Jersey Shore Reporting 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 07013-14
AGENCY DKT. NO. DOL 14-003

Issued: December 31, 2021

I. BACKGROUND

Pursuant to N.J.S.A. 43:21-14(c), on August 8, 2013 the New Jersey Department of Labor and Workforce Development ("Department" or "Respondent") assessed Jersey Shore Reporting ("Jersey Shore" or "Company" or "Petitioner") for unpaid contributions to the Department's unemployment and disability benefit funds for the period from 2008 to 2010 (the "audit period"), in the total amount of $39,236.06. Jersey Shore filed a timely appeal and the matter was transferred in 2014 to the Office of Administrative Law ("OAL") for a hearing as a contested case before Administrative Law Judge ("ALJ") Elia A. Pelios.

Jersey Shore is a registered court reporting agency that provides legal transcription services to attorneys, courts, and public agencies (including the State's workers' compensation courts). The principal issue before the ALJ was whether the court reporters engaged by Jersey Shore during the audit period were employees of the company, and consequently whether Jersey Shore was responsible under N.J.S.A. 43:21-7 for making contributions to the unemployment and disability benefits funds for those individuals. 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 either that the service is exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7), (i)(9), or (i)(10), which contain 27 separate specialized exemptions from UCL coverage, or that the service and the individual performing the service meet the statutory test for independent contractor status found at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), commonly referred to as the "ABC test."

Under the UCL, in order to successfully assert any of the 27 separate specialized exemptions set forth at N.J.S.A. 43:21-19(i)(7), (i)(9), and (i)(10), a putative employer must establish not only that the services are covered under the terms of the particular UCL exemption, but also that those services are exempt under the Federal Unemployment Tax Act ("FUTA"), or that contributions with respect to those services are not required to be paid into a state unemployment fund as a condition for a tax offset credit against the tax imposed by FUTA. The relevant exemption applicable in this case is at N.J.S.A. 43:21-19(i)(10):

> Services performed by a legal transcriber, or certified court reporter certified pursuant to P.L.1940, c.175 (C.45:15B-1 et seq.), shall not be deemed to be

> employment subject to the "unemployment compensation law," R.S.43:21-1 et seq., if those services are provided to a third party by the transcriber or reporter who is referred to the third party pursuant to an agreement with another legal transcriber or legal transcription service, or certified court reporter or court reporting service, on a freelance basis, compensation for which is based upon a fee per transcript page, flat attendance fee, or other flat minimum fee, or combination thereof, set forth in the agreement.
>
> For purposes of this paragraph (10): "legal transcription service" and "legal transcribing" mean making use, by audio, video or voice recording, of a verbatim record of court proceedings, depositions, other judicial proceedings, meetings of boards, agencies, corporations, or other bodies or groups, and causing that record to be printed in readable form or produced on a computer screen in readable form; and "legal transcriber" means a person who engages in "legal transcribing."

If a putative employer cannot establish a specialized exemption from UCL coverage, it is also possible to assert an exemption under the UCL by meeting the statutory criteria for independent contractor status under the ABC test. A putative employer has the burden to establish the following with regard to the services and the individual performing those services:

> (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 business for which such service is performed, or that such services 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).

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.

It is not disputed that Jersey Shore paid its court reporters an "appearance fee" and/or a "per page fee" for their work, depending upon if a transcript was ordered. (Tr. 1[1], 14:8-20; 65:1-66:10, 243:11-245:8; Tr. 2, 13:7-12). Jersey Shore issued Form 1099s to the court reporters documenting these payments, as detailed in the auditor's report. (Exh. R-2, pp. 12-13, 17-18, 22-23). As a threshold matter, I find that this constitutes "remuneration" under the UCL for services rendered.

I also note that the Certified Court Reporters Association of New Jersey was given leave by the ALJ to participate in the case. Its counsel was present and participated during the two days of testimony in April 2019 and submitted a brief. I view the Association's submission as akin to an *amicus* brief, have included it in the record, and have considered it accordingly.

This case has a lengthy procedural history, which I will summarize.

A. ALJ'S APRIL 18, 2018 ORDER GRANTING PARTIAL SUMMARY DECISION

On January 26, 2015, Jersey Shore filed a motion for summary decision, asserting that the company was not liable for these contributions. (Summary Decision, p. 2). Jersey Shore argued two points. First, it argued that in 2008 and 2009 its court reporters were independent contractors and not employees, and therefore the company was not required to contribute to the State funds. Ibid. For 2010, the company argued that it was not liable because in that year, the State Legislature amended the UCL to "specifically exempt court reporters from coverage under the law, pursuant to N.J.S.A. 43:21-19(i)(10)." Ibid.

