



Garden State Fireworks, 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 11159-13
AGENCY DKT. NO. 13-005**

Issued: October 27, 2015

The appeal of Garden State Fireworks, Inc. ("Garden State" or petitioner) concerning an unemployment and temporary disability assessment by the New Jersey Department of Labor and Workforce Development (DLWD) was heard by Administrative Law Judge Mumtaz Bari-Brown (ALJ). In her initial decision, the ALJ concluded with regard to the pyrotechnicians or "shooters" engaged by Garden State during the years 2006 through 2009 to "transport, set up, shoot and clean up" fireworks displays, that none were employees, but rather, were all independent contractors. Based on this finding, the ALJ ordered the reversal of the DLWD's determination regarding Garden State's tax liability for all shooters who had been engaged by Garden State during the audit period.

The issue to be decided is whether those shooters whose services were engaged during the audit period by Garden State were employees of Garden State and, therefore, whether Garden State 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 the audit period.

Under N.J.S.A. 43:21-1 et seq. (the Unemployment Compensation Law or UCL), the term “employment” is defined broadly to include any service performed for remuneration or under any contract of hire, written or oral, express or implied. N.J.S.A. 43:21-19(i)(1)(A). Once it is established that a service has been performed for remuneration, that service is deemed to be employment subject to the UCL, unless and until it is shown to the satisfaction of the DLWD 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 stated the following:

The credible evidence supports that Garden State’s subcontractors are free from control or direction over the performance of their services. The subcontractors have discretion to determine the duration and pattern of fireworks displays, they are paid by the show, they are free to work as much or as little as each subcontractor chooses, they are generally not supervised by Garden State, and they are free to work for Garden State’s competitors. Therefore, I CONCLUDE that Garden State established that the subcontractors have “been and will continue to be free from control or direction over the performance of such service.” N.J.S.A. 34:21-19(i)(6)(A).

With regard to Prong “B” of the ABC test, the ALJ concluded that Garden State had met its burden in that it had established that its shooters perform their services outside of all the places of business of the enterprise for which such services are

performed; that is, outside of all the places of business of Garden State. In support of this conclusion, the ALJ adopted the distinction made by Garden State between those who work in its Millington, New Jersey, factory where fireworks are manufactured and where the business is headquartered, and those who set-off firework shows for Garden State at the display sites. Garden State argued, and the ALJ agreed, that whereas the factory qualifies as among “all the places of business” of Garden State, which is in the business, according to Nunzio Santore, Sr., co-owner of Garden State, of manufacturing fireworks, transporting fireworks to shows, and running shows, both manual and electric; the display sites where the company’s fireworks shows are performed is not among “all the places of business” of Garden State. Here, as elsewhere in the ALJ’s initial decision, she afforded great weight to Garden State’s own decision as to how it should classify its workers (those in the factory as employees and those in the field as independent contractors) and the consequent Internal Revenue Service (IRS) forms used by Garden State to report the compensation of workers so classified (W-2 forms for employees and 1099 forms for independent contractors). That is, within the ALJ’s “B” Prong analysis, she stated the following:

Santore, Papa, Neville, and Brown each testified that the subcontractors [the shooters] did not work at the factory. Notably, Garden Sate employs many workers at the factory, classifies those workers as employees, and pays those workers with W-2 forms.¹ While some of the subcontractors pick up the equipment from the factory, to transport the fireworks to the display site, the trucks are typically pre-loaded by employees. Papa testified that he simply completes the paperwork, and proceeds to the show. Brown testified that he does not go to the factory at all, but meets the lead operator at the display site. The mere fact that subcontractors pick up materials from the factory does not render the subcontractors employees....

Further, the credible testimony reveals that Garden State’s factory workers perform different services than workers at the display site. At the factory, workers manufacture, package and load fireworks, and perform office work. At the display site, workers set up, shoot, and clean up the fireworks display. These are completely different services, performed at different locations.

