



OT, 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 13304-13
AGENCY DKT. NO. DOL 13-035**

Issued: October 5, 2017

Pursuant to N.J.S.A. 43:21-14(c), the New Jersey Department of Labor and Workforce Development (DLWD, Department or respondent) assessed OT, Inc. (OT or petitioner) for unpaid contributions to the unemployment compensation fund and the State disability benefits fund for the period from 2005 through 2007. OT requested a hearing with regard to the Department's assessment. The matter was transmitted to the Office of Administrative Law (OAL), where it was scheduled for a hearing before Administrative Law Judge Leland S. McGee (ALJ). The issue to be decided was whether those individuals who had provided physical and occupational therapy services pursuant to contracts between OT and schools located in New Jersey during the audit period, the years 2005 through 2007, were employees of OT and, therefore, whether OT was responsible under N.J.S.A. 43:21-7 for making contributions to the unemployment compensation fund and the State disability benefits fund with respect to those individuals during that period.

As to what constitutes "employment," N.J.S.A. 43:21-1 et seq. (the Unemployment Compensation Law or UCL), defines the term broadly to include any service performed for remuneration or under any contract of hire, written or oral, express or implied. N.J.S.A. 43:21-19(i)(1)(A). Once it is established that a service has been

performed for remuneration, that service is deemed to be employment subject to the UCL, unless and until it is shown to the satisfaction of the Department that:

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

(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.

Following a hearing, the ALJ concluded that “OT [had] satisfied the ABC test,” and that, consequently, none of the therapists engaged by OT to perform services during the audit period (2005-2007) had been employees, but rather, had all been independent contractors. The ALJ found that two claims for temporary disability benefits filed in or around 1999/2000 had prompted DLWD to conduct an audit of OT for the purpose of determining potential liability for contributions to the unemployment compensation fund and State disability benefits fund for the years 1997 through 2001. That audit concluded that the therapists engaged by OT during the audit period (1997-2001) had been improperly reported as independent contractors. OT appealed the outcome of the audit. The matter was transmitted to the OAL for a hearing. Prior to a hearing, the parties entered into a settlement agreement, which stated the following:

(1) The Department of Labor will limit its assessment to the years 1998, 1999, 2000, 2002, and 2002.

(2) OT, Inc. will pay contributions, interest and penalty in the amount of \$12,158.87, which represents \$8084.20 in contributions, \$2168.17 in interest computed to October 31, 2002 and penalty of \$1906.50. This payment is inclusive of both Kirsten Solete and Lori Piazza.

(3) OT Inc. will withdraw from all appeals it has with this agency as it relates to employee/independent contractor.

(4) OT Inc. will comply with the Department of Labor's reporting and worker classification requirements effective January 1, 2003. It is agreed upon by both parties that all contracts OT Inc. has with corporation and LLC's comply with N.J.S.A. 43:21-19(i)(6) (so called ABC Test) and are not taxable.

(5) OT Inc. shall make a down payment of \$8084.20. Upon signing this agreement 24 monthly payments of \$269.77 starting January 22, 2003.

(6) If the conditions of this settlement are not satisfied, the Department of Labor's right to audit and establish liability for all statutory periods will remain intact.

According to the ALJ, following resolution of the 1997-2000 audit through the above settlement, OT entered into agreements going forward with seven separate LLCs to provide physical and occupational therapy services pursuant to contracts between OT and schools located in New Jersey. Those LLCs were: (1) Jennifer Doyle, T/A Jennifer Doyle OT LLC; (2) Nicole Schray, T/A Kid Care Therpay, LLC; (3) Dawn Odell, LLC; (4) Jodi Z Occupational Therapy, LLC; (5) Empowered Therapy, LLC; (6) Bernadette Townsend, T/A Sunshine Physical Therapy, LLC; and (7) Kimberly Wallace, T/A Puzzle Pieces Therapy, LLC. In 2008, the DLWD conducted another audit of OT for the years 2005 through 2007, which resulted in the assessment for unpaid contributions to the unemployment compensation fund and State disability benefits fund that is at issue in this appeal.

