Big Daddy Drayage, Inc.
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 17680-16
AGENCY DKT. NO. DOL 15-006
(ON REMAND LID 11214-15)

Issued: December 11, 2017

Pursuant to N.J.S.A. 43:21-14(c), the New Jersey Department of Labor and Workforce Development ("DLWD" or respondent) assessed Big Daddy Drayage, Inc. ("BDD" or petitioner) for unpaid contributions to the unemployment compensation fund and the State disability benefits fund for the period from 2006 through 2009 ("the audit period"). BDD requested a hearing with regard to the DLWD's assessment. The matter was transmitted to the Office of Administrative Law, where it was heard by Administrative Law Judge Ellen S. Bass (ALJ). In the ALJ's initial decision, issued on August 11, 2016, Judge Bass applied the test for independent contractor status found within the State's Unemployment Compensation Law (UCL), N.J.S.A. 43:21-1 et seq.; commonly referred to as the "ABC test" (see N.J.S.A. 43:21-19(i)(6)(A), (B) and (C))[1],

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

to the question of whether the services provided by drivers engaged by petitioner to haul freight in connection within its Newark, New Jersey, facility during the audit period constituted covered "employment." Applying the ABC test to the services provided by the drivers in question, the ALJ concluded that none of the drivers had been employees, but rather, had all been independent contractors. Based on this finding, the ALJ ordered the reversal of the DLWD's determination regarding petitioner's tax liability for all such drivers who had been engaged by petitioner during the audit period. Importantly, however, as a preliminary matter, the ALJ rejected petitioner's assertion that the ABC test is not the appropriate test to apply under the circumstances; that is, the ALJ rejected petitioner's assertion that it should be permitted to establish the existence of a Federal Unemployment Tax Act (FUTA) exemption for the services provided by its drivers and, thereby, establish entitlement to the exemption from UCL coverage found at N.J.S.A. 43:21-19(i)(7)(X) (referred to hereafter as the "owner-operator exemption"), by demonstrating to the satisfaction of the ALJ and, ultimately, to the satisfaction of the Commissioner of the DLWD, that it has met the Internal Revenue Service (IRS) 20 factor test for independence. [2] In support of its asserted right to establish the existence of a

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> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
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> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
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> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
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> N.J.S.A. 43:21-19(i)(6)

[2] Separate and apart from the UCL's test for independence (the ABC test), which, if satisfied, exempts services performed by independent contractors from UCL coverage; there are a series of specialized exemptions from UCL coverage, found at N.J.S.A. 43:21-19(i)(7)(A) through (Z) and N.J.S.A. 43:21-19(i)(9) and (10), which include, among others, the owner-operator exemption. In order to successfully assert one of the latter specialized exemptions from UCL coverage, the putative employer need not meet the requirements of the ABC test. However, regarding each specialized exemption, the putative employer must establish (1) that the services meet the requirements of the given specialized exemption (e.g., for the owner-operator exemption, that the services are performed by operators of motor vehicles weighing 18,000 pounds or more, licensed for commercial use and used for the highway movement of motor freight, who own their own equipment or who lease or finance the purchase of their equipment through an entity which is not owned or controlled directly by the entity for which the services were performed and who were compensated by receiving a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance

FUTA exemption through proof that the services of the drivers in question meet the IRS 20 factor test and, thereby, establish entitlement to the specialized owner-operator exemption from UCL coverage (assuming petitioner meets the other requirements for the owner-operator exemption described in FN2), petitioner cited to a DLWD rule; specifically, N.J.A.C. 12:16-23.2, which states that evidence of a FUTA exemption may include (1) a private letter ruling from the IRS, (2) an employment tax audit conducted by the IRS after 1987, which determined that there was to be no assessment of employment taxes for the services in question, (3) a determination letter from the IRS, and/or (4) "documentation of responses to the 20 tests required by the Internal Revenue Service to meet its criteria for independence." Again, the ALJ rejected petitioner's assertion relative to use of the IRS 20-factor test and concluded that in the absence of a private letter ruling from the IRS, an employment tax audit conducted by the IRS after 1987, or a determination letter from the IRS, petitioner would be unable to establish a FUTA exemption; would, therefore, be prohibited under N.J.S.A. 43:21-19(i)(7) from asserting the specialized owner-operator exemption from UCL coverage; and, consequently, would be required to establish that it had met each prong of the ABC test found at N.J.S.A. 43:21-19(i)(6) in order for the services of the drivers in question to be considered exempt from UCL coverage. In support of the ALJ's conclusion relative to applicability of the owner-operator exemption and; specifically, to use of the IRS 20 factor test to establish the existence of a corresponding FUTA exemption, Judge Bass stated the following:

> Relative to the IRS test, the Department urges that satisfaction of that test must be demonstrated by submission of a form SS-8, as required by the Federal government.
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> Big Daddy's argument that it can avail itself of the exemption contained in paragraph (a)(4) of the regulation [N.J.A.C. 12:16-23.2] simply by demonstrating in this proceeding that it meets the twenty-point IRS test is unpersuasive. It is well established that an administrative regulation is subject to the same canons of construction as a statute. When interpreting a statute or regulation, our courts assume that the framers intended to ascribe to words their ordinary meaning. The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. An agency's interpretation its own regulations is entitled to "great deference."
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> Here, the regulation uses the word "evidence," and defines that word by reference to unequivocal rulings from the IRS. The clear intent of the regulation is to defer to a formal Federal determination of exemption, not to shift to the State the obligation to analyze Federal law.