As to Prong “C” of the ABC test, the ALJ concluded that Garden State’s shooters are “customarily engaged in an independently established trade, occupation, profession or business,” because they “are employed full-time and part-time in other industries and professions;” that is, they are employed in occupations other than the display of fireworks. For example, Dana Papa, is Police Chief of Chatham Township, and Anthony Brown, works for a lawn-care company. The ALJ also concluded that Garden State had satisfied Prong “C” of the ABC test relative to the work performed by the shooters,

¹ As opposed to the shooters, which according to Nunzio Santore, Sr., are always paid with 1099 forms. See Page 8 of the ALJ’s initial decision.

because it had established that the average shooter only performs two shows per year, because shooters like Mr. Papa earn only approximately \$2,500 per year from the work they perform for Garden State, and because the consequent loss in income which would be suffered by a shooter whose relationship with Garden State had been terminated would “not significantly impact [his or her] finances.”² Thus, the ALJ concluded that none of the shooters who had performed work for Garden State during the audit period had been employees, but rather, had all been independent contractors. Respondent filed exceptions to the ALJ’s initial decision. Petitioner filed a reply to respondent’s exceptions.

In its exceptions, respondent takes issue with the findings and conclusions of the ALJ with regard to each prong of the ABC test. Specifically, with regard to Prong “A” of the ABC test, respondent notes that the Court in Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor, 125 N.J. 567 (1991), listed specific factors as indicative of control, including whether the worker is required to work any set hours or jobs, whether the enterprise has the right to control the details and means by which the services are performed, and whether the services must be rendered personally. Respondent added, citing Carpet Remnant, *supra*, and Schomp v. Fuller Brush Co., 124 N.J.L. 487, 490 (Sup. Ct. 1940), that “an employer need not control every facet of a person’s responsibilities for that person to be deemed an employee.” Applying the factors enumerated in Carpet Remnant to the case at hand, respondent asserts the following:

[A]n individual or entity such as a municipality or private venue seeking to contract for a firework display contracts with Garden State to purchase the performance, not [with] the individuals performing the services for Garden State at the display. Once Garden State enters into an agreement to perform a fireworks display, the [shooters] are then contacted by Garden State and are expected to render services on the date and at the time during which the fireworks event is to occur. Accordingly, they are “hired” to work during a specific event scheduled and arranged by Garden State. Prior to the event, the license fee required to permit the [shooters] to handle the fireworks is obtained and paid for by Garden State. In addition, Garden State is required by the Federal Bureau of Alcohol, Tobacco and Firearms to perform background checks on all of the [shooters]. All of the fireworks and supplies required to stage and shoot the show are supplied by Garden State. The vehicles in which the [shooters] and the materials are transported to the display are owned and insured by Garden State. Garden State also provides workers’

² In support of the latter conclusion regarding Prong “C” of the ABC test, the ALJ relied heavily upon her interpretation of the holding in Carpet Remnant Warehouse, Inc. v. Department of Labor, 125 N.J. 567 (1991). That is, as best I can ascertain from the contents of the ALJ’s initial decision, she apparently believes that the holding in Carpet Remnant stands for the principle that if one does not earn sufficient money from a given employer to result in a finding of monetary eligibility for unemployment benefits based solely on the wages earned by that individual from that employer, then the employer can incur no liability under N.J.S.A.. 43:21-7 with respect to that individual for contributions to the unemployment compensation fund and the State disability benefits fund.

compensation insurance and liability insurance for all of the [shooters]. Although the [shooters] are free to design their own displays, this single factor allowing the individuals in question limited artistic license does not demonstrate that their services are free from direction and control by Garden State as the duration and magnitude of the display is dictated by the financial terms of the contract entered into with Garden State. The record supports a finding that Garden State directed and controlled virtually every aspect of the [shooters] services, obtaining the licenses required, providing the vehicles, supplied and equipment [sic] and scheduling the time and place of the event. Accordingly, the ALJ's finding and analysis as [to] the "A" Prong [of the ABC test] are incorrect and should be rejected by the Commissioner.

