



West Berlin Dental Care, LLC
Petitioner,

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

v.

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

**FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER**

**OAL DKT. NO LID 14372-17
AGENCY DKT. NO. 17-018**

Issued: October 22, 2018

The appeal of West Berlin Dental Care, LLC (petitioner or West Berlin), a dental practice operated by Dr. Paul Hammond concerning an unemployment and temporary disability assessment of the New Jersey Department of Labor and Workforce Development (respondent or Department) was heard by Administrative Law Judge Catherine A. Tuohy (ALJ). In her Initial Decision, dated July 24, 2018, the ALJ concluded that petitioner had failed to present sufficient proofs to establish that two of the four individuals whose services were the basis for the Department's assessment – Joanne Caire and Jennifer Kazemi – 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 the two remaining individuals whose services were the basis for the Department's assessment – Ed Marshall and Ryan Morris – the ALJ concluded that petitioner had met its burden under the ABC test and had thereby established that the services provided by those individuals were those of genuine independent contractors. Therefore, the ALJ upheld the amounts assessed by the Department against petitioner for unpaid contributions to the unemployment compensation fund and the State disability benefits fund on behalf of Joanne Caire and Jennifer Kazemi. However, the ALJ

recommended the reversal of the Department's assessment against petitioner for unpaid contributions to the unemployment compensation fund and the State disability benefits fund on behalf of Ed Marshall and Ryan Morris.

Regarding the services provided to petitioner during the audit period by the above-listed individuals, the issue to be decided is whether those individuals 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 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 Department that:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

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

N.J.S.A. 43:21-19(i)(6)

This statutory criteria, 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 Department had satisfied its initial burden of proving that all four individuals – Joanne Caire, Jennifer Kazimi, Ed Marshall and Ryan Morris – had performed a service for remuneration. The burden of proof then having shifted to petitioner to rebut the resulting presumption of an employer/employee relationship, the ALJ concluded that petitioner had failed to meet that burden relative to the services performed by Jennifer Kazimi and Joanne Caire. Specifically, relative to Ms. Kazimi, the ALJ found the following:

Dr. Kazimi is a dentist practicing at Dr. Hammond's dental offices. Although Dr. Kazimi would still continue her profession as a dentist in the event her relationship with Dr. Hammond was terminated, she would lose the bulk of her income which was derived from West Berlin Dental. Dr. Kazimi was not engaged in her own independently established dental practice, but performed services for West Berlin Dental LLC. If her business relationship with West Berlin Dental ended, it is unlikely that she would be able to maintain an independent practice without an office, staff or equipment, since she utilized West Berlin Dental's offices, staff and equipment while engaging in her profession. So, although Dr. Kazimi has worked for other dentists, most of her income is derived from her relationship with West Berlin Dental. Therefore, I CONCLUDE that petitioner has failed to meet prong "C" of the ABC test as to Dr. Kazimi.

As to Ms. Caire, who provided office cleaning services to petitioner, the ALJ found the following:

Dr. Hammond did not control [Ms. Caire] in the performance of her cleaning duties and West Berlin is not in the business of office cleaning. Dr. Hammond believed she worked for a urologist and also did housecleaning for other clients. However, there was no documentation provided to establish that Ms. Caire was engaged in an independently established business. To the extent that N.J.S.A. 43:21-19(i)(6) requires the employer to prove all three parts of the ABC test, I CONCLUDE that petitioner has not satisfied prong "C" of the ABC test in regard to Joanne Caire.

Regarding Mr. Marshall, who provided lawn maintenance services to petitioner, and Mr. Morris, doing business as Ryan Property Management LLC, who provided and serviced dental equipment for petitioner, the ALJ found the following:

Dr. Hammond did not exercise control over the manner in which Mr. Marshall maintained the lawn. Lawn maintenance services are outside the usual course of business of a dental practice. Mr. Marshall is engaged in the lawn maintenance trade which is independent from the practice of dentistry. Therefore, I CONCLUDE that petitioner has satisfied the ABC test with regard to Ed Marshall.

...

Dr. Hammond did not exercise control over the manner in which Mr. Morris provided and serviced the dental equipment. The provision and servicing of dental equipment is outside the usual course of business of a dental practice. Mr. Morris is engaged in the occupation of providing and servicing dental equipment which is independent from the practice of

dentistry. Therefore, I CONCLUDE that petitioner has satisfied the ABC test with regard to Ryan Morris.

Based on the foregoing, the ALJ recommended that the Department's assessment against petitioner for unpaid contributions to the unemployment compensation fund and State disability benefits fund relative to Jennifer Kazimi and Joanne Caire be affirmed; however, the ALJ ordered that the Department's assessment against petitioner for the services performed by Ed Marshall and Ryan Morris be reversed. No exceptions were filed.

Having considered the record and the ALJ's Initial Decision, and having made an independent evaluation of the record, I have accepted and adopted the findings of fact, conclusions and recommendation contained in the ALJ's Initial Decision.

ORDER

Therefore, consistent with the recommendation of the ALJ, the Department's assessment against petitioner for unpaid contributions to the unemployment compensation fund and State disability benefits fund for services performed by Jennifer Kazimi and Joanne Caire is affirmed and the Department's assessment against petitioner for unpaid contributions to the unemployment compensation fund and State disability benefits fund for the services performed by Ed Marshall and Ryan Morris is reversed. Thus, petitioner is hereby ordered to immediately remit to the Department \$2,918.64 assessed for unpaid unemployment and temporary disability contributions for the years 2012 through 2015, along with applicable interest and penalties, minus that portion of the assessment attributable to the services performed by Mr. Marshall and Mr. Morris.

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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