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and weight of the transportation move), and (2) that the services are also exempt under FUTA or that contributions with respect to such 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 Department's contention that Big Daddy would need to present form SS-8 to demonstrate a FUTA exemption is consistent with the overall intent of the regulation. Accordingly, I CONCLUDE that the appropriate test to use in determining whether the controverted owner-operators are independent contractors is the "ABC" test traditionally used by the Department.
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> (citations omitted)

As indicated earlier, the ALJ having concluded that petitioner would "need to present form SS-8 to demonstrate a FUTA exemption," and, in the absence of such evidence from petitioner, having concluded that "the appropriate test to use in determining whether the controverted owner-operators are independent contractors is the 'ABC' test traditionally used by the Department," the ALJ applied the ABC test to the evidence presented during the hearing and concluded that petitioner had met that test. Consequently, the ALJ issued a recommended order reversing the DLWD's determination that petitioner is liable for $258,689.79 in unreported and/or underreported wages for the audit period. Respondent filed exceptions. Petitioner filed a reply to respondent's exceptions, which also contained certain exceptions taken by petitioner to the initial decision issued by the ALJ.

In a remand decision, dated November 4, 2016, I disagreed with the ALJ as to her interpretation of N.J.A.C. 12:16-23.2(a)(4) and the related threshold issue: whether, for the purpose of asserting entitlement to the specialized owner-operator exemption, petitioner may establish a FUTA exemption for the services performed by its drivers during the audit period by demonstrating to the satisfaction of the ALJ and, ultimately, to the satisfaction of the Commissioner of the DLWD, that it has met the IRS test for independence. Following is an excerpt from the remand decision:

> The ALJ correctly observed that an administrative regulation is subject to the same canons of construction as a statute. One of those canons of construction is the general rule against surplusage, which stands for the principle that where one reading of a statute (or regulation) would make one or more parts of the statute (or regulation) redundant and another reading would avoid the redundancy, the other reading (the one which would avoid the redundancy) is preferred. The ALJ concluded within her initial decision that reading N.J.A.C. 12:16-23.2(a)(4) so as to require petitioner to "present form SS-8 to demonstrate a FUTA exemption is consistent with the overall intent of the regulation," explaining further, "[t]he clear intent of the regulation is to defer to a formal Federal determination of exemption, not to shift to the State the obligation to analyze Federal law." However, the paragraph of N.J.A.C. 12:16-23.2(a) immediately preceding N.J.A.C. 12:16-23.2(a)(4); specifically, N.J.A.C. 12:16-23.2(a)(3), already lists the Form SS-8 Determination Letter as acceptable evidence of a FUTA exemption. Consequently, if one were to read N.J.A.C. 12:16-23.2(a)(4) as the ALJ

> suggests, then both N.J.A.C. 12:16-23.2(a)(3) and (a)(4) would refer to precisely the same form of evidence - a determination letter(s) from the IRS – which would violate the rule against surplusage, rendering N.J.A.C. 12:16-23.2(a)(3) redundant. In addition to her earlier observation about the same canons of construction applying to regulations as to statutes, the ALJ also correctly observed that when interpreting a statute or regulation, our courts assume that the framers intended to ascribe to words their ordinary meaning. N.J.A.C. 12:16-23.2(a)(4) states that "documentation of responses to the 20 tests required by the IRS to meet its criteria for independence" (emphasis added), constitutes acceptable evidence of a FUTA exemption. N.J.A.C. 12:16-23.2(a)(4) then directs the reader to IRS Revenue Rule 87-41 for a list of the 20 factors. Why would the agency refer within N.J.A.C. 12:16-23.2(a)(4) to "documentation of responses" to the IRS 20 factor test, as opposed to an IRS determination applying the IRS 20 factor test; and why would the agency direct the reader's attention to an IRS revenue rule which lists the 20 factors of the IRS test for independence, if it did not intend to permit an employer to demonstrate before the agency that it meets the IRS test for independence? In other words, if the agency intended, as the ALJ suggests, for N.J.A.C. 12:16-23.2(a)(4) to require the production by petitioner of an IRS determination letter indicating an "unequivocal ruling from the IRS" as to employment status, then it need simply have stated within N.J.A.C. 12:16-23.2(a)(4) that an IRS determination letter constitutes evidence of a FUTA exemption. N.J.A.C. 12:16-23.2(a)(4), as currently written, does not state that. Moreover, as indicated earlier, N.J.A.C. 12:16-23.2(a)(3) already does. Thus, again, to read N.J.A.C. 12:16-23.2(a)(4) as the ALJ suggests would create a redundancy. All of this leads, in my opinion, to two inescapable conclusions: (1) as currently written, N.J.A.C. 12:16-23.2(a)(4) does, in fact, permit a putative employer to prove the existence of a FUTA exemption for the purpose of establishing entitlement to one of the specialized exemptions from UCL coverage set forth at N.J.S.A. 43:21-19(i)(7) by demonstrating through documentation that it meets the IRS test for independence, and, consequently, (2) this matter must be remanded to the ALJ for further hearing so that petitioner may be afforded the opportunity to demonstrate through documentation that the services provided by the drivers in question meet the IRS test for independence.