With regard to Prong "B" of the ABC test, which requires that in order to establish independent contractor status, one must prove that the service at issue is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed, respondent notes that the court in Carpet Remnant defined the phrase "all places of business" to mean those locations where the enterprise has a physical plant or conducts an integral part of its business. Relative to the latter part of that definition, respondent maintains that since the principal part of Garden State's business enterprise is performing firework shows, the outdoor venues where those shows are performed are locations where Garden State conducts an "integral part of its business." Similarly, respondent maintains that since the principal part of Garden State's business enterprise is performing fireworks shows, the performance of those shows by the shooters engaged by Garden State is a service performed within, not outside of, Garden State's usual course of business.

In support of its exceptions to the ALJ's conclusions regarding Prong "C" of the ABC test, respondent cites to the opinion in Gilchrist v. Division of Employment Sec., 48 N.J. Super. 147 (App. Div. 1957), wherein the court stated the following:

The double requirement 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, supra, 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." Thus, respondent asserts that in order to satisfy Prong "C" of the ABC test, Garden State must demonstrate that each shooter was engaged in a viable, independently established, business displaying fireworks at the time that he or she rendered that service to Garden State. Respondent states that there is no evidence in the record demonstrating that any of the shooters had an outside business relationship with any other firm in the firework

display business, adding that, in fact, all of the income earned by Garden State's shooters during the audit period in the display of fireworks came from Garden State.

Respondent characterizes as inexplicable and "without regard for the relevant statutory provisions of the UCL," the ALJ's conclusion that evidence of full-time and part-time employment by shooters in other industries and professions (like Police Chief and lawn-service worker), demonstrates that the shooters were customarily engaged in an independently established trade, occupation, profession or business, thereby satisfying Prong "C" of the ABC test. Respondent explains, "the mere fact that an individual holds other simultaneous employment in an unrelated trade, occupation or profession does not support the conclusion that the individual is an independent contractor or that he/she is ineligible for unemployment compensation benefits," adding, "[t]he UCL envisions multiple employment, N.J.S.A. 43:21-3(d)(B)(i)(ii), N.J.S.A. 43:21-6(b), N.J.S.A. 43:21-14.1, N.J.S.A. 43:21-19(u), and thus the fact that any of these [shooters] could have been or were employed by others while working for Garden State does not preclude a finding that these individuals were also employees of Garden State."

Regarding the ALJ's apparent belief that the holding in Carpet Remnant stands for the principle that if one does not earn sufficient money from a given employer to result in a finding of monetary eligibility for unemployment benefits based solely on the wages earned by that individual from that employer, then the employer can incur no liability under N.J.S.A. 43:21-7 with respect to that individual for contributions to the unemployment compensation fund and the State disability benefits fund, and the ALJ's consequent conclusion that Garden State had satisfied Prong "C" of the ABC test relative to the work performed by the shooters, for among other reasons, because it had established that the average shooter only performs two shows per year, because shooters like Mr. Papa earn only approximately \$2,500 per year from the work they perform for Garden State, and because the resulting loss in income which would be suffered by a shooter whose relationship with Garden State had been terminated would "not significantly impact [his or her] finances," respondent states the following:

[A]lthough the [shooters] may be unable to file a valid claim for benefits based upon earnings from Garden State alone, pursuant to N.J.S.A. 43:21-4(e)(4) their wages from all employment would be combined to establish a valid claim for benefits under the UCL. Thus, wages earned in employment are taxable without regard to whether at any given time an individual has sufficient earnings to establish a valid claim for benefits.

In reply to the exceptions filed by respondent, Garden State asserts that, "[t]he DOL wants to dictate that a person working perhaps one day a year, not at a physical plant of [Garden State], not under the control or supervision of [Garden State] and that has no plausible intent, ability, necessity or reality of claiming unemployment benefits and the loss of such one day a year in no way affects their ability to maintain a living, is an employee," adding, "[t]he ALJ heard the facts, applied the facts to the law, and reached the correct conclusion." Specifically, regarding Prong "A" of the ABC test, Garden State characterizes as "ridiculous," respondent's assertion within its exceptions

that Garden State had failed to establish that each shooter has been and will continue to be free from control or direction over the performance of the services he or she provides to Garden State. Garden State explains:

These technicians are under no requirements. [Garden State] can't call up a police officer who is on duty in their full time daily job and say you need to shoot this display at some date and time "or else." If such a preposterous assertion were to be true, the simple reply of the police officer would be something of the effect "or else what? – I don't work for you. What are you going to do? I shoot fireworks when I want and if I want. If that doesn't work, then that is too bad." This is not the relationship of an employee/employer.