[1] "Tr. 1" refers to the transcript of the OAL hearing conducted on April 23, 2019, and "Tr. 2" refers to the transcript of the same hearing conducted on April 24, 2019.

The Department argued that in 2008 and 2009 the court reporters were employees under the UCL and not independent contractors, and therefore the company was liable. Id. at 3. As for 2010, the Department argued that there was no such blanket exclusion for court reporters, and the company could not avail itself of the exemption because it did not hold a corresponding exemption under FUTA. Id. at 3.

In his decision, the ALJ found that there were genuine issues of material fact that necessitated a hearing to determine Jersey Shore's liability for 2008 and 2009. Id. at 10. Consequently, the ALJ denied the company's motion for summary decision relative to its contributions for these two years. Ibid. As for liability in 2010, the ALJ granted the company's motion for summary decision. Ibid. The ALJ found that under P.L. 2009, c. 211, the Legislature "amended the UCL...to specifically exempt services performed by legal transcribers or court reporters irrespective of a parallel exemption under FUTA." Ibid. Therefore, the company did not owe contributions for 2010. Ibid.

B. COMMISSIONER'S JULY 19, 2018 REMAND

On April 23, 2018 the Department filed a request for interlocutory review. I determined that this request was more appropriately viewed as a request for my review, as agency head, of an initial decision under N.J.A.C. 1:1-12.5(e). (Remand, p. 1). I accepted the Department's submission as exceptions to the ALJ's summary decision, and accepted Jersey Shore's submission as a reply to the exceptions. Id. at 1-2.

In its brief, the Department principally argued that the ALJ erred in holding that the 2010 amendment to the UCL exempted court reporters from UCL coverage without a parallel FUTA exemption. The Department wrote:

> The Legislature may have been well-intentioned when it stated its intention to grant an exemption to the employers of court reporters without also requiring a

> corresponding FUTA exemption. However, the Legislative committee amendment statements cannot alter the plain language of the previously enacted legislative mandate imposed by N.J.S.A. 43:21-19(i)(1)(G)[2]. N.J.S.A. 43:21-19(i)(1)(G) requires that service must be covered by the UCL unless it has been demonstrated that there is a corresponding FUTA exemption…
>
> N.J.S.A. 43:21-19(i)(10) does not contain any language directing that this exemption shall be granted in the absence of a FUTA exemption. Indeed, for the above-stated reasons it could not. Here, the only language suggesting that the statute be applied in such a manner is outside the mandatory plain language of the statute and is contained solely within the legislative statements. N.J.S.A. 43:21-19(i)(10) is clearly subject to the provisions of N.J.S.A. 43:21-19(i)(1)(G) as it is in subsection (i) of section 19. Applying N.J.S.A. 43:21-19(i)(10) in the manner apparently intended by the Legislature and as urged here by Jersey Shore would create a clear conflict with the plain language of N.J.S.A. 43:21-19(i)(1)(G). Id. at 4.

In its brief, Jersey Shore argued that the Department was mistaken in its interpretation and "refuses to accept that the Legislature understood what it was doing when it amended the statute in 2010, and the Governor…intentionally and knowingly signed the bill allowing for the exemption." (Brief, p. 2). Therefore, according to Jersey Shore, the Department's position was against legislative intent. The company also argued that the text of the UCL should not be read as indicating that N.J.S.A. 43:21-19(i)(1)(G) applies to all of the provisions in the entire subsection (i); rather, it should be read as applying only to subsection (i)(1). Id. at 7-8.

In a decision delivered on July 19, 2018, I accepted the ALJ's denial of Jersey Shore's motion for summary decision for the audit years 2008 and 2009, and rejected the ALJ's grant of summary decision for the audit year 2010. I disagreed with the company's claim that the legislative history of the bill should be dispositive. Rather, I was guided by the first principle of

[2]The text of this portion of the UCL reads: (G) Notwithstanding any other provision of this subsection, service in this State with respect to which the taxes required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under the "unemployment compensation law" (R.S.43:21-1 et seq.).

