Alpha Omega 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 16487-15
AGENCY DKT. NO. DOL 15-015A

Issued: September 29, 2022

The appeal of Alpha Omega Drywall, LLC (Alpha Omega or petitioner) concerning an unemployment and temporary disability assessment of 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 2009 through 2014 ("the audit period") was heard by Administrative Law Judge Elia A. Pelios (ALJ). In his initial decision, the ALJ concluded that Alpha Omega had failed to present sufficient proofs to establish that the individuals who had been engaged by Alpha Omega during the audit period to perform work on the installation of drywall were bona fide independent contractors exempt from coverage under the New Jersey Unemployment Compensation Law (UCL), N.J.S.A. 43:21-1 et seq. Consequently, the ALJ affirmed the Department's assessment and dismissed petitioner's appeal.

The issue to be decided is whether the individuals who were engaged by Alpha Omega to perform drywall installation work (hereafter referred to as "Installers") were employees of Alpha Omega and, therefore, whether Alpha Omega 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 the work performed by those individuals.

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 established that a service has been performed for remuneration, that service is deemed to be employment and the individual who performed the service an employee 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 concluded that Alpha Omega had met its burden to establish that the Installers were free from control or direction by Alpha Omega. In support of this conclusion, the ALJ found that, "the individuals in question were ***generally*** free from petitioner's control" (emphasis added). The ALJ also stated that, "the individuals were not trained or ***closely*** supervised by the petitioner or his agents," and "[t]here did not appear to be ***significant*** procedures imposed by petitioner from which the individuals could or could not deviate" (emphasis added).

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

> In the current matter the record is clear that the individuals at issue performed services within the usual course of petitioner's business. With regard to whether the services were performed outside the petitioner's places of business, petitioner's enterprise has little to no physical plant, beyond the home office he (Jaime Aldebol, Jr., owner of Alpha Omega) uses to prepare his paperwork and

> identify and pursue jobs. The services provided by the individuals are not performed there. The remainder of the enterprise is largely conducted on site where the installation of drywall is to occur, which, if determined to be [among] petitioner's places of business, would require extending the meaning of such to every geographical point of installation, in contravention of Carpet Remnant Warehouse, 125 N.J. 567 (1991). Accordingly, I FIND and CONCLUDE that petitioner has demonstrated by a preponderance of the evidence, that the workers identified performed services outside of the petitioner's places of business.

Relative to Prong "C" of the ABC test, the ALJ acknowledged the holding in Carpet Remnant, supra, 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 putative employer compared to that received from others. The ALJ noted the testimony of Mr. Aldebol that each of the Installers engaged by Alpha Omega during the audit period had been required first to "show proof of business and certificates of insurance." Nevertheless, the ALJ found that Alpha Omega had failed to establish that it met the "C" Prong of the ABC test, and therefore, had failed to establish that the Installers engaged by Alpha Omega during the audit period were independent contractors rather than employees, explaining, "[b]usiness structure…is but one factor to consider [under Prong "C"]," adding:

> The petitioner in the instant matter (Alpha Omega) did not offer any evidence of advertising, business stationary or cards or phone numbers, independent trade names, professional directory listings, liability insurance, tax identification numbers, I.R.S. Form 1040 Schedules C, or any other indicia of separate enterprises for the subject workers. Furthermore, no competent credible evidence was offered as to the duration and strength of the installers' businesses; the number of customers and their respective volume of business; the number of employees; the extent of the installers' tools, equipment, vehicles, and similar resources. No demonstration has been made that the individual workers were engaged in a business that could have continued to exist independently and apart from their relationship with petitioner.

Based on the foregoing, the ALJ concluded that all of the Installers engaged by Alpha Omega during the audit period were employees. Thus, he affirmed the Department's assessment and dismissed petitioner's appeal. No exceptions were filed. However, when the New Jersey Supreme Court issued its Opinion in East Bay Drywall, LLC v. Dep't of Labor and Workforce Dev., 251 N.J. 477 (2022), the parties were afforded an opportunity to submit letter briefs to the Commissioner addressing the impact of that Opinion on the instant matter. The facts in East Bay Drywall, supra, were summarized by the Court as follows:

> East Bay is a drywall installation business operating in Stone Harbor, Avalon and Sea Isle, New Jersey. East Bay's principal, Benjamin DeScala, testified before the ALJ. He explained that ninety percent of East Bay's work consists of drywalling residential homes. According to DeScala, East Bay gets its business by communicating with builders who are already in the process of constructing homes. East Bay thereafter hires workers to complete the drywall installation, taping, and finishing on a per-job basis.
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> Once a builder accepts East Bay's bid for a particular project, East Bay contacts workers – whom it alleges to be subcontractors – to see who is available. Workers are free to accept or decline East Bay's offer of employment, and some workers have left mid-installation if they found a better job.
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> DeScala testified that Eat Bay deals with and hires all its workers in the same manner. Before employing a worker, DeScala requests an up-to-date certificate of liability insurance and tax identification numbers (proof of business registration) to ensure the worker is an independent entity.
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> East Bay provides the workers with the raw materials necessary to complete the drywall installation. The workers perform the labor but must provide their own tools and arrange for their own transportation to the worksites. East Bay does not dictate who or how many laborers the workers must hire to complete the project. Although East Bay does not direct how the workers install drywall, DeScala made clear East Bay remains responsible for the finished product. DeScala testified that he inspects the drywalling after the workers are finished and "[i]f the work doesn't come out good [he has] to hire another subcontractor to come and fix it."
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> . . .

