the holding in Carpet Remnant, supra, in order to satisfy Prong "A," one must, "establish not only that the employer has not exercised control in fact, but also that the employer has not reserved the right to control the individual's performance," adding that "an employer need not control every facet of a person's responsibilities for that person to be deemed an employee." Carpet Remnant, 125 N.J. at 582. Applying the principles enumerated in Carpet Remnant, supra., to the case at hand, respondent cites to exhibits entered into evidence during the hearing before the ALJ in support of its assertion that MKI has failed to meet its burden under Prong "A." Included among the exhibits cited by respondent are the "Independent Contractor Consulting Agreement" between MKI and its therapists (Exhibit R-1, pages 89-92), the "Staffing Contract" between MKI and its clients (Exhibit R-1, pages 84-88 and Exhibit R-6), and the bid and "Request for Qualification" sent by MKI to a prospective client (Exhibit R-1, pages 94 -108). Specifically, respondent maintains that the following terms/characteristics of those documents constitute indicia of control:

> (1) The agreements with healthcare facilities and other entities for the provision of therapy services, i.e., the "staffing contracts," are executed exclusively by MKI and not by the individual therapists,
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> (2) Section 1, paragraph "b" of the staffing contract between MKI and Progressive Steps, Inc. (Exhibit R-6), which lists the duties and responsibilities of "STAFFING FIRM" (MKI), states that MKI will "[p]ay assigned contractors wages that STAFFING FIRM offers to them,"

(3) Section 1, paragraph "e" of the staffing contract between MKI and Progressive Steps, Inc., states that MKI will "[h]old independent contractors responsible for keeping their files current and submitting any requisite monthly notes and verification logs to the Progressive Steps office.,"

(4) "Exhibit A" to the staffing contract between MKI and Progressive Steps, Inc., contains a "Rate Schedule," which sets forth the rate at which MKI will bill Progressive Steps for therapy services; specifically, $85.00 per hour for occupational therapy; $85.00 per hour for speech and language pathology; and $85.00 per hour for physical therapy,

(5) The bid and "Request for Qualifications" submitted by MKI to Passaic County (Exhibit R-1, pages 94-108), states that "MKI will contact Preakness Healthcare Center 48 hours in advance in the event of a cancelation and provide replacement staff,"

(6) The above-cited bid and "Request for Qualifications" contains a "Fee Schedule," which sets forth the rate at which MKI will bill the County for therapy services; specifically, $65.00 per hour for physical therapists, $57.00 per hour for physical therapist assistants, $65.00 per hour for occupational therapists, $57.00 per hour for certified occupational therapists, and $65.00 per hour for speech therapists, and

(7) The "independent contractor consulting agreements" between MKI and its therapists contain a non-competition clause, which indicates that, "other than with the express written consent of the Customers (MKI and [the] facility) which will not be unreasonably withheld, the Consultant (therapist) will not, during the continuance of this agreement or within 1 year after the termination of this Agreement, be directly or indirectly involved with a business which is in direct competition with the particular business line of the customers..." (Exhibit R-1, pages 89-92)

In further support of its position relative to Prong "A," respondent cites to the testimony of petitioner's witness, Andrea Savastano, who confirmed during her testimony that while she was a contractor with MKI she could only be placed by MKI, could not directly contract with the facility where she had been placed and was unable to negotiate with the facility for her rate of pay. Respondent also cites to the testimony of its witness, Auditor Victoria Egejuru, who testified about a letter that had been provided to her during the course of her audit of MKI by therapist Andrew Gandolfo. In that letter (Exhibit R-2, page 34), entitled "REQUIREMENT TO WORK FOR MKI ASSOCIATES," MKI instructed Mr. Gandolfo that he "[is] not legally able to work (for MKI) under individual status," and "must be incorporated under a business status." The letter went on to state that Mr. Gandolfo "will be unable to continue to work through MKI Associates as an individual since you are not recognized by the labor department as an Independent Contractor and you may be subjected to consequences." Thus, maintains

respondent, "[b]esides controlling the business relationship between the therapists and the facilities and controlling the rate of pay, MKI also controls the type of business entity these contractors maintain."