statutory interpretation, that "if the statutory language is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than the act's literal terms to divine the Legislature's intent." (Remand, p. 5, *quoting* State v. Butler, 89 N.J. 220, 226 (1982)). That is to say, according to this first principle it is only appropriate to delve into formal legislative history if the statute is ambiguous or unclear. "Legislative history is not the law…it is the business of Congress to sum up its own debates in legislation, and once it enacts a statute we do not inquire what the legislature meant; we ask only what the statute means." Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 396-397 (1951) (Jackson, J. concurring). I found that because of the existence of N.J.S.A. 43:21-19(i)(1)(G), no statutory provision within subsection (i) can otherwise remove the requirement that employment must be covered under the UCL where there is a corresponding obligation to pay employment taxes under FUTA. (Remand, p. 5). It is not enough to have a state statutory exemption in these cases; rather, there must be a parallel FUTA exemption in order to be relieved of paying UI taxes. Ibid. Indeed, under N.J.S.A. 43:21-19(i)(1)(G), **"[n]otwithstanding any other provision of this subsection**[3]," "Employment" under the UCL includes service in the State of New Jersey with respect to which the taxes required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or for which as a condition for full tax credit against the tax imposed by FUTA is required to be covered under the New Jersey UCL. Ibid.

I remanded to the ALJ for a full evidentiary hearing with regard to the entire 2008-2010 audit period.

[3] That is, subsection (i), of Section 19, of Chapter 21, of Title 43 of the N.J.S.

C. ALJ'S SEPTEMBER 22, 2020 INITIAL DECISION

In a decision delivered on September 22, 2020 the ALJ found that Jersey Shore had no liability for the 2008-2010 audit period.

The ALJ credited the July 19, 2018 remand decision as "in force and the law of this case," and accepted my conclusion that court reporters are not "categorically exempt" from the UCL as of 2010. (Initial Decision, p. 16). He then proceeded to analyze whether the reporters had met a statutory UCL exemption by establishing a parallel FUTA exemption, or by meeting all three prongs of the ABC test. He noted that under N.J.A.C. 12:16-23.2, evidence of a FUTA exemption can be established in several ways. Id. at 17-18. One of these methods, "documentation of responses to the 20 tests required by the IRS to meet its criteria for independence," was eliminated in September 2018, but the ALJ found that it could be applied here since the audit period occurred before it was eliminated. Id. at 18.

20-FACTOR TEST

The ALJ reviewed the 20-factor IRS test and found that for the court reporters 14 factors tended toward independent contractor status, 3 tended toward employee status, and 3 lacked sufficient evidence in the record to make a determination (but their resolution would not change the outcome). Id. at 25. The ALJ found that under this test the court reporters should be considered independent contractors:

> It is apparent that the reporters work by the job; can make a profit or suffer a financial loss; and receive no tools, equipment, training, or reimbursement for expenses from petitioner. They do not comply with the typical work requirements of an employee, such as being present at a given time or place or filing reports that would update their employer on their work effort. The reporters work for themselves, and not for petitioner. Ibid.

The ALJ also noted that recently the IRS has shortened the 20-factor test to include more emphasis on behavioral control, financial control, and the nature of the relationship that exists.

Ibid. The ALJ analyzed the court reporters' employment status under this newer test as well. With respect to all of the elements of the newer test, the ALJ found that the evidence tended toward independent contractor status. Id. at 27.

ABC TEST

The ALJ then analyzed the court reporters' employment status under the ABC test. Under the A prong, the ALJ found that the reporters were "generally free from petitioner's control." Id. at 29. He found that they were free to choose which jobs to take and when to work; were not limited to a geographic area; were not subject to dismissal; were not trained or closely supervised; were not precluded from working for competitors; were not furnished with supplies, equipment, or uniforms; and were not provided any fringe benefits. Ibid. Consequently, the ALJ found that Jersey Shore had met the A prong. Ibid.

Under the B prong, the ALJ found that none of the court reporters regularly worked out of Jersey Shore's offices, rather they worked out of various business locations or the workers' compensation courts. Id. at 30. It would only be in rare circumstances, such as with out-of-state clients without ready access to a conference room, that work was performed at the company's offices. Ibid. Therefore, the ALJ found that the court reporters performed services outside of Jersey Shore's places of business, and therefore Jersey Shore had met the B prong. Ibid.

Under the C prong, the ALJ found that the reporters were free to provide services to other agencies while continuing to accept work from Jersey Shore, and many did so. Id. at 31. He credited the Department's assertion that many of the reporters lacked "common indicia of a business enterprise" such as business cards, advertising, and so forth, but credited the company's assertion that "modern technology and economy have rendered some of the traditionally accepted indicia less essential or even useful in the context of running a modern business enterprise." Id. at

32. The ALJ further found that it was likely that the court reporters could continue to work with different agencies even if a particular agency failed. Ibid. Therefore, they had a profession "that will plainly persist despite the termination of the challenged relationship," and Jersey Shore had met the C prong. Ibid., *citing* Hargrove v. Sleepy's, LLC, 220 N.J. 289, 306 (2015).