Because I was ordering a remand for further hearing on this threshold issue, I declined to address within the remand decision the ALJ's application of the ABC test to the evidence presented during the hearing, nor did I find that it was necessary at that time for me to address either respondent's exceptions to Judge Bass' initial decision or petitioner's reply to those exceptions. I will however address each at this time.

As indicated above, in the ALJ's August 11, 2016 initial decision, she applied the ABC test to the services provided by the drivers in question and concluded that none of the drivers had been employees, but rather, had all been independent contractors.

Following is a summary of the ALJ's analysis relative to each of the three prongs of the ABC test:

Prong "A"

The ALJ found that "[t]he totality of the owner-operators' relationship with [BDD] confirms that they are not under [BDD's] control." Specifically, the ALJ found that the drivers work when they wish and suffer no repercussions if they do not seek an assignment; they are free to work for other carriers; they supply their own equipment (their trucks); incur all expenses attached to maintaining their trucks, to include registration, insurance, repairs, and fuel; they are engaged in a "skilled job" that requires licensure via a commercial drivers' license; they receive no benefits of any kind; and "they are paid by the job." The ALJ continued that the BDD truck drivers' "employment arrangement" is reminiscent of that in Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super. 135 (App. Div. 1990), in which the court found that nurses who had been engaged by Trauma Nurses, Inc. (TNI), a supplier of hospitals with nurses on a temporary basis, had been customarily engaged in an independently established trade, occupation, profession or business, because the "independent nature" of their nursing profession would survive without the existence of TNI. Trauma Nurses, 242 N.J. Super., at 148. Relative specifically to Prong "A," the ALJ explained that the BDD truck drivers are like the TNI nurses in that the TNI nurses alone decided whether to work, when to work, what shifts to work and working hours; that the TNI nurses, like the BDD truck drivers, signed one year contracts, with optional yearly renewals; that while TNI could terminate a contract, it rarely did, although nurses often elected to stop utilizing its services; and that placement at TNI was not necessarily the exclusive source of work.

With regard to use by BDD drivers of BDD's United States Department of Transportation (USDOT) number while hauling freight for BDD[3], the ALJ concluded that, "an examination of the Federal regulatory scheme that requires USDOT registration supports the argument that the drivers are independent contractors." In this regard, the ALJ cited as instructive the holding in Great West Casualty Insurance Company v. National Casualty Company, 53 F. Supp. 3d, 1154, 1179 (N.D.D. 2014), which speaks to the policy objectives of the Federal regulatory scheme relative to motor carriers and which, according to the ALJ, indicates that the Federal regulations were designed to protect the shipping and highway-traveling public, not to facilitate control by the carrier over the owner-operators. The ALJ also quoted from the opinion in NLRB v. A. Duie Pyle, 606 F. 2d 379 (3d Cir. 1979), where the court held that "[s]ubstantial precedent indicates that government regulations, standing alone, are insufficient to turn owner-operators into employees, adding that they (the Federal regulations), "'may be considered

[3] According to the ALJ, the "most critical aspect" of DLWD Auditor Minesh Patel's determination had been the display of BDD's USDOT number on the vehicles operated by the BDD truck drivers. According to the ALJ, Patel had testified during the hearing that under the USDOT regulations a "carrier" can haul interstate under his own USDOT number, but a "registrant" must use a trucking company's USDOT number to haul interstate.

in conjunction with other elements of the relationship in determining the status of an individual worker,' [but] they do not necessarily imply the existence of an employer-employee relationship." NLRB v. A Duie Pyle at 385. (citing Merchants Home Delivery Service v. NLRB, 580 F. 2d 966, 974 (9th Cir. 1978).

With regard to the lease agreement between BDD and its drivers and the possible resulting exclusive possession of the vehicles used by BDD drivers during the term of the lease, the ALJ found that 49 C.F.R. 376.12(c)(1) requires that such a lease shall provide that the authorized carrier lessee shall have exclusive possession, control and use of the equipment for the duration of the lease and 49 C.F.R. 376.12(c)(4) states that nothing in paragraph (c)(1) is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. Thus, the ALJ concluded, the "exclusive possession" requirements of Federal law do not, in and of themselves, create an employer-employee relationship.

With regard to the non-compete clause contained in the agreements between BDD and its drivers[4], the ALJ found that it also does not, in and of itself, create an employer-employee relationship, because, according to the ALJ, "the clause does not limit their [the drivers'] ability to drive for other carriers, only for those carriers who work with [BDD's] customers; and only for those customers for whom the driver has previously hauled loads."