As to Prong "B" of the ABC test, Garden State asserts the following:

The position raised again in the exception to the ALJ's findings as they pertain to prong B once again demonstrates the lengths the DOL will go to force their own conclusion. This is not even close. [Garden State] has a plant. They have employees. Those employees work in that plant. Their payroll is approx.. 1 million dollars for those employees working at that location. The idea that no matter where someone works is the principal place of business is implausible. It is akin to saying that when you sleep in a motel for a night away from your home that that is your principal residence. Principal is a pretty simple word. Not much in the way of interpretation. An easy definition of a word that the DOL is somehow attempting to be confused and extended to result in a constant failure of prong B of the test.

Relative to Prong "C" of the ABC test, Garden State maintains the following:

[T]he DOL completely ignores the ALJ's conclusions and rationale and the statement's contained in the Carpet Remnant case and as further logically analyzed at page 588 of said decision. Why should benefits be withheld and taxes collected from a technician [who] has no realistic eligibility or basis to claim unemployment benefits. There are no time cards. There are no hours logged. Finish the task in two hours or ten hours and the pay is the same. One, two, three days a year of work does not make someone an employee especially in a circumstance where that individual is in complete control of whether they do or do not work, when and how they work under their own direction and control. These individuals place ZERO reliance on [Garden State] as a means of support or existence. Work or don't work for [Garden State], either way makes no difference to them. This was clearly demonstrated at trial and logically interpreted and applied by the ALJ.... There is nothing present here to upset said determination other than the same inappropriate rationale that is certainly not applicable to these facts. The DOL seems to focus on the

fact that the particular technicians that testified at trial have shot shows for [Garden State] alone as some form of restriction, reliance and control. [Garden State] has used technicians from other companies and [Garden State] technicians have covered events for other companies at their discretion and will outside the influence or control of [Garden State]. These technicians can shoot or not shoot for [Garden State] or for anyone. They are truly independent in every sense of the word.

In conclusion, Garden State indicates the following:

[T]he DOL cites itself the fact that these workers need to work 20 weeks at \$165+ per week or earn \$8,300 in 2015 to qualify [for unemployment benefits]. Not a single technician approaches such a formula. Whether or not [Garden State] is an employer does not make someone an employee. [Garden State] is an employer of their employees that work full and part time under their supervision and control at their principal place of business which such workers [sic] are taxed accordingly. Those workers are not the same as these technicians in issue as is clearly evidenced. Irrespective of all the little nuances, the court in *Carpet Remnant* was clear. Make logical determinations based on the facts of a circumstance. The DOL's determination and position are not logical. The ALJ made such conclusions and determinations and they need to be accepted.

CONCLUSION

Upon *de novo* review of the record, and after consideration of the ALJ's initial decision, as well as the exceptions filed by respondent and the reply thereto filed by petitioner, I hereby reject the ALJ's reversal of the DLWD's determination that Garden State had employed the shooters whose services it engaged and, therefore, that Garden State is liable for unpaid contributions to the unemployment compensation fund and the State disability benefits fund on behalf of those employees for the audit period, 2006 through 2009.

I agree with respondent that the ALJ's legal analysis relative to Prong "C" of the ABC test is fatally flawed. That is, the ALJ incorrectly concluded that because the shooters engaged by Garden State were also employed full-time and part-time in occupations unrelated to the display of fireworks, such as, police officer, fireman, carpenter, lawn-care worker and electrician, they were customarily engaged in an independently established trade, occupation, profession or business, as that phrase is used within N.J.S.A. 43:21-19(i)(6)(C). As noted by respondent in its exceptions to the initial decision of the ALJ and as reflected in the opinions in both *Carpet Remnant* and *Gilchrist*, 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. Multiple employment, such as that relied upon by the ALJ in support of her conclusion relative to Prong "C" of the ABC test, does not equate to an

independently established enterprise or business. In Carpet Remnant, 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.