D. EXCEPTIONS AND REPLY

The Department filed exceptions to the ALJ's initial decision, and Jersey Shore filed a reply in opposition.

The Department raised several points in its brief. First, the Department argued that the ALJ improperly held that Jersey Shore had established a FUTA exemption by applying the 20-factor IRS test. (Exceptions, p. 8). Because the controlling regulation (N.J.A.C. 12:16-23.2) was amended in 2018 to limit the methods of asserting a specialized exemption from the UCL, under the "time of decision" doctrine the ALJ should not have applied the 20-factor test because the hearing occurred in April 2019 and the ALJ issued his decision in September 2020. Ibid., *citing* Walker v. New Jersey Dept. of Institutions & Agencies, Div. of Public Welfare, 147 N.J. Super. 485 (App. Div. 1977). The Department also asserted that the ALJ erred in his application of the ABC test. Id. at 9.

In reply, Jersey Shore argued that the ALJ's use of the 20-factor IRS test was appropriate because of court precedent that laws and regulations should generally be applied prospectively, and should only be applied retroactively when there is express legislative intent to do so or a manifest injustice would result. (Reply, p. 4). The company also faulted the Department for the delay in the proceedings, and asserted that the "time of decision" rule "cannot be valid in a case where one party is largely responsible for a ten-year delay." Ibid. Finally, Jersey Shore defended the ALJ's ABC analysis .

II. DISCUSSION

Upon *de novo* review of the record, and after consideration of the ALJ's Initial Decision as well as the exceptions and replies filed by the parties, I hereby REVERSE the ALJ's Initial Decision.

A. THE ALJ ERRED IN APPLYING THE IRS 20-FACTOR TEST, AS WELL AS THE UPDATED 3-FACTOR TEST

A significant portion of the ALJ's Initial Decision was devoted to a review of whether Jersey Shore could establish a corresponding FUTA exemption for its court reporters through application of the 20-factor IRS test to the ALJ's satisfaction, as well as the shorter 3-factor test that the IRS now employs. While this was permitted under N.J.A.C. 12:16-23.2 from 1995 until 2018, in 2018 the regulation was amended to limit proof of a FUTA exemption to a private letter ruling from the IRS, an IRS audit, or an IRS determination letter. 50 N.J.R. 1026(a).

As explained by our Supreme Court, a "time of decision" problem arises when "there is a change in the relevant law that governs the disposition of the issues on appeal." Riggs v. Tp. of Long Beach, 101 N.J. 515, 520-521 (1986). The question in such cases is "which law should control the reviewing court's decision: the law in effect when the issues arose and were initially presented for the lower tribunal's determination or the new or amended law that is in effect at the time the appellate court must render its decision." Ibid. With respect to agency action:

> There is no longer any question but that a court decides an appeal with reference to the state of law at the time of resolution of the appeal (citations omitted). No sufficient reason has been advanced to absolve administrative bodies, exercising quasi-judicial functions, from similarly deciding appeals in the context of the law as it exists at the time that administrative appeal is decided. Walker v. N.J. Dept. of Institutions & Agencies, Div. of Public Welfare, 147 N.J. Super. 485, 489 (App. Div. 1977).

Thus, in the context of agency action, appeals must be decided under the context of the law as it exists at the time of decision. This principle has been repeatedly upheld by our courts and agencies. See e.g. In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 333 (App. Div. 2002) (court reviewing agency action required to use most current version of regulations); Newton Board of Education v. NJDOE, 2005 N.J. AGEN LEXIS 463 (2005) ("An administrative agency must apply the law at the time of its decision, otherwise the administrative body would issue orders contrary to the existing legislation.") Maragliano v. Land Use Bd. of Township of Wantage, 403 N.J. Super. 80, 83 (App. Div. 2008) ("Under the time of decision rule, an agency or reviewing court will apply the law in effect at the time of its decision rather than the law in effect when the issues were initially presented."); James Durr t/a Durr Wholesale Florist v. NJDEP, 2010 N.J. AGEN LEXIS 13 (2010) ("The "time of decision" rule holds that generally a reviewing court or an administrative agency that is reviewing a pending matter should apply the law in effect at the time that it decides the matter, so that the legislative determination as to the issue is not thwarted."); Commissioner, NJDOBI v. Peter A. Ladas, 2004 N.J. AGEN LEXIS 938 (2004) ("The "time of decision" rule provides that, in administrative decision making, where a case is pending and there is a change in the law, the law that is in effect at the time a decision is rendered is generally applicable.")