Relative to each of the three prongs of the ABC test, the ALJ found as follows:

Prong "A"

The ALJ found that OT had established that it had not exerted control over the therapists and, therefore, had met Prong "A" of the ABC test. In reaching this conclusion the ALJ relied heavily on the holding in Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super. 135 (App. Div. 1990), which involved an employment broker, Trauma Nurses, Inc. (TNI), that matched nurses to hospitals looking for temporary personnel, and wherein the court determined, according to the ALJ, that TNI had met its burden under Prong "A" of the ABC test, because each nurse could select when and where they worked, were permitted to work elsewhere, were not obliged to comply with TNI rules, were not given instruction by TNI, were supervised only by the hospitals, were not provided training and were not furnished with supplies or fringe benefits. Comparing OT to TNI, the ALJ explained his reasoning as follows:

Similarly, OT does not provide any training, equipment, or ongoing instruction, and the therapists are all independently licensed and insured. While the therapists working for OT do not have as much freedom to select their hours, the hours that the therapists work are dictated by IEPs (Individualized Education Plans) which OT does not control and is not privy to. These facts lead to a conclusion that OT does not exert control over the contracted therapists. Despite an assertion otherwise, the contracts between OT and the LLCs require that the contractor prepare clinical notes and the contract between OT and the schools has a duty list. The list of specific duties may be nothing more than an iteration of common practice for occupational therapists who work with students, but neither side has brought light to that element, and instead make broad conclusory statements that there is or is not control exerted. Despite signing the same contract, Kid Care Therapy was considered bona fide by the Department, so it would appear the Department does not take issue with the contract. The first prong is satisfied.

(citations omitted)

Prong “B”

The AJJ found as follows:

The second prong is written in the disjunctive, so the petitioner must only satisfy either, that the work is conducted outside the employer’s “place of business” or the “usual course of business.”

...

OT asserted that both theories of Prong B were satisfied. The course-of-business argument was based on the fact that Sopka (the President of OT) is not licensed in New Jersey and unable to practice in New Jersey, therefore in effect, OT “brokers” services in New Jersey and is not an Occupational Therapy practitioner in New Jersey. Notwithstanding, OT prevails on the second part of Prong B which is written in the disjunctive. OT does not have any offices in New Jersey and the therapists are not required to report anywhere other than to the school to which they are assigned. Prong B is satisfied.

(citations omitted)

Prong “C”

The ALJ found that OT had established that all of the therapists it had engaged during the audit period “have qualifications and opportunity to practice outside of their contract with OT.” On the basis of this finding, and relying heavily on his reading of the

holding in Trauma Nurses, *supra*, and an unreported opinion of the Superior Court, Appellate Division, in Feinsot v. Board of Review, A-1982-04T2 (February 26, 2007)¹, the ALJ concluded that “Prong C [had been] satisfied.” In so concluding, the ALJ explained as follows:

Unfortunately, OT did not make “an evaluation in each case” as per Carpet Remnant [Warehouse v. N.J. Department of Labor, 125 N.J. 567 (1991)] and instead analyzed the professions of Occupational Therapy and Physical Therapy as a field. OT provided statistics that there are many available jobs in those fields, but did not attempt to prove that each LLC had been established in the field before accepting work with OT. Similarly, OT did not offer information about the other employment taken by each LLC, but did explain that the low yearly earnings despite a high hourly rate proves that each LLC was free to accept other work, and any decision not to do so would be the sole choice of the LLC. In fact, all subcontractors were [sic] worked part-time hours, with work weeks

¹ The Feinsot opinion was on appeal from a determination of the Board of Review, not the Commissioner, and involved Ms. Feinsot’s eligibility to collect unemployment compensation benefits, not the employer’s obligation to make contributions to the unemployment compensation fund and State disability benefits fund. Although it did involve application of the ABC test to the services performed by Ms. Feinsot, as an unpublished opinion, it does not constitute precedent and is not binding on any court. R. 1:36-3. Furthermore, in a subsequent decision of the Commissioner (Assigned Counsel, Inc. v. DLWD, Remand, issued June 9, 2009) involving the obligation of Assigned Counsel, Inc. (ACI) to make contributions to the unemployment compensation fund and State disability benefits fund, relative to Ms. Feinsot and the other attorneys who performed services for ACI during the same period, although the Commissioner was bound under the doctrine of collateral estoppel by the unpublished Appellate Division decision exclusively relative to the employment status with ACI of Ms. Feinsot, he found relative to the *other* attorneys whose services had been engaged by ACI during the audit period that in order to meet Prong C of the ABC test ACI would have to do substantially more than establish that the individuals involved had been licensed as attorneys prior to and after entering their relationship with ACI. Rather, the Commissioner found that ACI would be required to address the factors set forth in Carpet Remnant, *supra*, so as to establish that each individual had been *customarily engaged* in the *independently established* practice of law. Toward that end, the Commissioner instructed the ALJ on remand to be cognizant of the New Jersey Court Rules, which require an individual who is engaged in the independent practice of law to maintain a bona fide office for the practice of law (a place where clients are met, files are kept, the telephone is answered, mail is received, etc.) and to maintain in a financial institution in New Jersey a trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, trustee or receiver, or in any other fiduciary capacity, into which trust account or accounts funds entrusted to the attorney’s care would be deposited and a business account into which all funds received for professional services would be deposited.