In the instant matter, Garden State has failed to demonstrate that the shooters it engages to perform fireworks displays received payment for such services from any other firm. In fact, as noted by the respondent in its exceptions, the record demonstrates that all of the income earned for the display of fireworks by the shooters who worked for Garden State came from Garden State. In light of Garden State’s failure to establish that a single one of its shooters had received payment from someone other than Garden State for the display of fireworks, it is not surprising that Garden State was unable to address the duration and strength of any fireworks display business independently operated by any of the shooters it engages, nor was it able to address the number of customers or number of employees of any such business. As to extent of the shooters’ “tools, equipment, vehicles and similar resources,” the testimony of Nunzio Santore, Sr., as summarized by the ALJ, indicates that the shooters owned no tools, equipment, vehicles or other similar resources used in the display of fireworks; that is, according to Mr. Santore, the materials and equipment used by the shooters to display the fireworks are owned by Garden State; those materials and equipment are picked up by the shooters at Garden State’s plant prior to the show and are returned to Garden State’s plant following the show; the trucks used to transport the materials and equipment are owned by Garden State, are pre-loaded by Garden State, are picked up by the shooters at Garden State’s plant prior to the show and are returned to Garden State’s plant following the show; the trucks provided by Garden State to the shooters for transportation to the show venue are insured by Garden State; Garden State pays the shooters’ license fees; and Garden State provides both workers’ compensation and liability insurance for the shooters.

Many, if not all, of the ALJ’s erroneous conclusions relative to Prong “C” of the ABC test, appear to be the result of the ALJ’s misunderstanding of the holding in Carpet Remnant and her lack of familiarity with the UCL; case in point, the ALJ’s conclusion that among the reasons Garden State had satisfied Prong “C” of the ABC test is that it had established that the average shooter only performs two shows per year, because shooters earn only approximately \$2,500 per year from the work they perform for Garden State, and because the consequent loss in income which would be suffered by a shooter whose relationship with Garden State had been terminated would “not significantly impact [his or her] finances.” I agree with respondent that although the shooters may be

unable to file a valid claim for benefits based upon earnings from Garden State alone, pursuant to N.J.S.A. 43:21-4(e), their wages from all employment would be combined to establish a valid claim for benefits under the UCL. Thus, wages earned in employment are taxable without regard to whether at any given time an individual has sufficient earnings to establish a valid claim for benefits.

Regarding both Prong “A” and Prong “B” of the ABC test, I also agree with respondent that Garden State has failed to meet its burden. Specifically, relative to Prong “A,” it is difficult to understand how the ALJ could find in favor of petitioner when, according to the ALJ’s own summary of the testimony of Nunzio Santore, Sr., his company, Garden State, “runs” the fireworks shows; “hires” the technicians; as part of that hiring process, performs background checks on prospective technicians; follows a process in “creating a fireworks show,” which includes providing a “preloaded” truck to the technicians; “trains technicians until they are ready to perform shows on their own;” sometimes “supervises the shows” to ensure that the pyrotechnicians are “correctly performing their services;” and, finally, according to Mr. Santore, is the “kind of business where you have to be hands-on.” Suffice it to say, I disagree with the ALJ that Garden State has met its burden under Prong “A” of the ABC test, and find instead that the overwhelming weight of the evidence in the record supports the opposite conclusion.

Regarding Prong “B” of the ABC test, petitioner goes on at some length within its reply to respondent’s exceptions about how its factory in Millington, New Jersey, is its “principal place of business” and how “principal is a pretty simple word,” not requiring “much in the way of interpretation.” Unfortunately for petitioner, the test under Prong “B” is not whether the service is performed outside the usual course of the business for which such service is performed, or outside of the principal place of business of the enterprise for which such service is performed. Rather, the test is whether the service is performed outside the usual course of the business for which such service is performed, or outside of all the places of business of the enterprise for which such service is performed. As noted by respondent in its exceptions, the Court in Carpet Remnant defined the phrase “all places of business” to mean those locations where the enterprise has a physical plant or conducts an integral part of its business. In light of the testimony of Mr. Santore regarding the nature of Garden State’s operation, Garden State cannot credibly assert that the shooting of fireworks displays is not an integral part of its business. It most certainly *is* an integral part of its business³ and, therefore, the services performed by the shooters for Garden State are not performed “outside of all the places of business” of Garden State, nor, obviously, are the services performed by the shooters for Garden State outside of the usual course of Garden State’s business. Consequently, as