Under this doctrine, in his September 2020 decision the ALJ was not permitted to use the 20-factor test (or the updated 3-factor version) in order to determine whether Jersey Shore had established a FUTA exemption. He was limited only to the forms of proof available at the time, all of which required direct review by the IRS. As Jersey Shore did not submit proof of a private letter ruling from the IRS, an IRS audit, or an IRS determination letter, I cannot credit it with having established a parallel FUTA exemption.

With respect to the company's argument that applying the rule change to its pending matter would be a retroactive application of the rule change and create "manifest injustice," that argument is inapposite because the Department's application of the "time of decision" doctrine here would not be retroactive. It would in fact merely be a valid application of the doctrine presently – the Department is applying the law in effect at the time it is making its decision. That is consistent with the purpose of the doctrine, which is to "effectuate the current policy" declared by the agency. Riggs v. Tp. of Long Beach, *supra*, at 521, *quoting* Kruvant v. Cedar Grove, 82 N.J. 435, 440 (1980). A retroactive application of the doctrine would be quite different. For example, a retroactive application would occur if the Department determined that an ALJ's decision concerning the 20-factor test, that occurred before the rule change in 2018, was invalid on that basis; or if the Department prohibited a party, prior to the rule change, from asserting that it had established a UCL exemption through application of the 20-factor test. Such actions would in fact have interfered with a party's vested right to make such an assertion, and would have been a retroactive application of the rule change. But that is simply not the case here.

For these reasons, I FIND that the ALJ erred in holding that Jersey Shore established a FUTA exemption by applying the 20-factor IRS test and the newer 3-factor test. Because the company did not offer any of the three remaining forms of proof available under N.J.A.C. 12:16-23.2(a), I FIND that it has not established an exemption from UCL coverage under N.J.S.A. 43:21-19(i)(10).

B. THE ALJ ERRED IN FINDING THAT JERSEY SHORE MET ALL ELEMENTS OF THE ABC TEST

The ALJ also found that Jersey Shore had met all elements of the ABC test. I cannot agree with this determination.

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

While it is true the record showed that Jersey Shore's court reporters had some flexibility in their work, the ALJ erred in determining that this meant that the company did not exercise control (or retained the ability to exercise control) over their work under the A prong.

In his decision, the ALJ found that the reporters were "generally free from petitioner's control." (Initial Decision, p. 29). He found that they did not have employment contracts; were free to choose which jobs to take and when to work; were not limited to a geographic area; were not subject to dismissal; were not trained or closely supervised; were not precluded from working for competitors; were not furnished with supplies, equipment, or uniforms; and were not provided any fringe benefits. Ibid.

However, critical aspects of the reporters' work **were** controlled by Jersey Shore. As the ALJ noted, the company's owner, Gene Ertle, testified that on the day before a proceeding he would email his roster of court reporters to see if anyone was available, and the first person that responded to that email would be given the assignment. Ibid. Thus, Jersey Shore was responsible for finding the work in the first place. Jersey Shore also sets the rate that is charged to clients, as well as the rate that it pays to court reporters:

> Q. Okay and how does – do the rates get establish or set that you – like if you're going out to do a deposition in an attorney's office how's that fee determined?

> A. If court reporters talk you can see other agencies, what they're charging. We can get the feedback what they're charging. You negotiate with some of the clients, you know, I – I don't want to pay more than X amount of dollars per page. There's a lot of negotiating sometimes. Back in the day that's what it was. Now it's just, "This is what we charge. You want to use us? If you don't you can go down the road." (Tr. 1, 135:6-18)…
>
> Q. So who does the calculations on what's being paid to the individuals?
>
> A. They – they – they know ahead of time what their per-page rate is. For a regular deposition or a regular hearing there's a certain rate that they're made aware of. They know what the appearance rate is. (Tr. 1, 149:9-14).

The reporters are discouraged from contracting with clients directly, and do not have an ability to negotiate a different rate for themselves:

> Q. These individuals who you contract[4] with to perform services for you, do they have any say in how much compensation they receive from an event?
>
> A. No.
>
> Q. Do they have the ability to contract with your client directly?
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> A. Well, I'm sure they could without me knowing it. Sure. (Tr. 1, 148:9-16).

