



Yeamon Music, Inc.,
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 02286-20
AGENCY DKT. NO. DOL 19-008**

Issued: January 19, 2023

The appeal of Yeamon Music, Inc. (Yeamon 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 2014 through 2018 (“the audit period”) was heard by Administrative Law Judge Jacob S. Gertsman (ALJ). Yeamon Music, Inc., was created by James J. “Jimmy” Maraventano, of “Jimmy and the Parrots” (JATP), a Jimmy Buffet cover band, as the business arm of JATP. Jimmy, along with his wife Kristine, and son James, are the owners of Yeamon. Jimmy owns fifty percent of the company, and Kristine and James each own twenty-five percent. The Yeamon bank account holds the band’s money, from which the musicians, sound technician and administrator at issue are paid. In his initial decision, the ALJ concluded that Yeamon had failed to present sufficient proofs to establish that the following individuals, who had performed services for Yeamon during the audit period, 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.: Jimmy Maraventano (musician), James C. “James” Maraventano (musician), Fred Saunders (musician), Dan Ehrlich (musician), Vincent Dalbo (sound technician), and Mary Beth Rotella (administrator). Consequently, the ALJ affirmed the

Department's assessment as to the services performed during the audit period by those individuals and dismissed petitioner's appeal.

The issue to be decided is whether the above-listed individuals who were engaged by Yeamon to perform work as musicians, a sound technician and an administrator, respectively, were employees of Yeamon and, therefore, whether Yeamon 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

(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, 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 Yeamon had met its burden to establish that the musicians (Jimmy and James Maraventano, Saunders and Ehrlich) and the sound technician (Dalbo) were free from control or direction by Yeamon. In support of this conclusion, the ALJ found the following:

Here, the mere act of informing the musicians and technicians of the date, time and place of a gig, or Jimmy leading the band on stage, does not establish control or direction over these individuals. The musicians and sound technicians are free to choose whether to accept or reject any offer to play a gig when it is offered by either Jimmy or Rotella. The musicians own their own instruments, and Dalbo owns his equipment. Further, there is no indication that these individuals were provided with any fringe benefits.

Regarding application of Prong “A” of the ABC test to the services performed by Rotella, the ALJ found that Yeamon had failed to meet its burden to establish that Rotella was free from control or direction by Yeamon, explaining that “Jimmy supervises Rotella for all her duties with Yeamon, and following discussions between them, he instructs her on what needs to be done.”

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

The record is clear that the individuals at issue performed services within the usual course of petitioner’s business.

...

Regarding whether the services were performed outside the petitioner’s places of business, petitioner’s enterprise has little to no physical plant. Yeamon’s business address is at Jimmy’s home, however, he does not provide any services for the company at that location.

...

While Yeamon is an entertainment company that advertises the sale of compact discs, cruises and merchandise on its website, there can be no doubt that the live performances of JATP, and the services related to those performances at the venues, are an integral part of Yeamon’s business. Accordingly, I CONCLUDE that petitioner has failed to demonstrate by a preponderance of evidence that the workers identified performed services outside of petitioner’s places of business, and thus has failed to satisfy Prong B.

Relative to Prong “C” of the ABC test, the ALJ acknowledged the holding in Carpet Remnant Warehouse, Inc. v. N.J. 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 putative employer compared to that received from others. Considering those factors and applying them to the

evidence adduced during the hearing, the ALJ found that Yeamon had failed to establish that it met Prong “C” of the ABC test, and therefore, had failed to establish that the four musicians, sound technician and administrator at issue who had been engaged by Yeamon during the audit period were independent contractors rather than employees. Specifically, the ALJ explained with regard to Saunders, Ehrlich and James Maraventano, “[t]he record demonstrates that Saunders, Ehrlich and James played in JATP during the audit period and petitioner presented no evidence, including advertisements, that any of these individuals were in an independently established business as a professional musician.” Regarding the sound technician, the ALJ found that, “Dalbo’s I.R.S. Form 1040 Schedule C does not contain any business expenses such as advertisements or insurance, and only contains expenses for gas, tolls and hotels,” adding, “his gross receipts from Yeamon in 2014 were \$17,600, representing 72.73 % of the gross receipts for that year.” As to Rotella, the ALJ found that although she describes herself as a “freelance bookkeeper and booking agent” on her Facebook page, Rotella does not advertise or hold herself out to the general public and her name is on the JATP business cards along with Jimmy’s name, adding that Rotella works only with JATP and her gross sales from Yeamon in 2014 were \$9,600, representing 100% of her gross receipts.

Regarding Jimmy’s and James’ status as corporate officers of Yeamon, the ALJ cited as controlling the Departmental rule, N.J.A.C. 12:16-4.6, which provides the following:

(a) For the purpose of the Unemployment Compensation and Temporary Disability Benefits Laws, each officer of a corporation receiving remuneration for any personal services performed for that corporation shall be considered to be in its employ, and such payments shall be taxable.