Relative to the requirement within the Independent Contractor Agreement whereby all BDD drivers must drive personally, and that BDD must approve any substitute drivers; that the contract cannot be assigned, the ALJ found that, "BDD correctly replies that compliance with Federal regulations and liability concerns necessitate that it be circumspect in regard to who hauls its loads," adding, "I thus am unable to agree that this is an indicator of the sort of control envisioned by the ABC test."

Prong "B"

The ALJ found that the work in which the owner-operators are engaged clearly does not take place at BDD's place of business, but rather, "on the roads and highways of the East Coast," adding, "[t]hey perform none of their job responsibilities at the [BDD] site, and report there only to receive their assignment." Thus, the ALJ concluded that, "the owner-operators are independent contractors under Part B of the ABC test," adding, "[s]ince the B standard is in the disjunctive, I need not determine whether truck driving is outside the usual course of [BDD's] business."

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[4] The "Independent Contractor Agreement" contains a non-compete clause, under which the contractor agrees that for a period of two years after the termination of the agreement, he will not "[d]irectly or indirectly sell or render services to or for the benefit of a competing business, including a business he may own in whole or in part, that would involve any customer or former customers of Big Daddy Drayage with whom he may have worked, provided services to, or had regular contact."

Prong "C"

The ALJ acknowledged the holdings in Gilchrist v. Division of Employment Security, 48 N.J. Super. 147 (App. Div. 1957) and Carpet Remnant Warehouse, v. New Jersey Dep't of Labor, 125 N.J. 567 (1991), which list factors to be considered when determining an individual's ability to maintain an independent business or trade, such as the duration and strength of the business, the number of customers and their respective volume of business, the number of employees, the extent of the individual's tools, equipment, vehicles and similar resources and the amount of remuneration each individual received from the putative employer compared to that received from others. However, the ALJ distinguished each of those cases from the current matter, explaining that Gilchrist involved salespeople and Carpet Remnant involved carpet installers; whereas the current matter involves truck drivers, who, "are not salespeople, nor are they carpet installers," adding, "I thus do not believe that [BDD] should be burdened unfairly with a tax obligation simply because its owner-operators have not opted for any particular sort of business structure." The ALJ then went on to state the following:

> The owner-operators are, simply put, "guys with a truck," who get paid by the day to haul a load. The fact that [BDD] presented no proofs that they have more formal business enterprises, with the physical indicia to so prove, does not alter my view that they are independent contractors under Part C of the ABC test. Like the nurses in Trauma Nurses, they have an "independently established profession." N.J.S.A. 43:21-19(i)(C). Like the nurses there, they must "fulfill...licensure requirements in order to practice their profession." Trauma Nurses, supra., 242 N.J. Super. at 148. Licensed commercial drivers can offer their skill to any number of carriers, and the facts reveal that many of these drivers do. See also Luxama v. Ironbound Exp., 2012 WL 5973277, *6 (D.N.J. June 28, 2012)(where the court held that "possession of a commercial driver's license qualifies as a special skill....")

The ALJ also stated that she was not persuaded by "the fact that some of the drivers drove exclusively for [BDD]," adding that this is not dispositive of the issue of whether BDD met the requirements of Prong "C." Finally, the ALJ stated the following:

> I likewise disagree with the Department's contention that [BDD] failed to meet its burden of proof because it did not present evidence about the business enterprises of each and every one of the owner-operators who hauled loads for [BDD] during the four years in question. [BDD] bore the burden of proving that its drivers were independent contractors by a preponderance of the competent, relevant and credible evidence. The evidence must be such as to lead a reasonable cautious mind to a given conclusion. Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. Gallagher (Michael Gallagher, President of BDD) convincingly described the consistent

relationship between his company and all the drivers whose services he retained, and was the only competent witness to do so.

(citations omitted)

In its exceptions, respondent took particular issue with the ALJ's findings of facts and conclusions relative to Prong "C" of the ABC Test, citing in support of its position the opinion in Gilchrist, supra, 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 cited to the holding in Schomp v. Fuller Brush Co., 124 N.J.L. 487 (Sup. Ct. 1940), wherein the Court stated that "it is an analysis of the fact surrounding each employee that determines whether an alleged employee is an independent contractor according to the ABC test" (emphasis provided by respondent). Thus, respondent asserted that in order to satisfy Prong "C" of the ABC test, BDD must demonstrate that each truck driver was engaged in a viable, independently established, business at the time that he or she rendered services to BDD. It is in this regard that respondent asserted BDD had "most convincingly failed the ABC test." That is, respondent stated the following:

> Here, there is no evidence in the record demonstrating that any of the alleged independent contractors had an outside business relationship with other transportation businesses. Moreover, the record reflects no evidence that these individuals had indicia that would be considered as independently established businesses such as business cards, letterheads, invoices and Federal Tax Returns 1040 C showing business locations away from the petitioner or a small percentage of income from the petitioner.
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> Satisfaction of the "C" prong of the statute requires that the individuals in question are customarily engaged in an independently established trade, occupation, profession or business. The petitioner's only witness was [BDD's] president Michael Gallagher, who testified that the alleged independent contractors had the ability to drive for other transportation companies. The record reflects that no documentation [was] provided to actually demonstrate that these alleged contractors provided their services for anyone else [other than for BDD] besides the petitioner's self-serving testimony. [BDD] has not carried its burden and

is unable to demonstrate that the alleged independent contractors are independently engaged in the transportation business.