If a client dislikes a court reporter's work, the client will contact Jersey Shore and not the reporter and ask the company not to send that reporter again. (Tr. 1, 170:9-16). Jersey Shore requires that transcripts be completed within 14 business days, or within 3 days for an expedited request. (Tr. 1, 66:11-20, 67:1-5). The company keeps most of the business records. (Tr. 1, 247:3-8). Finally, the court reporters suffer no risk of loss if a client refuses to pay, as it falls entirely upon Jersey Shore to recover. (Tr. 1, 254:13-15).

Thus, while the court reporters have some flexibility in determining how they complete their work, the overall relationship that leads to the work, and the key terms and conditions

[4] Although Jersey Shore indicated that there is no employment contract with its court reporters (Tr. 1, 163:1-4), I take it that the word "contract" here was used informally, to indicate that the court reporters perform work for the company.

concerning the work – such as finding and maintaining relationships with clients, how much a client is charged, how much a reporter is paid, how quickly the work must be completed, recovering from clients if they fail to pay, and so forth – are all set by Jersey Shore. The court reporters may like this – as Stephanie Hagen, a reporter Jersey Shore regularly engaged, testified, she liked that she doesn't have to "chase attorneys for money," and that Jersey Shore will "print it, book it, mail it, bill it, haggle with the attorneys." (Tr. 1, 210:6-11). But this is indicative of employee status, as it vests the company with authority over nearly all of the formal elements of employment. With such restrictions in place, Jersey Shore exercises effective control and direction over the performance of services.

I view this case as largely congruent with Transcriptions, Ltd. v. NJDOL, 1994 N.J. AGEN LEXIS 1097 (1994) (aff'd by Commissioner of Labor). That case involved a determination of UCL coverage against an agency that provided medical transcription services, with terms of work that are similar to the court reporters here:

> The petitioner is in the business of providing medical transcription services for hospitals located throughout the United States. The petitioner picks up recording tapes which have been dictated by hospital physicians or staff and types the contents of these tapes onto forms prescribed by the various hospitals. The petitioner performs these typing services in two ways. Some tapes are transcribed by in-house transcriptionists who work at the offices of the respondent. There seems to be no dispute that these transcriptionists are employees of the petitioner and subject to unemployment compensation and temporary disability benefit taxes. Other tapes are transcribed by other transcriptionists who have a contract with the petitioner and work at home [or] their own place of business. The petitioner delivers tapes to these transcriptionists on a daily basis in the transcriptionists' homes or places of business. The transcriptionists decide what material they will accept. These transcriptionists can reject work offered to them. However, if they accept the work, it must normally be completed by the next day. Material prepared by these transcriptionists must be in a form required by the hospital providing the tape, and the transcriptionists can transcribe the material at any location a at any time. They may also subcontract the work out to another person. These transcriptionists are paid by the number of pages they produce. They are paid a gross amount for their typed product, and no taxes are taken out. At the end of each year the petitioner prepares for these transcriptionists an IRS 1099 Form. The respondent does not

> offer these transcriptionists fringe benefits, paid vacation, or educational opportunities. These transcriptionists may also work for other employers if that is their wish. The respondent requires that the transcriptionists be certified by the American Association of Medical Transcribers. Id. at *3-4.

There are numerous similarities between the at-home medical transcribers in that case and the court reporters here. The medical transcribers largely worked where and when they wanted; they were free to reject or accept assignments; they were permitted to work for other employers; they were not closely supervised by the employing agency; and they were offered little or no fringe benefits. Id. at *4. But, similar to the court reporters here, the major formal elements of employment were all controlled by the agency. The medical transcribers were paid a fixed amount that did not vary, and had no control over what the agency billed clients; if work was accepted, the agency set a deadline for its completion; and the agency exclusively established and maintained all of the business relationships with clients. Id. at *4-12. In that case the ALJ held that the medical transcribers were employees. Id. at 15-16. In his final agency determination, the Commissioner of the Department of Labor agreed, accepting and adopting the findings, conclusions and recommendation of the ALJ. I am persuaded that a similar outcome is warranted here.

Therefore, I FIND that Jersey Shore has failed to meet Part A of the ABC test.

B PRONG: "Such service 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."

Under the B prong, the ALJ found that none of the court reporters regularly worked out of Jersey Shore's offices, rather they worked out of various business locations or the workers' compensation courts. (Initial Decision, p. 30). It would only be in rare circumstances, such as with out-of-state clients without ready access to a conference room, that work was performed at the company's offices. Ibid. Therefore, the ALJ found that the court reporters performed services

outside of Jersey Shore's places of business, and therefore Jersey Shore had met the second part of the B prong. Ibid. The ALJ did not make a finding as to the first part of the B prong.