-ranging from one to twenty-one hours. Further, the only restriction that OT places on its contractors is that they bypass OT and directly contract with the schools that OT has a contract with.

If the primary concern was additional contracts, as the Department asserts, OT does not satisfy this prong with any LLC, except for perhaps Dawn O'Dell who derives sixty-seven percent of her income from OT. Feinsot and Trauma Nurses, rejected this approach. All of OT's subcontractors independently have the qualifications and opportunity to practice outside of their contract with OT, thus Prong C is satisfied.

In addition, relative to the issue of burden of proof, the ALJ concluded the following:

It is unreasonable to require the petitioner to supply information about the subcontractor's tax records, which would evidence past work history and alternative employment, that only the Department and the subcontractor are privy to. Furthermore, the Department should have these files readily available after their audit, and if not, the failure to have such information should not unreasonably penalize the opposing party who may not have either the experience or means to uncover the facts sought. Demanding evidence that a petitioner cannot uncover would undermine the impartiality for which the OAL was founded. The burden of proof should not be extended to information that the petitioner does not reasonably have access to. A lack of information on alternative employment should be held against the Department, not OT.

(citations omitted)

Finally, relative to the earlier 2002 settlement agreement between DLWD and OT, the ALJ found as follows:

The settlement in 2002 provided that "all contracts OT Inc. has with corporation and LLC's comply with N.J.S.A. 43:21-19(i)(6) (so called ABC Test) and are not taxable." The use of the present tense implies that only LLCs and corporations that OT was contracted with at the time of the signing were covered by the agreement. However, OT was not contracted with any corporations or LLCs at the time the agreement was signed, which strains that interpretation. OT acknowledged in the September 2014 interrogatories that "OT Inc. agreed to comply with the Department of Labor's reporting and worker classification requirements on January 1, 2003 going forward." Furthermore, OT Inc. admitted that "[a]ll contracts with LLC's and corporations began January 1, 2003." It should be assumed that all contracts must comply with reporting and classification requirements. While the purpose of paragraph four of the Settlement Agreement seems clear on its face, it is unlikely that the

Department intended to grant a blanket exemption all LLCs that OT contracted with going forward. The parties are in complete disagreement with the meaning of paragraph four, OT asserts it cleared the ground for future contracts and the Department asserts that it never applied to sole proprietorship companies. It is possible to use that paragraph to provide a baseline for business practices as they pertain to OT and thus satisfy A and B of the ABC test, as those pertain to practices of OT. Furthermore, OT loosened control over the therapists and ceased meeting with them after the settlement.

(citations omitted)

It was on the basis of the above enumerated findings of fact and the above summarized legal analysis that the ALJ ultimately concluded that OT had met its burden under the ABC test and ordered that DLWD's assessment against OT for unpaid contributions to the unemployment compensation fund and State disability benefits fund be reversed. Exceptions were filed by respondent.

It its exceptions, respondent takes issue with the ALJ's heavy reliance upon the holding in Trauma Nurses, *supra*, asserting that the Trauma Nurses case and the instant matter are "readily distinguishable." Specifically, respondent states that whereas TNI was an employment broker, matching nursing professionals with hospitals and other health care institutions, OT is not a broker, matching therapists with facilities; rather, OT "employs therapists to fulfill its contractual obligation to provide therapeutic service to patients at facilities." Respondent also argues that unlike TNI, with whom the nurses could negotiate a salary, OT paid a flat salary to its workers based upon the fee rate contained in the individual contracts entered into between OT and the facilities. In addition, respondent takes issue with the ALJ's reliance upon Feinsot v. Board of Review, 2007 N.J. Super. Unpub. Lexis 2922, arguing that Feinsot was, "an unpublished decision determined on a limited record made before the Board of Review (rather than before the Commissioner)." That record, respondent continues, "was used to determine eligibility for benefits solely for that claimant, Feinsot," adding, "no analysis of percentage of remuneration via Schedule C was done in Feinsot as required by CRW (Carpet Remnant Warehouse), *supra*)."