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 MKI's business enterprise is providing therapeutic services pursuant to the staffing contracts that MKI maintains with its clients, the facilities where those services are performed under the staffing contracts are locations where MKI conducts an "integral part of its business." Similarly, respondent maintains that since the principal part of MKI's business enterprise is providing therapeutic services, the performance of those services by the therapists engaged by MKI to satisfy MKI's obligations and responsibilities under its staffing contracts is a service performed within, not outside of, MKI's usual course of business.

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 [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, in order to satisfy Prong "C" of the ABC test, petitioner must demonstrate that each therapist was engaged in a viable, independently established business providing therapy services at the time that he or she rendered that service to petitioner. Relative to the facts adduced during the MKI hearing, with an eye to addressing the above-cited standard, respondent states the following:

> [T]he auditor disclosed no evidence that these individuals will or in fact could continue to operate a viable business after their relationship with MKI terminates. The auditor testified that the audit disclosed no evidence that any of the therapists have their own business location, business telephone number, business stationary, or any advertisement in any form. Andrea Savastano testified that she does not negotiate a rate of pay with the facility [ ], does not advertise her therapy services, does not have a business telephone listing, does not maintain a business location, does not utilize her own letter head or stationary. Most evident, Savastano testified

[that] her alleged business "had no other income from 1099s besides the work for Kevin as 1099."

(citations omitted)

In addition, respondent takes issue with the ALJ's heavy reliance in support of her conclusions on the opinion in Trauma Nurses, supra, adding that the ALJ incorrectly found that the facts in Trauma Nurses, supra, are similar to the facts at issue in the within matter. Specifically, respondent maintains that whereas each nurse engaged by TNI negotiated with TNI to set an individual hourly rate, MKI "paid a reduced flat rate to its workers based upon the rate contained in the individual contracts entered into between MKI and the facilities." Citing the testimony of Kevin Iula, co-owner of MKI, respondent adds, "[t]he reduced rate would take into consideration a five-dollar profit per hour that MKI would generate for each hour the therapist performed their services." Furthermore, respondent asserts that whereas TNI functioned as a "licensed employment agency" and, accordingly, was characterized by the court as an "employment broker, matching nursing professionals with hospitals and other health care institutions seeking to supplement their staffs on a temporary, short-term basis," Trauma Nurses, supra, at 137, MKI "is not licensed to provide a brokered service" and, instead, "employs therapists to fulfill its own contractual obligations to provide a therapeutic service to patients at facilities."

In reply to the exceptions filed by respondent, petitioner asserts the following with regard to Prong "A:"

> The fact that Mr. Pfeffer (the redetermination auditor for the Department who presented respondent's case before the ALJ) has even attempted to argue that MKI exercised control over these individuals is ludicrous. Several of these independent contractors testified that other than the placement of MKI, they were completely under the control of the facilities in which they worked. MKI did not set their hours, their assignments or how they worked. MKI did not provide any tools of the trade or anything else re: their job. All MKI did (and this was clearly testified to by several individuals) was place the individual in a facility. What the facility did with that individual was up to each individual facility. If the entity did not like a person placed by MKI, it was under no obligation to keep that person there.

Relative to Prong "B" petitioner maintains the following:

> An analysis of Prong B reveals that what Prong B refers to is where the individuals actually perform their services. Again, there is no question that MKI Associates is located in Kevin and Monica Iula's home. Most of the therapists have never even stepped foot inside the home and no therapy services are provided there. In essence, the Iulas (MKI Associates) are conduits between the therapists and the various facilities or agencies.

> It is beyond belief that Mr. Pfeffer at page 12 of his letter can argue that "there is no doubt from the evidence produced at hearing that the services in question were in the usual course of the petitioner's business." MKI has one location and one location only; the home of Monica and Kevin Iula. It is unsettling that Mr. Pfeffer can argue that any of the facilities not owned or operated by MKI can in fact be called one of their "places of business."