Taking the second part of the B prong first, I do not dispute the ALJ's assessment of the infrequency with which the court reporters worked out of Jersey Shore's corporate offices. But the ALJ did not consider the full scope of the requirement that, in order to meet this part of the B prong, services must be "performed outside of all the places of business of the enterprise for which such service is performed." Jersey Shore is in the business of providing court reporting services to the legal community in such places as courtrooms, attorney's offices, municipal buildings, and so forth. (Exh. R-2, p. 4). Much of the actual work, therefore, takes place in these locations – that is where the court reporters are paid an appearance fee for their attendance, and then either an hourly rate for real-time work performed during the proceedings, or a per page rate if a transcript is ordered at the close of proceedings and delivered later. These services are an integral part of Jersey Shore's business, and delivery of services in these locations is not a random occurrence. Rather, it is specifically determined at the time of acceptance of the contract with Jersey Shore. These client locations, therefore, must under Carpet Remnant be considered an extension of Jersey Shore's place of business.

With respect to the first part of the B prong, it is clear that the court reporters are not outside of Jersey Shore's usual course of business. The company is in the business of providing court reporting and transcription services, and it achieves that through its use of court reporters. In the analogous Transcriptions, Ltd. case, the ALJ found that the services performed by the in-home medical transcribers were "a major part of the petitioner's business," and tended toward a finding of employee status. Transcriptions, Ltd., *supra,* at *15. Once again, I agree.

Consequently, I FIND that Jersey Shore has failed to meet Part B of the ABC test.

C PRONG: "Such individual is customarily engaged in an independently established trade, occupation, profession, or business."

Under the C prong, the ALJ found that the reporters were free to provide services to other agencies while continuing to accept work from Jersey Shore, and many did so. (Initial Decision, p. 31). He credited the Department's assertion that many of the reporters lacked "common indicia of a business enterprise" such as business cards, advertising, and so forth, but credited the company's assertion that "modern technology and economy have rendered some of the traditionally accepted indicia less essential or even useful in the context of running a modern business enterprise." Id. at 32. The ALJ further found that it was likely that the court reporters could continue to work with different agencies even if a particular agency failed. Ibid. Therefore, they had a profession "that will plainly persist despite the termination of the challenged relationship," and Jersey Shore had met the C prong. Ibid., *citing* Hargrove v. Sleepy's, LLC, 220 N.J. 289, 306 (2015).

The ALJ has misread the C prong in several respects. To begin, he largely ignored the results of the Department's thorough audit.

In conducting an audit for potential misclassification, it is standard Department practice to contact the purported employer and all purported subcontractors and request that they submit documentation (such as tax returns, business cards, invoices, letterhead, advertisements they have taken out, insurance, and other 1099s) that would help the Department to determine their employment status. (Exh. R-2, p. 31). Since there was no real dispute over whether remuneration had been paid to the court reporters for their services, that established a presumption of employee status unless Jersey Shore could meet each prong of the ABC test. In practice, as testified to by redetermination auditor Alan Handler, this meant that if a purported employer did not provide the Department with relevant documents, the Department could lawfully infer that the individual was

likely an employee, as no information was provided to rebut the presumption of employee status. (Tr. 2, 74:24-75:16).

The audit record shows that Jersey Shore provided documentation for slightly less than half of the court reporters that it engaged. In 2008, out of 32 court reporters engaged by Jersey Shore, the Department only received documents for 15 (as indicated by a number 8 in the "Documents" column in the "1099 Summary Report"). (Exh. R-2, pp. 12-13). In 2009, out of 30 court reporters engaged by Jersey Shore, the Department only received documents for 15. (Exh. R-2, pp. 17-18). And in 2010, out of 31 court reporters engaged by Jersey Shore, the Department only received documents for 14. (Exh. R-2, pp. 22-23). Adding it together, out of 93 court reporters engaged by Jersey Shore during the audit period, the Department received documentation for only 44 (totaling 47.3%). The company did not submit any documents, and no other evidence, to rebut the lawful presumption that its remaining court reporters (totaling 52.3%) were not customarily engaged in an independently established business.

The Department received copies of the IRS Form Schedule C (which is a form submitted to show profit and loss from a sole proprietorship) for several of the court reporters engaged by Jersey Shore. Being registered and filing taxes as a business can potentially show that an individual has met the C prong, though it is not dispositive. (Tr. 2, 102:7-10). A key element of the Department's analysis of a Schedule C is the proportion of income that comes from each source, on the theory that the greater number of sources of income, the more likely that an individual can "continue to exist independently of and apart from" his relationship with his putative employer, and thereby show that he engages in an independent business under the C prong. Carpet Remnant Warehouse, *supra,* at 592-593.