As to the ALJ's ABC test analysis, respondent takes issue with all of it; which is to say, respondent asserts that OT has failed to meet its burden under any one, no less all three, of the three prongs of the ABC test. As to Prong "A," respondent maintains that the contracts between OT and the therapists as well as the contracts between OT and the schools to which they provide services through the therapists, indicate that OT exercises control over the therapists. Specifically, according to respondent, the contracts between OT and the schools set the duration of the arrangement with the school districts, set what is compensable time (excludes travel), requires OT to monitor qualifications of all therapists it places and sets the rate of compensation received by OT for the services performed. In addition, according to respondent, OT has the ability to change terms with the school districts, whereas the therapists do not. As to the contracts between OT and

the therapists, respondent asserts that they set the rate of pay the therapists receive for their services, place the therapists in their positions within the contracted school, prohibit the therapists from working directly for any school with which OT has a contract, dictate when the therapists will be compensated, the duration of the contract and state that OT will monitor the therapists' criminal background history, immunization schedules and whether their licenses are up to date.

As to Prong "B," respondent asserts the following:

The ALJ erred in his interpretation of the "B" prong of the statute in relation to the services. As stated in Carpet Remnant Warehouse, the phrase "places of business" as used in the UCL "...refers only to those locations where the enterprise has a physical plant or conducts an integral part of its business." OT Inc. does not have a physical location in the State of New Jersey, but has contracted with the school districts to provide the needed therapeutic services to the students via the contract for physical therapy. As part of the contract, the therapists are required to perform all of the services at the contracted locations agreed to by OT Inc. and the school districts. This is not a random location that is determined on a per transaction basis as in CRW. This is at a fixed location, that is determined at the time of the acceptance of the contract with OT Inc. and so is an extension of OT Inc.'s business location. It is akin to renting space to perform services for an out of state business. The services provided by the therapists are both integral and performed at OT Inc. locations.

(citations omitted)

As to Prong "C" and as to the ALJ's related conclusion that respondent should have the burden of proof under Prong "C," because it has, "greater access (than petitioner) to tax records" and "expertise in auditing tax records," respondent asserts that N.J.S.A. 43:21-19(i)(6) clearly establishes that the burden of proof rests with the employer, adding that both the statute and associated case law have consistently required that the employer has the burden of proof in these matters. According to respondent, it is under no statutory requirement to gather or otherwise obtain information from an employer's "subcontractors," but nevertheless has made every possible attempt to obtain relevant information on all of the "subcontractors" in question. In fact, notes respondent, when records are not made available by an employer, N.J.S.A. 43:21-7d empowers the Department to make an estimate regarding the liability of the employer and to issue an assessment based on that estimate. As to Prong "C" itself, respondent cites to the opinion in Gilchrist v. Division of Employment Sec., 48 N.J. Super. 147 (App. Div. 1957), wherein the court stated the following:

The double requirement that an individual must be customarily engaged and independently established calls for an enterprise that exists and can continue to exist independently and apart from a particular service

relationship. The enterprise must be one that is stable and lasting – one that will survive the termination of the relationship.

In addition, respondent cites to the holding in Schomp v. Fuller Brush Co., 124 N.J.L. 487, 490 (Sup. Ct. 1940), aff'd, 126 N.J.L. 368 (E&A 1941), wherein the court stated that “it is an analysis of the facts surrounding each employee that determines whether an alleged employee is an independent contractor according to the ABC test” (emphasis provided by respondent). Thus, respondent asserts that in order to satisfy Prong “C” of the ABC test, OT must demonstrate that each therapist was engaged in a viable, independently established, business at the time that he or she rendered services to OT. It is in this regard that respondent asserts OT “has most convincingly failed the ABC test.” That is, respondent notes that OT failed to provide evidence that any of the therapists had an ongoing business that would continue to exist upon termination of the relationship with OT.

Respondent does not take issue with the ALJ’s finding that paragraph four of the 2002 settlement agreement between OT and DLWD provided that “all contracts OT Inc. has with corporation and LLC’s comply with N.J.S.A. 43:21-19(i)(6) (so called ABC Test) and are not taxable,” nor does respondent take issue with the ALJ’s finding that following resolution of the 1997-2000 audit through the 2002 settlement, OT entered into agreements going forward with seven separate LLCs to provide physical and occupational therapy services pursuant to contracts between OT and schools located in New Jersey. Rather, respondent maintains that, “forming a LLC that is not a corporation does not satisfy either the statutory or case law requirements that the entity is a viable one that could survive the severance of the relationship with OT, Inc.”

