East Bay Drywall, 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 18382-17
AGENCY DKT. NO. DOL 17-019

Issued: January 13, 2020

The appeal of East Bay Drywall, LLC ("East Bay" 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 2013 through 2016 ("the audit period") was heard by Administrative Law Judge John S. Kennedy (ALJ). In his initial decision, the ALJ explained that East Bay is a drywall contracting business, which pays "drywall subcontractors" to do the work – the installation, taping and finishing of the drywall - that East Bay has been contracted to perform. The ALJ divided the "drywall subcontractors" whose services had been the basis for the Department's assessment into two groups: (1) "business entities," and (2) "individuals not otherwise listed as some type of business entity." Relative to the "drywall subcontractors" characterized by the ALJ as "business entities," the ALJ concluded that none were employees, but rather, were all independent contractors. Relative to the "drywall subcontractors" characterized by the ALJ as "individuals not otherwise listed as some type of business entity;" specifically, Dan Martin, Ami Serra and Kyle Cuevas, the ALJ concluded that East Bay had failed to establish their status as independent contractors, concluding instead that each had been an employee of East Bay. Based on these findings, the ALJ ordered the reversal of the Department's determination

regarding petitioner's unemployment compensation and State disability benefits fund contribution liability relative to all of the "drywall subcontractors" characterized as "business entities," but affirmed the Department's contribution liability assessment against East Bay for the services performed by the "drywall subcontractors" characterized as "individuals not otherwise listed as some type of business entity;" namely, Dan Martin, Ami Serra and Kyle Cuevas.

The issue to be decided is whether the "drywall subcontractors" 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 "drywall subcontractors" 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.

In the ALJ's initial decision, his legal conclusions opened with the following statement:

> First, N.J.S.A. 43:21-19 is applicable only to services performed by individuals. "[I]ndividual" is used in both part A and part C of the ABC test. As a consequence, this section [that is, Section 19, of Chapter 21, of Title 43, of the New Jersey Statutes] cannot apply to payments made to business entities.

The ALJ then proceeded with an analysis under the ABC test of the services performed by each of the "drywall subcontractors," including those he had characterized as "business entities" and those he had characterized as "individuals not otherwise listed as some type of business entity." Specifically, relative to Prong "A" of the ABC test, the ALJ found the following:

> All of East Bay's subcontractors pass the first part of the ABC Test because they were not under petitioner's control by being placed with one of its clients and being paid by petitioner. Petitioner hired them for a specific job but did not instruct the subcontractors how to perform the work or how many individuals will be required to complete the work in the time frame provided by the builder. East Bay did not provide the subcontractors with any tools but does supply the materials such as sheetrock and tape. The subcontractors were required to supply ladders, scaffolding, stilts, chalk lines, electric tools, planks and any other tool required to complete the work. Other than providing the blueprints to the subcontractors, East Bay did not control or direct the performance of the subcontractors. Similar to the carpet installers in Carpet Remnant, subcontractors were free to accept or reject any job offered to them by East Bay. East Bay's subcontractors had a choice as to which of petitioner's clients they worked for.

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

> All of East Bay's work is performed at the locations under construction and not at the place of business of East Bay. All of the jobs sites at which the subcontractors performed their services were the "place of business" of East Bay's clients, not East Bay. They operate outside of East Bay's place of business and therefore, Part B of the ABC test is satisfied.

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

> Here, petitioner supplied business entity information[1] for all twelve of the businesses deemed non-bona fide independent contractors. All twelve

[1] The "business entity information" provided by petitioner consists primarily, if not entirely, of one or both of the following two documents: (1) a certificate of insurance, and (2) a computer printout from the "New Jersey Business Gateway, Business Entity Information and Records Service." (See Exhibits P-6 through P-15). The New Jersey Gateway reports/printouts list the principals of the "business entity," including

> businesses ceased operation prior to the audit being conducted. However, the business entity information provided by East Bay shows them all to be viable entities that existed independently of and apart from the particular service relationship with East Bay. Accordingly, East Bay's subcontractors that were business entities satisfy Part C of the ABC test.
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> Dan Martin failed the second prong by having no other source of income. Ami Serra did not operate a business and, therefore, failed the third prong because a company could not be deemed an independent business. Petitioner failed to provide any proof that Kyle Cuevas was a bona fide independent contractor. Therefore, I CONCLUDE that Dan Martin, Ami Serra and Kyle Cuevas failed the ABC Test and were therefore not independent contractors.