Applying the "C" Prong factors enumerated in Carpet Remnant, supra., Gilchrist v. Div. of Emp. Sec., 48 N.J. Super. 147 (App. Div. 1957), and Trauma Nurses, Inc., v. Dep't of Lab., 242 N.J. Super.135 (App. Div. 1990), the Court in East Bay Drywall concluded that notwithstanding each Installer's possession of a business registration and certificate of insurance, East Bay had failed to meet its burden under Prong "C," to establish that the Installers had been customarily engaged in an independently established business enterprise. For example, the Court noted that East Bay had not provided evidence that the entities maintained independent business locations, advertised, or had employees. Thus, the Court in East Bay Drywall concluded that all of the Installers engaged by East Bay had not been independent contractors, but rather, had all been employees of East Bay. In so concluding, the Court offered the following observation:

> A business practice that requires workers to assume the appearance of an independent business entity – a company in name only - could give rise to an inference that such a practice was intended to obscure the employer's responsibility to remit its fund contributions as mandated by the State's employee protections statutes. That type of subterfuge is particularly damaging in the construction context, where workers may be less likely to be familiar with the public policy protections afforded by the ABC test and consequently particularly vulnerable to the manipulation of the laws intended to protect all employees. Such a business practice also undermines the public policy codified in the [Unemployment Compensation Law].
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> East Bay Drywall, supra, at 477.

Alpha Omega, in its letter brief regarding the impact on the instant matter of the Opinion in East Bay Drywall, supra,, asserts that it has satisfied Prong "C" of the ABC test, because it "maintained proper and complete books of its operations, operated consistently with the norms and practices of the industry, and cautiously required all of its subcontractors to prove the existence in good standing of their businesses, along with proof of insurance." Alpha Omega states that requiring it to provide proof of the viability of the businesses of these "subcontractors" beyond business registration information and certificates of insurance is "a requirement beyond Alpha Omega's ability and "doom[s] Alpha Omega to fail…on Prong C." As to the absence of evidence produced by Alpha Omega addressing the Prong "C" factors enumerated in Carpet Remnant, supra, Gilchrist, supra, and Trauma Nurses, supra, described in detail above, petitioner argues that, "each of the factors which the Supreme Court found lacking in East Bay Drywall, supra: the lack of advertising; the lack of business cards; contracts with others, is obviated by a strong and successful business relationship with Alpha Omega," adding, "[t]here is no evidence that the workers used by Alpha Omega were in any way dependent on Alpha Omega except that they made much of their income from the mutually beneficial relationship they had with Alpha Omega."

In its letter brief, respondent states that, like the Court in East Bay Drywall, supra, the ALJ in the instant matter "correctly concluded that Alpha [Omega] has failed to prove the drywall installers met the criteria required under Part C," adding, "[t]he petitioner did not have one drywall installer testify, nor did they have any documentation including contracts, invoices, business cards or any indicia of a business to demonstrate that these individuals were established in a business or trade that would survive the relationship with Alpha [Omega] or had income from a business outside his relationship with Alpha [Omega]."

CONCLUSION

Upon *de novo* review of the record, and after consideration of the ALJ"s initial decision, as well as the letter briefs submitted by both petitioner and respondent regarding

the impact on the instant matter of the Opinion in East Bay Drywall, supra, I hereby accept the ALJ's recommended order affirming the Department's assessment and dismissing petitioner's appeal.

The facts in this case are in every material respect identical to the facts in East Bay Drywall, supra. This is evident because as Alpha Omega indicated in its letter brief, the business practices of Alpha Omega are consistent with "the norms and practices of the [drywall installation] industry." Thus, just as East Bay's failure to produce any evidence of its Installers' independence beyond business registration information and a certificate of insurance was fatal to its claim that its Installers were independent contractors and that the services they had performed for East Bay were therefore exempt from coverage under the UCL, so too is Alpha Omega's reliance upon business registration information and a certificate of insurance as proof of independence absent any evidence addressing the "C" Prong factors enumerated in Carpet Remnant, supra, Gilchrist, supra, and Trauma Nurses, supra, fatal to its claim of UCL exemption for the services performed by its Installers. I find wholly unpersuasive petitioner's argument that "the strong and successful business relationship" between Alpha Omega and its Installers "obviates" the need to produce evidence to address the traditional "C" Prong factors, such as the duration and strength of the Installer's business, the number of customers of the Installer and their respective volume of business, the number of employees of the Installer, and the amount of remuneration each Installer received from the Alpha Omega compared to that received from others for the same services. I therefore agree with the ALJ that Alpha Omega has failed to demonstrate that the individual workers – the Installers – were engaged in a business that could have continued to exist independently and apart from their relationship with Alpha Omega, and that Alpha Omega, has therefore failed to meet its burden under Prong "C" of the ABC test.