(b) An election to report under the Small Business Corporation provisions of Section 1368 of the Internal Revenue Code whereby corporate profits may be distributed as dividends to shareholders, commonly referred to as Subchapter S or 1120S corporations, shall not affect (a) above. Reasonable remuneration as determined through facts and circumstances, shall be considered wages for benefit and contribution purposes when paid to officers of corporations having made such an election if the officers perform any services.

The ALJ thus concluded that since Jimmy and James, both corporate officers of Yeamon, had played in JATP and received 1120S distributions in 2014 of \$12,280 and \$6,139, respectively, both were in the employ of Yeamon and all payments made were taxable.¹

¹ The ALJ also found unpersuasive, as do I, Yeamon’s reliance in support of its assertion of independent contractor status for the individuals in question on the holdings in Jack Koza t/a Trieste v. N.J. Dept. of Labor, 282 N.J. Super. 560 (1995), Jack Koza t/a Trieste v. N.J. Dept. of Labor, 307 N.J. Super. 439 (1998), and Garden State Fireworks v. N.J. Department of Labor and Workforce Development (N.J. Super 2017; A-1581-15T2).

Based on the foregoing, the ALJ concluded that Jimmy Maraventano, James Maraventano, Fred Saunders, Dan Ehrlich, Vincent Dalbo, and Mary Beth Rotella, were all employees of Yeamon. Thus, he affirmed the Department's assessment relative to those individuals for \$9,156.11 in unpaid unemployment and temporary disability contributions, along with applicable interest and penalties, and dismissed petitioner's appeal. Exceptions were filed by both petitioner and respondent.

In its exceptions, petitioner, Yeamon, asserts that some of the six individuals in question would not have been eligible for benefits under the UCL during the audit period based on payments from petitioner alone; that some of the six individuals in question had earned more than the maximum taxable wage base in employment other than in connection with Yeamon and that, therefore, "collection of contributions from those individuals retroactively imposed by the Department, if paid during those years, [would be inappropriate in that it] would have entitled those workers to not one cent more in benefits than was actually paid in those years in connection with actual full-time employment other than in connection with Yeamon."

Petitioner also maintains the following:

- (1) The ALJ incorrectly concluded under Prong "B" of the ABC test that the venues at which JATP performed were among Yeamon's places of business;
- (2) The ALJ should not have rejected petitioner's argument as to the relevance of the unpublished opinion in Garden State Fireworks, supra, on the basis that the opinion is non-precedential and non-binding; and
- (3) the ALJ incorrectly considered within his Prong "C" analysis the existence or absence of advertising by the individuals in question of an independently established business, characterizing this as "just another invented 'requirement' that could not withstand judicial review."

In respondent's exceptions, it agrees with the ALJ's conclusion with regard to all six individuals in question, that petitioner has failed to meet its burden under the ABC test and that, therefore, all six were employees of Yeamon, rather than independent contractors. However, respondent does take issue with the ALJ's finding regarding the musicians and sound technician that each had been free from direction or control by

Specifically, the ALJ found that "this matter is distinguished from the Koza matters since here Jimmy determined how much each musician is paid for a gig and Koza's band was a 'joint venture where petitioner merely was the conduit for the payment of the group's earnings, net of expenses, to be shared by all.'" Koza, supra (emphasis added by the ALJ). As to Garden State Fireworks, supra, the ALJ noted that it is an unpublished opinion, it is not binding, and stated that the language cited from the opinion was not persuasive.

Yeamon and, that, therefore, Yeamon had met its burden under Prong “A” of the ABC test with regard to those individuals. Specifically, respondent maintains that Yeamon exercised direction or control over all six individuals, including the musicians and sound technician, when Yeamon unilaterally negotiated a single price for each “gig” with the venue owner, and when Jimmy decided how much to pay each individual for the gig from that check, adding, “[u]nlike an independent contractor, these individuals are not free to negotiate their compensation and must accept the amount offered to them for the services they provide to Yeamon.” In addition, respondent asserts that by Jimmy Maraventano’s own admission, he establishes the catalogue of songs to be played by the band and instructs the musicians and sound technician which songs from that catalogue will be played. This, maintains respondent, is also evidence of direction or control exercised by Yeamon.

CONCLUSION

Upon *de novo* review of the record, and after consideration of the ALJ’s initial decision, as well as the exceptions submitted by petitioner and respondent, respectively, I hereby accept the ALJ’s recommended order affirming the Department’s assessment and dismissing petitioner’s appeal.

Regarding Prong “C” of the ABC test, as reflected in the opinions in both Carpet Remnant, supra., and Gilchrist v. Division of Employment Sec., 48 N.J. Super. 147 (App. Div. 1957)., 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, Yeamon must demonstrate that *each* of the six individuals in question – the four musicians, the sound technician and the administrator - who performed services for Yeamon during the audit period was engaged in a viable, independently established, business at the time that he or she rendered services to Yeamon. See Gilchrist, supra., and Schomp v. Fuller Brush Co., 124 N.J.L. 487 (Sup. Ct. 1940).