³ In addition to the testimony of Mr. Santore regarding the nature of Garden State’s business, which is part of the hearing record, I hereby take administrative notice of the contents of Garden State’s own website, www.gardenstatefireworks.com, which lists among its accomplishments over 50 firework display performances, such as the Washington DC July Fourth Celebration, Macy’s New York July Fourth Celebration on the Hudson and the Statue of Liberty Bicentennial Celebration, and which boasts, “For over 110 years, GARDEN STATE FIREWORKS, INC. has performed thousands of displays, all over the world, for every event imaginable” (emphasis added).

with Prong “A,” above, I disagree with the ALJ that Garden State has met its burden under Prong “B” of the ABC test, and find instead that the overwhelming weight of the evidence supports the opposite conclusion.

Finally, included within the ALJ’s analysis under Prong “A” of the ABC test, though more aptly discussed under Prong “C,” is her finding that Garden State had established that the shooters it engaged were “free to work for Garden State’s competitors.” Regarding the significance of that finding, or lack thereof, the holding in Spar Marketing, Inc. v. New Jersey Department of Labor and Workforce Development, 2013 N.J. Super. Unpub. LEXIS 549 (App. Div. 2013), certification denied, 215 N.J. 487 (2013), is instructive. In that case, the services of retail merchandisers were at issue and the court observed:

No proof that the merchandisers worked simultaneously for other merchandising companies was provided; Brown’s general claims to the contrary,⁴ without documentary support, are not persuasive. As a result, petitioner failed to provide, by a preponderance of the credible evidence, proofs sufficient to satisfy subsection (C) of the ABC test.

Similarly, in the matter at hand, notwithstanding Garden State’s contention that its shooters are generally free to work for Garden State’s competitors, there is no evidence in the record to establish that other such relationships actually existed during the audit period; which is to say, there is no evidence in the record of the amount of remuneration that shooters received from Garden State compared to that received from “Garden State’s competitors.” Consequently, as in Spar Marketing, petitioner has failed to provide, by a preponderance of the credible evidence, proofs sufficient to satisfy Prong “C” of the ABC test.⁵

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

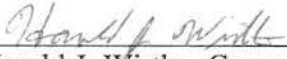
⁵ Mention is also made within the ALJ’s initial decision of an IRS form (Exhibit P-2), which contains the following conclusion: “[The IRS] will not change the status of pyrotechnicians you paid as independent contractors. These workers meet the safe harbor provision of industry practice under Section 530 of the Revenue Act of 1978 based on the study done by the American Pyrotechnics Association.” As noted by the ALJ, Garden State’s own witness, its accountant, Generoso Romano, CPA, testified that (1) New Jersey applies the ABC test, and is not bound by federal determinations of a worker’s status as an independent contractor, (2) the federal safe harbor regulations do not govern States, and (3) the determination of the trade association, American Pyrotechnicians Association, only addressed federal tax law, not State tax law. Nevertheless, the ALJ found that “while not controlling or dispositive, the fact that the IRS considers these workers independent contractors, at the very least, indicates that such conclusion is not unreasonable.” Simply stated, the ALJ is wrong. The test used by the IRS under federal law to determine independent contractor status is materially different than New Jersey’s statutory ABC test. For that reason, among others, the remark made by the IRS on the subject form is irrelevant and not worthy of discussion within the body of this decision.

ORDER

Therefore, with regard to all shooters who were engaged by Garden State during the audit period, the recommended order of the ALJ which reversed the determination of the DLWD is hereby rejected, petitioner's appeal is hereby dismissed, and Garden State is hereby ordered to immediately remit to the DLWD for the years 2006 through 2009 \$30,167.30 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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