Regarding Prong "A" of the ABC test, respondent maintained that the ALJ had erred in her finding that BDD had met its burden of proof to establish that the truck drivers had been and would continue to be free from control or direction by BDD over the performance of services. Specifically, respondent stated the following:

> Here, the record states that [BDD] solicits and contracts with big box stores for the transportation of standardized shipping containers from the Port of Newark to determined destinations. Furthermore, the Auditor testified that [BDD] directs and controls every aspect of the individuals in question, either by restricting the owner/operators from working for other companies while hauling under [BDD's] USDOT and insurance, tracking and monitoring each owner/operator's haul, or directing the owner/operators' deliveries to satisfy [BDD's] interchange agreements with all the major steamship lines and rail carriers.

As to Prong "B" of the ABC test, which requires that the putative employer establish that the service at issue is outside the usual course of business for which the service is performed or outside of all the places of business of the enterprise for which the service is performed, respondent asserted that since by Mr. Gallagher's own account the meaning of "drayage" is the moving of containers to and from a port and since the vast majority of the individuals engaged by BDD in its drayage business were, in fact, the owner/operators (during 2008 test year, 13 non-owner/operator employees vs. 173 owner/operators), BDD had failed to establish that the services performed by the truck drivers had been performed outside the usual course of BDD's business. Furthermore, respondent maintained that BDD not only occupied a small trailer that housed dispatchers and other clerical personnel, but also had a yard measuring 3 ½ to 4 acres located a block or two away from Port Newark at 575 Avenue P, where BDD held the containers prior to shipment. Respondent argued that since the owner/operators would pick up containers either from the Port of Newark or from BDD's yard and haul them to BDD's customers, BDD had failed to establish that the truck drivers' services had been performed outside of all the places of business of the enterprise for which the service had been performed.

In its reply/exceptions, petitioner took issue with the ALJ's rejection of its assertion that the ABC test is not the appropriate test to apply under the circumstances; that is, petitioner took issue with the ALJ's rejection of petitioner's assertion that it should be permitted to establish the existence of a FUTA exemption for the services provided by its drivers and, thereby establish entitlement to the exemption from UCL coverage found at N.J.S.A. 43:21-19Ii)(7)(X), by demonstrating to the satisfaction of the ALJ and, ultimately, to the satisfaction of the Commissioner of the DLWD, that it had met the IRS 20 factor test for independence, which petitioner asserts are "the usual common law tests," which "focus[ ] on direction and control." As to application of "the usual common law tests" to the evidence produced during the OAL hearing, petitioner asserted the following:

First, under applicable law, "the usual common law tests," [BDD] is not the employer of Port Newark owner-operators – who all owned or provided their own large trucks and were paid in a "task-based manner" – and were free from the direction and control of [BDD]. As [BDD] showed below, the United States Supreme Court precedent in the Silk case, United States v. Silk, 321 U.S. 704 (1947), essentially dictates the conclusion that the owner-operators are independent contractors under federal law. By the same token, the usual common law tests focus[ ] on independence (freedom from direction and control) – as embodied by IRS's 20 factors – also dictate the conclusion that [BDD] is not the common law employer of the owner-operators.

Second, again as also shown below, under federal law, putative employers are protected from the retrospective imposition of FUTA under safe harbor provisions – which protect the putative employer who mistakenly classifies workers as independent contractors, but has a reasonable basis for making the classification. A reasonable basis can include judicial decisions – Silk comes to mind – as well as the practice of the industry at issue to classify owner-operators as independent contractors. The record shows – indeed, it is undisputed – that motor carriers typically classify owner-operators as independent contractors. Although it is clear that [BDD] properly classified the owner-operators as independent contractors for FUTA, that classification could not be retrospectively overturned by IRS so long as [BDD] had a reasonable basis for so doing.

Third, the record shows that IRS has never questioned the propriety of [BDD] treating the owner-operators as independent contractors. Because IRS has never challenged that classification, the federal statute of limitations applicable to FUTA for the years at issue, 26 U.S.C. 6501(a) has come and gone without any assessment by the IRS. As such, [BDD] has no potential liability for FUTA for tax years 2008 and 2009.

In reply to respondent's exceptions; specifically, relative to the ALJ's findings of fact and conclusions under the ABC test, petitioner maintained the following with regard to each of the three prongs:

Prong "A"

Petitioner asserted the following:

Since Gallagher was the only competent witness to testify about the nature of the relationship [between BDD and the truck drivers] and Judge Bass found him to be both "convincing" and "credible," DOL's

submission fails to marshal any facts from which the Commissioner could reject that evidence – again, which essentially is Judge Bass's Part "A" finding.