As to Prong "C" petitioner asserts that the ALJ correctly relied in support of her legal conclusions on the holding in Trauma Nurses, supra,[3] adding that nurses and

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[3] In its reply petitioner references not only the Trauma Nurses case, but also the unreported opinion of the Superior Court, Appellate Division, in Feinsot v. Board of Review, A-1982-04T2 (February 26, 2007). Specifically, petitioner asserts that in the ALJ's initial decision she "appropriately...compared the MKI situation to not only the Trauma Nurse case but also the Feinsot case." Petitioner then goes on within the body of its reply to summarize the facts and holding in Feinsot, supra, which, according to petitioner, stands for the principle that an attorney is *per se* "customarily engaged in an independently established business or enterprise" by virtue of "her special training and expertise." However, the ALJ's initial decision is devoid of any mention of Feinsot, supra., as are respondent's exceptions. Consequently, petitioner's reference to Feinsot, supra., is procedurally inappropriate and petitioner's assertion that the ALJ relied upon the holding in Feinsot, supra., is inaccurate. For these reasons, I will not address the holding in Feinsot, supra., within the main body of this decision. However, it is important to note here that the Feinsot opinion was on appeal from a determination of the Board of Review, not the Commissioner, and involved Ms. Feinsot's eligibility to collect unemployment compensation benefits, not the employer's obligation to make contributions to the unemployment compensation fund and State disability benefits fund on behalf of all attorneys whose services it engaged. Although it did involve application of the ABC test to the services performed by Ms. Feinsot, as an unpublished opinion, it does not constitute precedent and is not binding on any court. R. 1:36-3. Furthermore, in a subsequent decision of the Commissioner involving the employment tax liability of Assigned Counsel, Inc. (ACI), the firm with which Ms. Feinsot (an attorney) was associated (Assigned Counsel, Inc. v. DLWD, Affirmed in Part, Remanded in Part, issued June 9, 2009), the Commissioner expressly rejected the ALJ's conclusion that all of the attorneys engaged by ACI (a legal staffing firm), including Ms. Feinsot, were *per se* "customarily engaged in an independently established business or enterprise" and, therefore met Prong "C" of the ABC test, solely by virtue of their having been attorneys licensed to practice law. Although with regard exclusively to the employment status of Ms. Feinsot, the Commissioner was bound under the doctrine of collateral estoppel by the unpublished Appellate Division decision, he found relative to the *other* attorneys whose services had been engaged by ACI during the audit period that in order to meet Prong "C" of the ABC test, ACI would have to do substantially more than establish that the individuals involved had been licensed as attorneys prior to and after entering their relationship with ACI. Rather, the Commissioner found that ACI would be required to

licensed physical or occupational therapists are unlike the individuals whose services were at issue in Carpet Remnant, supra, because the former are "engaged in an independent enterprise due to [their] special training and expertise." Petitioner explains,

> It is unlike a situation where a carpet installer, who is no longer employed, is no longer a carpet installer. In other words, once a carpet installer loses his or her job, he/she is not engaged in an independently established business or enterprise. However,...a licensed physical therapist is in fact independent and can work for a day on their own or for a few months....

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 and petitioner's reply, I hereby reject the ALJ's reversal of the Department's determination that MKI had employed the therapists it engaged and, therefore, that petitioner is liable for unpaid contributions to the unemployment compensation fund and State disability benefits fund on behalf of those employees for the audit period, 2011 through 2014.

Regarding Prong "A" of the ABC test, I agree with respondent that MKI has failed to meet its burden. That is, I agree that the documents governing the relationships between MKI and the therapists and between MKI and its clients, as well as the testimony of witnesses confirming the practices of MKI, reflect a degree of control over the therapists 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 MKI. Specifically, the "staffing contract" between MKI and its clients contains a "Rate Schedule" listing the hourly rates to be charged for the services of PTs, OTs, PTAs and OTAs. Testimony offered during the hearing confirms that the hourly rate charged to MKI's clients for the services of therapists and the hourly rate paid by MKI to its therapists are both set by MKI. The therapists are not free to negotiate their hourly rate of pay with the clients. The "staffing contract" also states that the client is prohibited from changing the "Assigned Contractor's" job duties without MKI's

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address the factors set forth in Carpet Remnant, supra., so as to establish that each individual had met the dual requirement that he or she (1) be independently established in the practice of law and, (2) be *customarily engaged* in the independently established practice of law. Toward that end, the Commissioner instructed the ALJ on remand to be cognizant of the New Jersey Court Rules, which require an individual who is engaged in the independent practice of law to maintain a *bona fide* office for the practice of law (a place where clients are met, files are kept, the telephone is answered, mail is received, etc.) and to maintain in a financial institution in New Jersey a trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, trustee or receiver, or in any other fiduciary capacity, into which trust account or accounts funds entrusted to the attorney's care would be deposited and a business account into which all funds received for professional services would be deposited.