But of the Schedule Cs the Department received, only a small number showed true independence. For example, in 2008 Corinna Trumper received a 1099 showing that Jersey Shore paid her $75,604, and Trumper's Schedule C from that year indicates that this amount was the entirety of her business's gross receipts and sales. (Exh. R-2, pp. 13, 33). In 2009, Trumper received a 1099 showing that Jersey Shore paid her $65,869.76, and her Schedule C from that year again shows that was 100% of her business's gross receipts and sales. (Exh. R-2, pp. 18, 35). In 2010, Trumper again received 100% of her business's gross receipts and sales from Jersey Shore, totaling $65,265.25. (Exh. R-2, pp. 23, 39). Trumper also submitted a business card from Jersey Shore with her name on it. (Exh. R-2, p. 36).

As another example, Dawn Cutillo received 100% of her business income from Jersey Shore in 2008; 92% in 2009; and 93% in 2010. (Exh. R-2, pp. 12, 17, 22, 43-45). As a third example, Christine Rhoades received 100% of her business income from Jersey Shore in 2008; 100% in 2009; and 100% in 2010. (Exh. R-2, pp. 13, 17, 51-56). Rhoades also submitted a Jersey Shore business card with her name on it. (Exh. R-2, p. 48). As a fourth example, Debra Balsamo received 100% of her business income from Jersey Shore in 2008 and 100% in 2010 (Exh. R-2, pp. 12, 17, 22, 67-70). Balsamo also submitted a Jersey Shore business card with her name on it. (Exh. R-2, p. 65). As fifth and sixth examples, Alexandria Sprague received 100% of her business income from Jersey Shore, and Denise Clark received 90% of her business income from Jersey Shore. (Exh. R-2, p. 5). Taken together, the Schedule Cs show that these purportedly independent contractors were in reality wholly dependent upon Jersey Shore.

For some of the other court reporters, the documents that were submitted did not provide sufficient proof of independence. As another example, Denise Maiorelli sent a letter to the auditor stating in part, "I am a 58-year-old court reporter who is self-employed part-time. I am not an

employee of Jersey Shore Reporting. Occasionally I take a deposition for Jersey Shore Reporting when they call me. I do not advertise my services other than being listed in the Legal Pages along with other Certified Court Reporters in the State of New Jersey. I do not have business cards." (Exh. R-2, p. 42). (Exh. R-2, p. 12). Maiorelli's declaration that she is not an employee cannot be accepted at face value, and her acknowledgement that she does not advertise her services apart from one source and does not have business cards was correctly determined by the auditor to be insufficient to overcome the presumption of employee status. (Exh. R-2, p. 12). In addition to not adequately considering the audit results, the ALJ erred in finding that the court reporters met the C prong because "if one [agency] goes out of business…often the same reporters will pick up more work – often the same work – from another agency." (Initial Decision, p. 31). This misreads Carpet Remnant. In order to meet the C prong, it is not enough to establish that these reporters could pick up more work from another agency. Rather, it must be demonstrated that they could "continue to exist independently of and apart from" their relationship with Jersey Shore **as an independent business.** Carpet Remnant Warehouse, *supra*, at 592. Put another way, these reporters' purportedly independent businesses will not "plainly persist despite the termination of the challenged relationship," **because they were never independent in the first place**. Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super. 135, 142 (App. Div. 1990). What the ALJ is describing is **multiple employment** – the court reporters can easily go from being an employee at one agency to an employee at another agency.

Finally, turning again to Transcriptions, Ltd., in that case the ALJ found that the in-home medical transcribers "do not maintain their own businesses, nor do they have their own commercial vehicles, business cards, business stationery, worker's compensation insurance, nor do they file income tax returns indicating that they are a business." Transcriptions, Ltd., *supra*, at *15.

Although the C prong is particularly fact-sensitive, I am persuaded that the commonalities between the court reporters here and the in-home medical transcribers indicate that the ALJ's decision in that case was sound, and reinforces my conclusion.

For these reasons, I FIND that Jersey Shore has failed to meet Part C of the ABC test.

ORDER

For the foregoing reasons, with regard to all court reporters engaged by Jersey Shore during the audit period, Jersey Shore is hereby ordered to immediately remit to the Department $39,236.06 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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