With respect to the two factors that DOL argues show that Judge Bass erred, [BDD's] insistence that owner-operators not use its USDOT number when hauling freight for others represents [BDD's] compliance with federal law as correctly detailed by Judge Bass. Even though DOL relied "heavily" on the fact that the owner-operator was under contract with [BDD] was required to display [BDD's] USDOT number, DOL has cited no legal authority to the Commissioner challenging the proposition that compliance with the "exclusive possession" regulation, 49 CFR 376.12(c), somehow transforms owner-operators into employees, contrary to the express intent of that regulation. Judge Bass's analysis of how federal DOT regulations impact state law characterization of the relationship between a carrier and an owner-operator was careful, cogent and correct.

Likewise, DOL cites "facts" in the record suggesting that [BDD] exerted control over the means and methods used by the owner-operator, but in fact the "facts" cited only show that the owner-operators were required to provide proof that the delivery was made. The legal issue, of course, is "control and direction," and that undisputed record shows that [BDD] had had no supervisors or "work rules" and simply did not, through contract or practice, control or direct the details of how the contractor was to perform.

(citations omitted)

Prong "B"

Petitioner asserted the following:

With respect to Part "B," Judge Bass concluded that since the owner-operators performed their transportation services on the public highways, Part "B" was satisfied. That conclusion reflects a proper application of Carpet Remnant Warehouse, 125 N.J. at 592 – which recognizes that "B" is the disjunctive, and that "places of business...refers only to those locations where the enterprise has a physical plant or conduct an integral part of its business."

Prong "C"

Petitioner asserted the following:

> With respect to Part "C," Judge Bass concluded that [BDD] satisfied its burden of showing that the owner-operators were enterprises that existed and could exist independently of their relationship with it. The evidence showed that many of the owner-operators drove for multiple carriers, that owner-operators came and went as they chose, that [BDD's] business was sporadic/seasonal, and that [BDD] made no promise of any work whatsoever in the parties' Independent Contractor Agreement. In addition, the undisputed evidence also showed that between 2005 and November 1, 2014 – when [BDD] ceased operations, that not a single owner-operator – out of hundreds – ever applied for unemployment or temporary disability benefits.
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> Judge Bass correctly determined that "no economic dependency existed, but rather, "[l]ike the nurses in Trauma Nurses, they [the owner-operator] have an "independently established profession."
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> (citations omitted)

As indicated earlier, following submission by the parties of the above-summarized exceptions and reply/exceptions, I, upon de novo review of the record, rejected the recommended order of the ALJ which had reversed the determination of the DLWD and ordered that the matter be remanded to the Office of Administrative Law so that the ALJ could reopen the hearing and take evidence as to whether the services provided to petitioner during the audit period by the drivers met the IRS test for independence, in order for the ALJ to determine in the first instance (prior to reaching the ABC test analysis) whether petitioner was able to establish an exemption from UCL coverage under the specialized owner-operator exemption found at N.J.S.A. 43:21-19(i)(7)(X).

The matter was then re-transmitted to the Office of Administrative Law, where it was returned to ALJ Bass. The ALJ conducted a hearing and issued a new initial decision. In that post-remand initial decision, the ALJ concluded relative to the threshold issue of whether petitioner had been able to establish an exemption from UCL coverage under the specialized owner-operator exemption at N.J.S.A. 43:21-19(i)(X), that petitioner had failed, not because of an insufficiency of evidence offered by petitioner as to whether the driver's services during the audit period met the IRS test for independence; but rather, because petitioner had failed to satisfy one of the other requirements under N.J.S.A. 43:21-19(i)(7)(X). Specifically, the ALJ found that whereas N.J.S.A. 43:21-19(i)(7)(X) requires as one of several conditions to a successful assertion of the owner-operator exemption that the owner-operator be compensated by receiving a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance and weight of the transportation move, "the moves arranged by [BDD] were day-trips and the drivers were paid based on a rate book that correlated compensation to the zip code where the load would be transported; in other words, their compensation was task-based." Thus, the ALJ concluded, "since the evidence does not reflect that compensation for the move was based both on the distance

and weight of the move," N.J.S.A. 43:21-19(i)(7)(X) is inapplicable to the services of those truck drivers who had provided services to BDD during the audit period. The ALJ noted that this was the same conclusion she had reached in her August 11, 2016 initial decision relative to the owner-operator exemption, "albeit for different reasons." The ALJ, therefore, concluded that it would be inappropriate to apply the IRS test for independence and that, "for the reasons expressed in my earlier decision, and in accordance with the ABC test, N.J.S.A. 43:21-19(i)(6), I again conclude that the controverted owner-operators are independent contractors, and not employees of [BDD]." In deference to my earlier remand decision, the ALJ did nevertheless within the post-remand initial decision analyze the relationship between BDD and its drivers using the IRS test. Although the ALJ ultimately based her post-remand recommended order reversing the DLWD's assessment for unpaid contributions to the unemployment compensation and State disability benefits funds on her finding that petitioner had met its burden under the ABC test, at the conclusion of her analysis under the IRS test for independence, she did also find that petitioner had met its burden under the federal test. The IRS test for independence, which is divided into three categories: (1) Behavioral Control, (2) Financial Control, and (3) Type of Relationship, is described in detail within both the body of the ALJ's post-remand initial decision and my November 4, 2016 remand decision. Relative to the ALJ's finding in favor of petitioner under the IRS test for independence, she explained as follows:

> Behavioral Control
>
> [BDD's] drivers do not receive the sort of instructions that are indicative of employee status. Although they are told where to deliver their load, they are not told what precise route to take; what workers to use to assist them, if any; or what vehicle to utilize. They are not told where to purchase gasoline or other supplies for their vehicle. Any instructions given by [BDD] are for from detailed; simply put, the driver is given a destination, and perhaps paperwork that must be completed to evidence delivery. The drivers are not formally evaluated. They receive no on-the-job training. They come to the job with commercial driving licenses, having already received whatever training was needed to procure licensure. The IRS criteria point to independent-contractor status.
>
> Financial Control
>
> The owner-operators own their own vehicles; they make a significant investment in the equipment they use to work for someone else. They incur all expenses attached to maintaining their truck, to include registration, insurance, repairs, and fuel. They are free to seek work elsewhere, and haul loads for other carriers. Financially, they can make a profit, or they can suffer a loss. Indeed, during a month that their vehicle needs extensive repairs, or fuel prices rise, they will make less profit, or possibly none. [BDD] does not guarantee them work; they could appear in the morning at [BDD's] premises and leave empty handed. And the

> IRS test notes that "an employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time." Conversely, an independent contractor is "usually paid by a flat fee for the job." Here, the owner-operators are paid by the job and are not guaranteed work. These factors are all indicative of independent-contractor status.
>
> Type of Relationship
>
> IRS guidance instructs that "[h]ow the parties work together determines whether the worker is an employee or an independent contractor." Here the drivers receive no benefits, vacation, sick, or other leave time, which is indicative of independent-contractor status. There is no permanency to the relationship; the driver "shows up" on the morning he wishes to haul a load, and suffers no repercussions if he chooses not to do so. He is hired to assist with a "specific project," that is, hauling the load in question that morning. While transportation is [BDD's] business, and the drivers clearly facilitate that business, the other aspects of control are so absent in the relationship that I am unable to view this factor as dispositive; overall, the relationship of the parties is not that of an employer and employee.[5]

Exceptions were submitted by both petitioner and respondent. Petitioner also submitted a reply to respondent's exceptions, which prompted one additional exchange of submissions from both respondent and petitioner.

In its exceptions, respondent agrees with the ALJ's conclusion that the specialized owner-operator exemption at N.J.S.A. 43:21-19(i)(7)(X) is not applicable; however, takes issue with the ALJ's findings of fact and conclusions relative to application of the ABC test to the services performed by drivers for BDD during the audit period. Respondent's objections to the ALJ's ABC test analysis and related findings of fact are substantially similar to the objections raised within respondent's exceptions to the August 11, 2016 initial decision, which are summarized above. As to the ALJ's findings of fact and conclusions relative to application of the IRS test for independence, respondent takes exception, explaining as follows:

> The record is clear that [BDD] did not satisfy the three separate categories set forth in the Commissioner's remand. Patel [DLWD auditor] testified that [BDD] failed the "Behavioral Control" factor, the "Financial Control" factor, and the "Type of Relationship" factor.
>
> First, Patel testified that [BDD] failed to demonstrate that they satisfied the behavioral control criteria because the owner-operators were

[5] The ALJ also applied the IRS 20-factor test, which is described in IRS Revenue Rule 87-41, and which, as explained in my November 4, 2016 remand decision, has been replaced by the three-part, multi-factor, IRS test for independence described above. The ALJ concluded that petitioner had met its burden under the 20-factor test as well.

told by [BDD] which container to deliver, where to deliver the container, and the time period to make the delivery. The record further clarifies that Gallagher advertised their different hauls via their website, Facebook, and Twitter accounts. The owner-operators would have not been able to haul these containers without [BDD] as they had no opportunity to secure these hauls directly without going through [BDD].

Furthermore, Patel testified that [BDD] directs and controls every aspect of the individuals in question, either by restricting the owner-operators from working for other companies while hauling under [BDD's] USDOT and insurance, tracking and monitoring each owner-operator's haul, or directing the owner-operators' deliveries to satisfy BDD's interchange agreements with all the major steamship lines and rail carriers.

Second, Patel also testified that the owner-operators failed the "financial control" criteria for independence because the owner-operators received reimbursed expenses such as fuel surcharges and detention charges. Thus, the owner-operators risk of loss is reduced or eliminated by receipt of these reimbursed expenses and advances for fuel and repairs.

Moreover, again the record is clear that the audit disclosed no evidence that any of the owner-operators have their own business location, business telephone number, business stationary, or any advertisement in any form. Clearly, the owner-operators were not holding out their services to the market or the industry. The record discloses that no documentation was ever provided to the Division demonstrating that the owner-operators provided their services to anyone other than [BDD].