Exceptions were filed by respondent. A reply to exceptions was filed by petitioner.

At the outset of its exceptions, respondent takes issue the ALJ's opening conclusion that N.J.S.A. 43:21-19 does not apply to the "drywall subcontractors" who are "business entities," because they are not "individuals" who have provided services for remuneration. Specifically, with regard to the "drywall subcontractors" who had formed Limited Liability Companies (LLCs), respondent asserts that under pertinent New Jersey and Federal law and regulations, single-member LLCs are treated as "disregarded" entities for the purpose of unemployment compensation and State disability benefits fund contribution obligations and are classified by their tax filing status with the Internal Revenue Service (IRS). See N.J.A.C. 12:16-11.2 and 26 C.F.R. 301.7701-2(a). Respondent explains that under the pertinent regulations, "[i]f a subcontractor chooses to report compensation on a Federal Form 1040, Schedule C, the subcontractor is considered a sole proprietor and the subcontractor's relationship with the source of the compensation will be scrutinized under [the ABC test] to determine if an employer/employee relationship exists between the subcontractor and the entity providing compensation to the subcontractor." According to respondent, the record reflects that each of the "drywall subcontractors" who had been engaged to perform services for East Bay during the audit period and who formed LLCs, had filed returns with the IRS as sole proprietor/Schedule C business owners. Because a sole proprietor is not recognized as a legal entity separate and apart from the individual business owner, respondent argues that the services performed by those sole proprietors should be analyzed under the UCL's ABC test. Based on the foregoing, respondent concludes

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officers/directors (corporations), managers/members/managing members (LLCs), general partners (LPs) or trustees/officers (non-profits). The vast majority of New Jersey Business Gateway report/printouts list a single individual as the principal of the company. All but one of the New Jersey Gateway printouts indicate the status of the entity as either "REVOKED FOR NOT FILING ANNUAL REPORT FOR 2 CONSECUTIVE YEARS," or "Cancelled."

relative to the "drywall subcontractors" who were "sole proprietor/Schedule C business owner(s):"

> The ALJ clearly erred in finding that payments to these LLCs were not payments to "individuals." The payments made to these LLCs must be treated in a manner consistent with Federal and State law. Force 1 Drywall LLC, Ama Construction LLC, and Serra Drywall LLC are operated as individual sole proprietorships and thus, should be treated as "individuals" for the purposes of N.J.S.A. 43:21-19(i)(6). Accordingly, the ALJ's decision finding that the sole proprietor/LLCs are not individuals subject to the [UCL] should be reversed.

With regard to the "drywall subcontractors" operating as corporations, respondent asserts that no evidence was provided by East Bay to demonstrate that these "drywall subcontractors" had properly maintained their corporate status while performing services for and receiving payments from East Bay during the audit period, adding that under State law in order to remain in good standing a corporation must file periodic reports with the Secretary of State. See N.J.S.A. 15A:4-5(c). Therefore, respondent concludes that, "the ALJ's decision finding that the corporations listed in the audit [were] bona fide entities operating independently of East Bay should be reversed."