I need not address either Prong "A" or Prong "B" of the ABC test in this decision, because, as indicated earlier, the ABC test is written in the conjunctive and, therefore, Alpha Omega's failure to meet its burden of proving Prong "C" alone is sufficient to find that that the Installers are employees, rather than independent contractors. Nevertheless, I do feel compelled to express for the record my disagreement with the ALJ's conclusions regarding the "A" and "B" prongs. That is, regarding Prong "A," I disagree with the ALJ that petitioner successfully demonstrated that the Installers were free from control or direction over the performance of the services they had performed for Alpha Omega. Even within the body of the ALJ's initial decision, the qualifying words used to describe the supposed freedom from control or direction are inconsistent with and ultimately belie his conclusion that Alpha Omega has met its burden under Prong "A." Specifically, the ALJ finds that the individuals were "generally" free from petitioner's control; he finds that the individuals were not "closely" supervised by petitioner; and finally, the ALJ finds that there did not appear to be "significant" procedures imposed by the petitioner from which the Installers could not deviate. I must infer the following from the use of these qualifiers: (1) there was ***some*** control or direction exercised by Alpha Omega over the work of the Installers, or else the ALJ would simply have made the unqualified finding that the Installers were free from control or direction, rather than that they were

"generally" free from control or direction; (2) similarly, there ***was*** supervision by Alpha Omega over the work of the Installers, if not "close" supervision, or else the ALJ would simply have made the unqualified finding that the Installers were free from supervision; and (3) there ***were*** procedures imposed by Alpha Omega over the work of the Installers, if not "significant" procedures, or else the ALJ would simply have made the unqualified finding that Alpha Omega imposed no procedures on the Installers in the performance of their work. Under Prong "A" of the ABC test, the putative employer has the burden of establishing that the individual in question "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" (emphasis added). The standard is "free from control or direction;" not "generally free from control or direction;" not "free from close supervision;" not "free from significant procedures." In fact, the overwhelming weight of the evidence in the record supports the conclusion that the Installers engaged by Alpha Omega during the audit period were ***not*** free from control or direction over the performance of their work. Not only did Mr. Aldebol testify that he did, in fact, supervise the work of the Installers in that he inspected their work and determined whether it was sufficient, but Mr. Aldebol also testified that Alpha Omega bid on, negotiated for and acquired all of the work performed by the Installers; Alpha Omega set the amount paid to the Installers; Alpha Omega provided all of the materials for the job; and importantly, Alpha Omega bore the risk of loss on each job. Therefore, I find that Alpha Omega failed to meet its burden under Prong "A" of the ABC test.

As to Prong "B," I disagree with the ALJ's conclusion that determining the work sites where the installation of drywall occurred to be among Alpha Omega's places of business would contravene the Court's holding in Carpet Remnant, supra. Under Prong "B," the putative employer has the burden of establishing 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. 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, since the principal part of Alpha Omega's business enterprise is the installation of drywall pursuant to the contracts that Alpha Omega maintains with its builder clients, the work sites where those services are performed are locations where Alpha Omega conducts an "integral part of its business." It is true that the Court in Carpet Remnant, supra, ultimately ruled that the homes of Carpet Remnant Warehouse's customers where the installation of carpet occurred were not among Carpet Remnant Warehouse's places of business; however, what distinguishes the installation of carpet in Carpet Remnant, supra, from the installation of drywall in the instant matter is that Carpet Remnant Warehouse had a showroom store, where it sold carpet over-the-counter, which was its business; that is, the business of carpet sales. When it sold carpet from its store, Carpet Remnant Warehouse would offer the option of arranging for the purchased carpet to be installed. Not all customers of Carpet Remnant Warehouse who purchased carpet would elect to have Carpet Remnant Warehouse arrange for the carpet's installation. That is, some customers would buy the carpet and arrange for its installation on their own. Thus, the installation of carpet was an ancillary service offered to the customers of

Carpet Remnant Warehouse who had purchased carpet from their store. By contrast, Alpha Omega's primary business is ***not*** the ***sale*** of drywall, but rather the ***installation*** of drywall. By Mr. Aldebol's own account, Alpha Omega is in the business of drywall installation; its customers are builders; it signs contracts with those builders to install drywall; and the Installers at issue in this matter install the drywall pursuant to those contracts. The sites where drywall is installed by a company that is in the business of drywall installation are locations where that drywall installation company conducts "an integral part of its business" and, therefore, are among the drywall installation company's places of business. This finding is not in contravention of Carpet Remnant, supra, but is rather, entirely consistent with Carpet Remnant, supra.

ORDER

Therefore, with regard to all Installers engaged by Alpha Omega during the audit period, petitioner's appeal is hereby dismissed and Alpha Omega is hereby ordered to immediately remit to the Department for the years 2009 through 2014 $33,557.37 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

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