CONCLUSION

Upon de novo review of the record, and after consideration of the ALJ’s initial decision, as well as the exceptions filed by respondent, I hereby accept, for reasons entirely separate from and unrelated to those set forth by the ALJ in his initial decision, the ALJ’s recommended order reversing the Department’s assessment against OT for unpaid contributions to the unemployment compensation fund and the State disability benefits fund. That is, I categorically reject the ALJ’s conclusion that OT has satisfied the ABC test relative to the services provided by therapists during the audit period; I categorically reject the ALJ’s legal analysis in support of that conclusion, including his interpretation of relevant case law; and I categorically reject the ALJ’s conclusion that the burden of proof under Prong “C” of the ABC test lies with respondent.² However, I do believe that paragraph four of the 2002 settlement agreement expressly assured OT

² See Carpet Remnant Warehouse, supra., at 581 (“if the Department determines that the relationship falls within that definition, and is not statutorily excluded, see N.J.S.A. 43:21-19(i)(7), then the party challenging the Department’s classification must establish the existence of all three criteria of the ABC test.) and Philadelphia Newspapers, Inc. v. Board of Review, 397 Super. 309, 320 (App. Div. 2007)(“A party challenging a Department’s classification must prove each of the three prongs of the ABC Test.”).

and its President, Jennifer Sopka, that all contracts between OT and either corporations or LLCs would comply with the ABC test and, therefore, would not be taxable; I do believe that Jennifer Sopka, President of OT, reasonably believed that the meaning of paragraph four of the 2002 settlement agreement was that going forward if the therapists she engaged in New Jersey were LLCs, then, as she testified, “there would not be a question as to whether or not they were taxable, that they would comply with the ABC test;” and, I believe that Ms. Sopka detrimentally relied on the express assurances contained within the 2002 settlement agreement. The principles of equitable estoppel may be applied against public bodies where the interests of justice, morality and common fairness clearly dictate that course. See Gruber v. Mayor of Raritan Twp., 39 N.J. 1, 13 (1962). The essential principle undergirding equitable relief is detrimental reliance. Welsh v. Board of Trs., 443 N.J. Super. 367, 379 (App. Div. 2016). The fact is that in 1998 the New Jersey Limited Liability Company Act, N.J.S.A. 42:2B-1 et seq.³, was amended to provide for single member LLCs. See P.L. 1998, c. 79. Consequently, at the time that the Department entered into the 2002 settlement agreement with OT, the Department was aware of both the statutory existence and legal implications of single member LLCs. Nevertheless, when the Department drafted the 2002 settlement agreement; and in particular, paragraph four of the 2002 settlement agreement, it made no mention of an exclusion for single member LLCs; rather, it wrote that “all contracts OT Inc. has with corporation and LLC’s comply with [the ABC test] and are not taxable” (emphasis added). Again, Ms. Sopka has shown that she reasonably believed this to mean that if she contracted with LLCs, including single member LLCs, she would comply with the ABC test and the services provided by those LLCs would not be taxable. She has also shown to my satisfaction that she relied to her detriment on the Department’s representation and her reasonable belief as to its meaning.

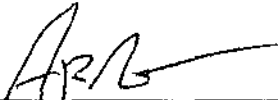
ORDER

Therefore, it is hereby ordered that the Department’s assessment against OT for unpaid contributions to the unemployment compensation fund and State disability benefits fund for the audit period 2005 through 2007 is reversed. In so ordering, however, I do wish to emphasize that Ms. Sopka should now be aware that there is, in fact, a legal distinction for tax classification purposes between single member LLCs and other LLCs. See N.J.S.A. 42:2C-92. She should also be aware that engaging the services of therapists who have formed single member LLCs will not, in and of itself, exempt the services of those individuals from coverage under the UCL. Consequently, neither Ms. Sopka, nor any other, may credibly assert from this date forward that he or she has reasonably relied to his or her detriment on an understanding of paragraph four of the 2002 settlement agreement between OT and DLWD that engaging the services of a single member LLC will, in and of itself, exempt the services of that single member LLC from coverage under the UCL.

³ The New Jersey Limited Liability Company Act was repealed in 2012 and replaced by the New Jersey Revised Uniform Limited Liability Company Act, N.J.S.A. 42:2C-1 et seq.

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



Aaron R. Fichtner, Ph.D., Commissioner
Department of Labor and Workforce Development

Inquiries & Correspondence: David Fish, Executive Director
Legal and Regulatory Services
Department of Labor and Workforce Development
PO Box 110 – 13th Floor
Trenton, New Jersey 08625-0110