"express prior written approval" and contains a "non-competition and non-solicitation" clause, described in detail earlier in this decision, that prohibits the client from employing any MKI therapist without first entering into a "buyout agreement" with MKI or after 1 year has passed from the last date on which the therapist performed services for the client on assignment from MKI. The "non-competition and non-solicitation" clause within the staffing contract also states that if the client uses the services of any "Assigned Contractor" as its "direct employee in any capacity" within 365 days after any assignment of the "Assigned Contractor" to the client from MKI, the client "must notify [MKI] and pay [MKI] a fee in the amount of $6,000." As mentioned earlier in this decision, the "Independent Contractor Consulting Agreement" between MKI and its therapists contains two corresponding clauses; one entitled, "non-competition" and the other entitled, "non-solicitation." The "non-competition" clause states that "other than with the express written consent of the Customers (MKI and the client), which will not be unreasonably withheld, the Consultant will not, during the continuance of this Agreement or within 1 year after the termination of this Agreement, be directly or indirectly involved with a business which is in direct competition with the particular business line of the Customers, divert or attempt to divert from the Customers any business the Customers [have] enjoyed, solicited, or attempted to solicit, from other individuals or corporations, prior to termination of this Agreement." The "non-solicitation" clause states that "[t]he Consultant understands and agrees that any attempt on the part of the Consultant to induce other employees or consultants to leave the Customers' employ, or any effort by the Consultant to interfere with the Customers' relationship with its other employees and consultants would be harmful and damaging to the Customers," adding, the following:

> Customer #2 (client) may not solicit the direct services of the Consultant without knowledge of Customer #1 (MKI) and a formal written request to Customer #1 (MKI). Customer #2 (client) may buy-out the contract of the Consultant only if agreed upon to a set price by Customer #1 (MKI). Customer #1 (MKI) reserves the right to refuse buy-out of this Consultant contract.

The ALJ excused or characterized as immaterial the "non-competition" and "non-solicitation" clauses on the basis that they were "not drafted by a lawyer," adding that it appeared that the "intention" was to prevent the therapists from establishing a business like MKI's or from establishing an employment relationship with a facility at which the individual was placed by MKI. First, whether these clauses were drafted by a lawyer, by Mr. Iula or by a non-lawyer for Mr. Iula is not relevant. One thing is certain, they were not drafted by the therapists. The clauses are contained in the staffing contracts *presented by MKI* to its clients as a condition to doing business and in the "Independent Contractor Consulting Agreements" *presented by MKI* to its therapists as a condition to engaging their services. Second, the "non-competition" clause within the consulting agreements states that during the agreement and for 1 year after termination of the agreement, the therapist is prohibited from being "directly or indirectly involved with a business which is in direct competition with the particular business line of the Customers (MKI and its client), and [is prohibited from] divert[ing] or attempt to divert from the Customers any business the Customers [have] enjoyed, solicited, or attempted to solicit,