Relative to each of the three prongs of the ABC test, respondent maintains the following:

Prong "A"

Respondent asserts that in order to satisfy Prong "A", East Bay must demonstrate that it did not exercise control over the services performed by the individuals listed in the audit report and that it did not reserve the right to control the individual's performance of those services, adding that East Bay need not have controlled every facet of the individual's services for those individuals to be deemed employees under the UCL. See Carpet Remnant Warehouse v. New Jersey Dep't of Labor, 125 N.J. 567, 582 (1991). As to the relevant facts, respondent maintains that the testimony of Benjamin DeScala, Managing Member of East Bay, reveals the following: (1) the jobs on which the "drywall subcontractors" perform drywall installation, taping and finishing for East Bay are all bid on, negotiated for (relative to price, start date and duration), and acquired by East Bay without any input from the "drywall subcontractors;" (2) once the job has been acquired by East Bay, Mr. DeScala telephones the "drywall subcontractors" to see who is available and then instructs them when, where, and for how much they will be performing work under the contract between East Bay and the builder; (3) Mr. DeScala alone is responsible for setting the "drywall subcontractor's" rate of pay in order to keep the job within the parameters negotiated by East Bay with the builder; which is to say, the amount paid by East Bay to the "drywall subcontractors" is a fixed amount set by East Bay and is not negotiated with each "drywall subcontractor," (4) East Bay provides the materials for the job, such as the sheetrock, screws, nails, corner bead, spackle, and level line; (5) Mr. DeScala's father (Louis) appears on site and goes over the specifications of

each job per the blueprint; and (6) according to Mr. DeScala, if a builder is unhappy with a "drywall subcontractor's" work, the builder complains to East Bay and it is East Bay's responsibility to correct any deficiencies. Respondent concludes that based on the foregoing and the fact that without East Bay securing drywall work from the builder(s) the "drywall subcontractors" would not have access to any of the subject drywall installation, taping and finishing jobs, East Bay has failed to meet Prong A of the ABC test and the ALJ's conclusion to the contrary should be reversed.

Prong "B"

With regard to Prong "B" of the ABC test, which requires that in order to establish independent contractor status, one must prove that the service at issue is either outside the usual course of business for which 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 East Bay's business enterprise is the installation, taping and finishing of drywall pursuant to the contracts that East Bay maintains with the builders that are its clients, the work sites where those services are performed are locations where East Bay conducts an "integral part of its business." Similarly, respondent maintains that since the principal part of East Bay's business enterprise is the installation, taping and finishing of drywall, the performance of those services by the "drywall subcontractors" engaged by East Bay to satisfy East Bay's obligations and responsibilities under the contracts with its builder/clients is a service performed within, not outside of, East Bay's usual course of business. Consequently, respondent urges the Commissioner to reverse the ALJ's conclusion that East Bay has met its burden under Prong B of the ABC test.

Prong "C"

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 "drywall subcontractor" was engaged in a viable, independently established business providing drywall installation, taping and/or finishing services at the time that he or she rendered that service to petitioner. Relative to the facts adduced during the East Bay hearing, with an eye to addressing the above-cited standard,

respondent observes that all twelve of the "drywall subcontractors" who were engaged to provide services to East Bay during the audit period and who were "business entities" ceased operation after having provided services to East Bay (and prior to the Department having conducted its audit), raising an inference that these entities were created solely for the purpose of providing services to East Bay and were not enterprises that existed and could continue to exist independently and apart from the relationship with East Bay. Furthermore, respondent states the following:

> In regard to subcontractor letters (sent to each "drywall subcontractor" by the Department in order to solicit information and evidence supporting the existence of an independent business for the purpose of removing any bona fide independent businesses from the audit), Mr. Hander (the Department auditor) stated that letters were undeliverable to the addresses on the 1099s and other addresses listed in the State's data base.... In addition, Mr. Handler found that the subcontractors did not operate an independently established business because they did not advertise, have a business telephone listing or business location.
>
> DeScala also admitted that he was unable to obtain or provide any evidence to substantiate the claim that the subcontractors in question were independently established in a trade or business operated apart from East Bay. DeScala stated during his testimony that the subcontractors do not have an office, store front or internet presence. Many do not even have a business telephone listing.[2]
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> (citations omitted)

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

> All of East Bay's subcontractors clearly satisfy this requirement. The facts of this case clearly show that: (1) all of the subcontractors were free to accept or reject any offer of work from East Bay; (2) East Bay did not instruct any of its subcontractors as to the manner in which the work was to be done; (3) East Bay did not provide any tools or equipment to any of its subcontractors; (4) East Bay did not set the time frame in which the subcontractors were to complete their work; and (5) East Bay does not provide any of its subcontractors with transportation to and from job sites.