In Carpet Remnant, supra., which 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,² 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, Yeamon must prove by a preponderance of the credible evidence with regard to each of the six individuals in question whose services it engaged during the audit period that the he or she 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 of the six individuals in question whose services Yeamon engaged during the audit period, it must address the duration and strength of each individual’s business during that period, the number of customers and their respective volume of business during that period, the number of employees of the business or enterprise during that period, the extent of each individual’s business resources during that period, and the amount of remuneration each individual received from Yeamon during that period compared to that received from others; which is to say, not a general claim that each musician, sound technician or administrator worked for or was free to work for others, but actual evidence reflecting the amount of remuneration that each musician, sound technician and administrator received from Yeamon compared to that received from others for performance of the same service. I agree with the ALJ that Yeamon has failed to demonstrate that the individual workers – the four musicians, the sound technician and the administrator – were engaged in a business that could have continued to exist independently and apart from their relationship with Yeamon, and that Yeamon, 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, Yeamon’s failure to meet its burden of proving Prong “C” alone is sufficient to find that that the six individuals in question are employees, rather than independent contractors. Nevertheless, I do feel compelled to express for the record that I agree with the ALJ’s findings and conclusions regarding Prong “B” of the ABC test; which is to say, I agree that the services performed by the six individuals in question were performed within, not without, Yeamon’s usual course of business. I also agree with the ALJ that the live

² Brown was one of the merchandisers who had been engaged to perform services for Spar Marketing, Inc.

performances of JATP, and the services related to those performances at the venues, are an integral part of Yeamon's business, and therefore, the venues are among petitioner's places of business. Thus, petitioner has failed to demonstrate by a preponderance of evidence that the workers identified performed services either outside of petitioner's usual course of business or outside of all petitioner's places of business.

Regarding Prong "A," I agree with the ALJ's findings and conclusion relative to Rotella, the administrator, that Jimmy Maraventano supervised Rotella in all of her duties with Yeamon and that, therefore, petitioner has failed to meet its burden under Prong "A" to establish that Rotella was free from control or direction by Yeamon. However, I disagree with the ALJ's findings and conclusion relative to the musicians and sound technician engaged by Yeamon. That is, I disagree with the ALJ's conclusion that Yeamon has met its burden to establish that the musicians and sound technician were free from control or direction because they were able to "choose to accept or reject any offer to play a gig when it is offered," they own their own instruments or equipment, and were not provided any fringe benefits. The Court in East Bay Drywall v. Dep't of Labor and Workforce Dev., 251 N.J. 477 (2022), expressly questioned the "probative value" of "refusal to accept or complete work," explaining that "generally speaking and subject to personal contractual obligations, even wholly dependent employees may choose to work for more than one employer or abruptly resign from their position" and, "like an employee, even a bona fide independent contractor is not free from the pressure to accept a job." Id. As to the musicians and sound technician owning their own instruments or equipment, I do not believe that is at all relevant to the question of direction or control under Prong "A," nor do I believe the provision of fringe benefits is relevant to the Prong "A" analysis. Rather, I agree with respondent that Yeamon exercised direction or control over the musicians and sound technician when Yeamon unilaterally negotiated a single price for each "gig" with the venue owner, and when Jimmy Maraventano decided how much to pay each individual for the gig from that check. That is, I agree with respondent that "[u]nlike an independent contractor, these individuals are not free to negotiate their compensation and must accept the amount offered to them for the services they provide to Yeamon."

With specific regard to petitioner's assertion that among the reasons the services in question are exempt from UCL coverage is that the individuals who performed the services would not have been eligible for benefits under the UCL based on payments from petitioner alone; under N.J.S.A. 43:21-4(e), an individual's wages from all employment are combined to establish a valid claim for benefits under the UCL. Thus, for example, an individual who works full-time with the State as an Investigator earning \$45,000 per year, and who also works on a seasonal basis (during November and December) as a salesperson for a retail establishment earning \$2,000 per year, is no less an employee of the retail establishment, nor is the retail establishment any less responsible to remit UI/DI contributions on behalf of its seasonal employee, simply because the individual holds full-time employment with the State, or because the individual would be unable to file a valid claim for benefits based on the \$2,000 in earnings from the retail establishment alone. Each is employment under the UCL (one full-time and the other part-time/seasonal) and each carries with it an obligation on the

part of the employer to remit UI/DI contributions on behalf of its employee based on wages earned.

ORDER

Therefore, with regard to the six individuals in question - Jimmy Maraventano (musician), James Maraventano (musician), Fred Saunders (musician), Dan Ehrlich (musician), Vincent Dalbo (sound technician), and Mary Beth Rotella (administrator), who were engaged by Yeamon during the audit period, petitioner's appeal is hereby dismissed and Yeamon is hereby ordered to immediately remit to the Department for the years 2014 through 2018 \$9,156.11 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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