from other individuals or corporations, prior to termination of this Agreement." The drafter chose to use the phrase "directly or indirectly involved" and the drafter chose to prohibit not just direct or indirect involvement with its competitors, but also direct or indirect involvement with its client's competitors. Any reasonable person would read this clause to prohibit far more than the ALJ opined. That is, taking Andrea Savastano as an example, who testified during the hearing that MKI had assigned her to work for a particular nursing home (hereafter "XYZ nursing home"). Under the MKI non-competition clause, both during and for 1 year after termination of her agreement with MKI, Ms. Savastano would be prohibited from direct or indirect involvement, which I presume includes working for or with, (1) any other healthcare facility that competes with XYZ nursing home, or (2) any other organization that competes with MKI in the business of providing therapy services to health care facilities and other entities. Ms. Savastano indicated that she resides in Ridgewood, New Jersey, the same town where MKI is headquartered (in the home of Kevin and Monica Iula). Let us assume for the sake of this example that XYZ nursing home is also located in Bergen County, New Jersey. Assuming that XYZ nursing home and MKI would consider those engaged in similar businesses throughout northeastern New Jersey (Bergen, Hudson, Essex, Passaic, and Union counties) to be their competitors, by virtue of signing the "Independent Contractor Consulting Agreement" with MKI, Ms. Savastano is now arguably prohibited while engaged by MKI and for 1 year thereafter from working *in any capacity* with or for *any* healthcare facility or for any organization or individual through any "broker" that does business throughout Bergen, Hudson, Essex, Passaic and Union Counties. True independent contractors are not required to sign agreements containing clauses like this as a condition to being engaged for the performance of services. This clause and the others described above reflect a substantial degree of control by MKI over its therapists. Suffice it to say, I disagree with the ALJ that MKI 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.

Regarding Prong "B" of the ABC test, I agree with respondent that 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 MKI's business enterprise is providing therapeutic services pursuant to the staffing contracts that MKI maintains with its clients, the facilities where those services are performed under the staffing contracts are locations where MKI conducts an "integral part of its business." Similarly, I would agree with respondent that since the principal part of MKI's business enterprise is providing therapeutic services, the performance of those services by the therapists engaged by MKI to satisfy MKI's obligations and responsibilities under its staffing contracts is a service performed within, not outside of, MKI's usual course of business.

Regarding Prong "C" of the ABC test, I agree with respondent that the opinion in Trauma Nurses, supra, is distinguishable from the matter at hand. That is, in Trauma Nurses, supra, the court states relative to TNI's nurses that, "[o]nce the schedule is confirmed, nurses are required to work each scheduled shift or make arrangements *on their own* with other qualified nurse contractors for coverage of any shifts that they are unable to work, subject to TNI's approval." (emphasis added) Trauma Nurses, 242 N.J. Super. at 139. By contrast, the bid and "Request for Qualification" provided by MKI to Passaic County (Exhibit R-1, pages 94-108) states that, "MKI Associates will contact Preakness Healthcare Center 48 hours in advance in the event of a cancelation *and provide replacement staff*." (emphasis added). In Trauma Nurses, supra, the court states relative to TNI's nurses that, "[e]ach nurse negotiates with TNI to set an individual hourly rate, which varies depending upon his or her experience and qualifications." Id., at 138. By contrast, MKI establishes the hourly rate it bills clients for the services provided by its therapists, as evidenced by the detailed "Rate Schedules" that it attaches to each "staffing contract" with its clients and Mr. Iula's testimony that that for every hour of services performed by a therapist, MKI makes $5.00 profit. Thus, the hourly rate of pay for the therapists engaged by MKI is established by MKI, not through negotiations with each individual therapist. In Trauma Nurses, supra., the court states relative to TNI's nurses that, "[n]o restriction is placed on a nurse's right to obtain placement by another broker or to obtain work independently." Id., at 140. As described in detail above, MKI includes a "non-competition" clause in each "Independent Contractor Consulting Agreement" that expressly restricts its therapists from being "directly or indirectly involved with" (which presumably includes working for) MKI's competitors (other "brokers") not only during the term of the agreement between MKI and the therapist, but for 1 year after termination of the agreement.

Needless to say, in my opinion, the ALJ's virtually exclusive reliance upon the Appellate Division opinion in Trauma Nurses, supra. in support of her conclusion that petitioner had met its burden under Prong "C" of the ABC test, is misplaced, as is the ALJ's casual dismissal of the more comprehensive and generally applicable standard announced by the New Jersey Supreme Court one year later in Carpet Remnant, supra., on the basis that whereas Carpet Remnant Warehouse "was paid for the product and the installation, MKI does not receive any payment independent of the hours and days worked by the therapist." The Supreme Court's holding in Carpet Remnant is controlling and the Prong "C" analysis announced therein has been applied repeatedly by New Jersey courts (and countless times by the Commissioner of the Department of Labor and Workforce Development in final administrative determinations) over the past 26 years to many services/occupations that do not involve the delivery and installation of a tangible product like carpet.