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[2] Respondent also notes in its exceptions that, "the Department and the court have long recognized that individuals performing drywall work are employees." In support of this assertion, respondent attaches to its exceptions the following decisions: L.W. Drywall, Inc. v. New Jersey Department of Labor, Initial Decision, OAL Dkt. No. LID 8875-88 (1989); L.W. Drywall, Incl. v. New Jersey Department of Labor, Final Administrative Decision of the Commissioner, OAL Dkt. No. LID 8875-88 (1990); and L.W. Drywall, Inc. v. N.J. Department of Labor, A-3627-89T2 (unpublished, App. Div. 1991).

Relative to Prong "B" petitioner maintains the following:

> New Jersey case law is clear that all work performed outside of the alleged employer's premises is considered to be "outside of all the places of business of the enterprise" within the meaning of N.J. Stat. 43:21-19(i)(6)(B). In Trauma Nurses, Inc., 576 A.2d at 292, the court ruled that the subcontractor nurses met the place of business requirement of part "B" because they worked in the hospitals, not the alleged employer's office. Moreover, in Schomp v. Fuller Brush Co., 12 A.2d 702, 705 (N.J. Super. Ct. App. Div. 1990), it was accepted that the services of door-to-door salesmen were performed "outside of all the places of business of the enterprise for which such service is performed." This is especially relevant to the case here because door-to-door salesmen, much like drywall installers, naturally only have opportunity to work at remote locations. Nevertheless, the sales company's office, and not the homes of its customers, is considered the sales company's place of business. In light of Schomp, it is clear that the job sites where East Bay's subcontractors performed all of their work are not considered East Bay's "places of business" under N.J. Stat. 43:21-19(i)(6)(B).[3]

As to Prong "C", petitioner maintains that, "in determining whether part 'C' is satisfied, courts have examined the contractor's relationship with the alleged employer prospectively," adding, "the contractor's ability to continue to perform services after the termination of a service relationship with an alleged employer has been examined from the perspective of the contractor at the time when the service relationship was still active." Thus, petitioner concludes, "the fact that twelve of the subcontractors here ceased operations prior to the audit being conducted does not mean that part 'C' is not satisfied," adding, "[t]he mere fact that a subcontractor ceased operations does not mean that the subcontractor's status as a bona-fide independent contractor is retroactively changed to that of an employee under N.J. Stat. 43:21-19(i)(6)."

Petitioner argues that "the subcontractors maintained separate business entity information which shows them to all be viable entities that existed independently of and

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[3] Petitioner also maintains that the issue under N.J.S.A. 43:21-19(i)(6)(B) of the Unemployment Compensation Law as to whether a service is performed outside of all the places of business of the enterprise for which the services is performed, should be governed by the definition of the term, "place of business" which appears at N.J.A.C. 18:7-7.2, within rules of the Division of Taxation, Department of Treasury (not the Department of Labor and Workforce Development). The rule cited by petitioner relates specifically to the Division of Taxation's enforcement of the Corporation Business Tax Act (not the UCL) and to whether under that the Corporation Business Tax Act a corporation is entitled to allocate part of its entire net income outside of New Jersey.

apart from their business relationships with East Bay;" then recreates verbatim the list of "business entity information" contained within the ALJ's initial decision, which regarding the twelve "drywall subcontractors" characterized as "business entities," consists primarily of certificates of insurance and the afore-mentioned New Jersey Business Gateway printouts. Finally, petitioner asserts that each "drywall subcontractor" maintained his own equipment, tools, personnel and work vans; and "had the ability to obtain work aside from the jobs that they received as a result of their service relationships with East Bay."