As reflected in the opinions in both Carpet Remnant, supra., and Gilchrist, supra., 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. Furthermore, in order to satisfy Prong "C" of the ABC test, MKI must

demonstrate that *each* therapist who performed services for MKI during the audit period was engaged in a viable, independently established, business at the time that he or she rendered services to MKI. See Gilchrist, supra, and Schomp v. Fuller Brush Co., 124 N.J.L. 487 (Sup. Ct. 1940).

In Carpet Remnant, supra., which as mentioned earlier, 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, [4] 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, MKI must prove by a preponderance of the credible evidence with regard to each therapist whose services it engaged during the audit period that the therapist was during the audit period customarily engaged in an independently established business or enterprise (not multiple employment). Under the holding in Carpet Remnant, supra., that means that relative to each therapist whose services MKI engaged during the audit period, it must address the duration and strength of each therapist's business during that period, the number of customers and their respective volume of business during that period, the number of employees of the therapist's business or enterprise during that period, the extent of each therapist's business resources during that period and, perhaps most importantly, the amount of remuneration each therapist received from MKI during that period compared

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

to that received from others; which is to say, not a general claim that each therapist worked for or was free to work for others, but actual documentary evidence reflecting the amount of remuneration that each therapist received from MKI compared to that received from others.

In the instant matter, MKI has failed to demonstrate that any of the therapists it engaged during the audit period received business income for such services from any firm other than MKI. In fact, as indicated by respondent in its exceptions, Ms. Egejuru, the Department auditor, testified that all Federal Form 1040 Schedule Cs that she was able to obtain for MKI therapists indicated that 100% of the business income of those individuals was derived from services rendered to MKI. In light of MKI's failure to establish that a single one of its therapists had received business income from a firm other than MKI, it is not surprising that MKI was unable to address many of the other factors enumerated in Carpet Remnant, supra., including the duration and strength of any therapy business independently operated by any of the therapists it engages, and the number of customers or number of employees of any such business.[5] [6]

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[5] The following conclusion appears within the ALJ's initial decision on page 25, under the heading "Additional Findings of Fact: "the idea that someone who made less than $1,000 from MKI was deemed an employee of MKI because 100 percent of the therapist's Schedule C income was from MKI is inconsistent with the application of the ABC test to these facts." This statement evinces a fundamental lack of understanding of the Unemployment Compensation Law (UCL). N.J.S.A. 43:21-1 et seq., and the holding in Carpet Remnant, supra.; which is to say, the ALJ does not appear to understand that although a given therapist may be unable to file a valid claim for benefits based upon earnings from MKI *alone*, pursuant to N.J.S.A. 43:21-1(e), that individual's wages from *all employment* would be combined to establish a valid claim for benefits under the UCL. Thus, wages earned in "employment," as that term is defined within the UCL, *whether that employment is full-time or part-time*, are taxable without regard to whether at any given time an individual has sufficient earnings to establish a valid claim for benefits.

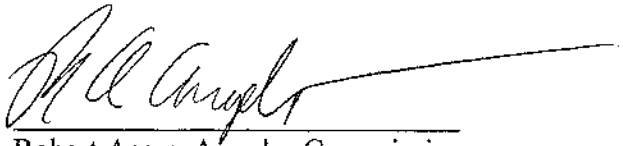
[6] Unrelated to the analysis under any specific prong of the ABC test, I feel compelled to address something troubling that I see in the ALJ's initial decision, which I know is echoed throughout the record in this case; that is, I feel I must address these references to "1099 work," "W-2 job," "W-2 employee" and phrases like "[h]e is paid as an independent contractor by 1099," and the related inference that by making the decision to report a worker's earnings to the federal government using a particular form, an employer may unilaterally deem that individual to be an independent contractor, as opposed to an employee. Whether one who is performing work is considered an independent contractor, as opposed to an employee, is governed by law, based on facts. 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.

ORDER

Therefore, with regard to all therapists engaged by MKI during the audit period petitioner's appeal is hereby dismissed and MKI is hereby ordered to immediately remit to the Department for the years 2011 through 2014 $118,347.75 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



Robert Asaro-Angelo, Commissioner
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