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 accept the ALJ's conclusion that Dan Martin, Ami Serra and Kyle Cuevas – the "drywall subcontractors" characterized by the ALJ as "individuals not otherwise listed as some type of business entity" – were employees of East Bay during the audit period and that East Bay is, therefore, responsible for unpaid contributions to the unemployment compensation and State disability benefits funds on behalf of those individuals. However, I reject the ALJ's reversal of the Department's determination that East Bay had employed the "drywall contractors" characterized by the ALJ as "business entities," and therefore, that petitioner is liable for unpaid contributions to the unemployment compensation and State disability benefits funds on behalf of those "drywall subcontractors" for the audit period, 2013 through 2016.

At the outset, I agree with respondent that under pertinent State and Federal law and regulations, single-member LLCs are treated as "disregarded" entities for the purpose of employment tax liability and are properly classified by their tax filing status with the IRS. See N.J.S.A. 42:2C-92. Consequently, I also agree with respondent that the "drywall subcontractors" who were operating single-member LLCs, each of whom had reported his compensation from East Bay on Federal Form 1040, Schedule C, were appropriately characterized by respondent for purposes of evaluating contribution liability as sole proprietors and their relationship with East Bay (the source of their remuneration) is properly analyzed using the UCL's ABC test. Regarding the "drywall subcontractors" that were operating as corporations, I agree with respondent that because no evidence was provided by East Bay to demonstrate that these "drywall subcontractors" had properly maintained their corporate status while performing services for and receiving payments from East Bay during the audit period, the ALJ's conclusion that each of these "drywall subcontractors" was operating as a corporation independent of East Bay is erroneous. For example, petitioner provided a New Jersey Business Gateway printout/report for JEC Construction, Inc. (Exhibit P-6). The report is dated February 27, 2019. It indicates that the original filing date for JEC Construction as a "domestic profit corporation" was October 17, 2011, that the corporate status was revoked on May 16, 2014 for having not filed an annual report for two consecutive years, that the annual report month was October and under both "last annual report" filed and "year" of last annual report, the printout/report indicates "N/A." Thus, JEC Construction filed no annual report in October 2012, no annual report in October 2013, and then promptly had

its corporate status revoked, which became effective in May 2014 (prior to the next annual report submission deadline). In other words, JEC Construction never filed a single annual report. Furthermore, under the heading "Principals," where the "domestic profit corporation" is to list corporate officers/directors, there is only one individual listed: Jose Eleidilane Custodio. Similarly, petitioner provided a New Jersey Business Gateway printout/report for Caslo Drywall Corporation (Exhibit P-7). The report is dated February 27, 2019. It indicates that the original filing date for Caslo Drywall as a "domestic profit corporation" was May 6, 2013, that the corporate status was revoked on December 16, 2015 for having not filed an annual report for two consecutive years, that the annual report month was May and under both "last annual report" filed and "year" of last annual report, the printout/report indicates "N/A." Thus, Caslo Drywall filed no annual report in May 2014, no annual report in May 2015, and then promptly had its corporate status revoked. In other words, as with JEC Construction, Caslo Drywall never filed a single annual report. Also, as with JEC Construction, under the heading "Principals," Caslo Drywall lists only one individual among the corporate officers and/or directors: Luis M. Olivares. The "business entity information" introduced at hearing by petitioner regarding the remaining "drywall subcontractors" characterized by the ALJ as "business entities" tells a similar story. That is, as asserted by respondent, each would appear to have been a corporation in name only. Under the circumstances, I agree with respondent that the relationship of each such "drywall subcontractor" with East Bay (the source of remuneration) is properly analyzed using the UCL's ABC test.

Turning to the ABC test, I agree with respondent that East Bay has failed to meet its burden under Prong "A." That is, I agree that the overwhelming weight of the evidence in the record supports the conclusion that the "drywall subcontractors" engaged by East Bay during the audit period were not free from control or direction over the performance of their work. Specifically, as observed by respondent, the testimony of Benjamin DeScala, Managing Member of East Bay, reveals that East Bay bid on, negotiated for and acquired all of the work performed by the "drywall subcontractors;" the amount paid by East Bay to the "drywall subcontractors" was a fixed amount set by East Bay and not negotiated with the "drywall subcontractor;" East Bay provided all of the materials for the job, such as sheetrock, screws, nails, corner bead, spackle and level lines; and East Bay, not the "drywall subcontractors," bore the risk of loss on each job. Mr. DeScala's testimony confirming the practices of East Bay reflects a degree of control over the "drywall subcontractors" 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 East Bay.

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 East Bay's business enterprise is the installation, taping and finishing of drywall pursuant to the contracts that East Bay maintains with the builders that are its clients, the work sites where those services are performed are locations where East Bay conducts an "integral part of its business." Similarly, I agree with respondent that since the principal part of East Bay's business enterprise is the installation, taping and finishing of drywall, the performance of those services by the "drywall subcontractors" engaged by East Bay to satisfy East Bay's obligations and responsibilities under the contracts with its builder/clients is a service performed within, not outside of, East Bay's usual course of business.

Regarding Prong "C" of the ABC test, 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, East Bay must demonstrate that *each* "drywall subcontractor" who performed services for East Bay during the audit period was engaged in a viable, independently established, business at the time that he rendered services to East Bay. 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, East Bay must prove by a preponderance of the credible evidence with regard to each "drywall subcontractor" whose services it engaged during the audit period that the "drywall subcontractor" 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 "drywall subcontractor" whose services East Bay engaged during the audit period, it must address the duration and strength of each "drywall subcontractor's" business during that period, the number of customers and their respective volume of business during that period, the number of employees of the "drywall subcontractor's" business or enterprise during that period, the extent of each "drywall subcontractor's" business resources during that period, and the amount of remuneration each "drywall subcontractor" received from East Bay during that period compared to that received from others; which is to say, not a general claim that each "drywall subcontractor" worked for or was free to work for others, but actual evidence reflecting the amount of remuneration that each "drywall subcontractor" received from East Bay compared to that received from others.

In the instant matter, petitioner relies almost entirely upon the so-called "business entity information" discussed at length above in support of its assertion that the "drywall subcontractors" it had engaged during the audit period other than Dan Martin, Ami Serra and Kyle Cuevas, were viable entities that existed independently of and apart from their business relationships with East Bay.[5] The ALJ agreed with petitioner, concluding that, "the business entity information provided by East Bay shows them all to be viable entities that existed independently of and apart from the particular service relationship with East Bay," adding without any further analysis, "[a]ccordingly, East Bay's subcontractors that were business entities satisfy Part C of the ABC test." However, the "business entity information" relied on so heavily by petitioner and the ALJ falls woefully short of meeting the standard enumerated in Carpet Remnant, supra. That is, it does not address the following factors with regard to each "drywall subcontractor:" the duration and strength of the business, the number of customers and their respective volume of business, or the number of employees; nor does it address the amount of remuneration each "drywall subcontractor" received from East Bay compared to that received from others for the same services.

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

[5] Mr. DeScala also testified that each "drywall subcontractor" maintained his own equipment, tools, personnel and work vans and "*had the ability to* obtain work aside from the jobs that they received as a result of their service relationships with East Bay" (emphasis added).

ORDER

Therefore, with regard to all "drywall subcontractors" engaged by East Bay during the audit period, including both those characterized by the ALJ as "business entities" and those characterized by the ALJ as "individuals not otherwise listed as some type of business entity," petitioner's appeal is hereby dismissed and East Bay is hereby ordered to immediately remit to the Department for the years 2013 through 2016 $42,120.79 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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