Third, Patel audit report indicates the owner-operators did not satisfy the type of relationship criteria for independence. Patel testified that the audit disclosed in 2008 that [BDD] had only 13 employees including two corporate officers and 11 administrative staff on payroll. However, a total of 173 owner-operators were classified as independent operators. [BDD] depends on the owner-operators to haul their containers. Without owner-operators, [BDD] simply would not exist and be able to maintain a viable business. This clearly indicates that owner-operators are a substantial component of [BDD's] every day operation.

Finally, Patel testified that his work papers show the information gathered for the alleged independent owner-operators' businesses. Those work papers further indicate that Manual Navarro received 100% of the alleged independent owner-operator's earnings came from [BDD]; Edgar Alvarez received 100% of the alleged independent owner-operator's earnings were from [BDD], and Aragon Adalberto received 95% of his alleged independent owner-operator's earnings from [BDD]. The audit

report amply demonstrates that the majority of [BDD's] owner-operators were similarly compensated.

(citations omitted)

In its exceptions, petitioner agrees with the ALJ's findings of fact and conclusions relative to application of both the IRS test for independence and the ABC test to the services provided by drivers for BDD during the audit period. However, petitioner objects to the ALJ's conclusion that the services provided to BDD by the drivers do not qualify for the specialized owner-operator exemption at N.J.S.A. 43:21-19(i)(7)(X) because the drivers were not compensated by receiving a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance and weight of the transportation move, but rather, "were paid based on a rate book that correlated compensation to the zip code where the load would be transported; in other words, [according to the ALJ] their compensation was task-based." Specifically, petitioner states the following:

> In dicta, Judge Bass appears to have rejected the notion that [BDD} is entitled to the large truck exemption from the ABC test set forth in N.J.S.A. 43:21-19(i)(7)(X). DOL's position that the large truck exemption does not apply because [BDD's] rate book does not compensate on the basis of distance and weight misapprehends the legislative intent.
>
> [BDD's] business was moving standard 40 foot, shipping containers that were received at Port Newark and which were needed to be transported to inland sites via a day-trip. Because a standard container is a standard container – and it would be wasteful not to fill it to the legal limit – [BDD's] rate book treated a container as a container, and fundamentally based compensation on the zip code of the recipient. [BDD] was not in the business of transporting small loads, big loads or loads in between, but rather standardized shipping containers, i.e., "weight" is not an independent variable for its customer base.
>
> At the initial proceeding, Michael Gallagher testified on behalf of [BDD] that the rate book model that [BDD] used essentially compensated the owner-operator on a zip code basis – which was augmented by fuel surcharges that were posted weekly in response to changes in the price of fuel. There were other secondary charges that could provide additional compensation – such as detention, i.e., if the customer did not timely unload the container [BDD] would impose a detention charge on the customer which, in turn, was received by the owner-operator.
>
> As Gallagher explained, [BDD's] rate book was intended to provide the owner-operator with between 73% to 75% of the gross revenues [BDD] received as a result of each "move." The rate book

system that [BDD] employed was task-based, and represents a hybrid between a "distance" model and "percentage of revenue" model.[6]

CONCLUSION

Upon a de novo review of the record, and after consideration of the ALJ's initial decision, as well as the exceptions filed by both respondent and petitioner, and the subsequent replies filed by each, I hereby reject the ALJ's conclusion that the owner-operator exemption at N.J.S.A. 43:21-19(i)(7)(X) does not apply to the services provided to BDD by its drivers during the audit period, because BDD's method of compensating its drivers was "task-based," rather than compensation as a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance and weight of the transportation move. That is, I agree with petitioner that the exemption's use of the term "distance," rather than mileage, allows the zip-code to zip-code compensation methodology utilized by BDD to meet the "distance" portion of the owner-operator exemption's compensation criteria. As to the "weight" component of the exemption's compensation criteria, I agree with petitioner that using a zip-code to zip-code rate calculated *taking into consideration a standardized full-load container* is

[6] In the exchange of submissions which followed the filing of exceptions by the parties; specifically, petitioner's October 26, 2017 response to respondent's exceptions, respondent's reply to petitioner's October 26, 2017 response, and petitioner's response to the October 26, 2017 reply, petitioner revisited its opposition to the ALJ's conclusion within the post-remand initial decision that the owner-operator exemption at N.J.S.A. 43:21-19(i)(7)(X) does not apply, because BDD's drivers were not compensated by receiving a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance and weight of the transportation move. Specifically, in petitioner's October 26, 2017 response to respondent's exceptions, it cited the difference between less-than-truckload ("LTL") carriers and full truckload shipping ("FTL") and explained that, "given the prevalence of standardized shipping containers at Port Newark and most terminals in the State, the FTL model prevails today, and many carriers – particularly drayage carriers – only transport standardized, full-load containers," adding, "[s]ince drayage carriers, by definition, carry only standardized, full-load shipping containers, BDD's rates did not need to apportion the container among multiple users (pro-rated by weight)." Respondent objected to petitioner having included within its October 26, 2017 response additional facts that had not been presented or substantiated during the hearing process and took issue with petitioner's analysis of the owner-operator exemption, including petitioner's assertion that legislature's use of the word "distance" within the exemption, rather than "mileage," brings its "rate book" method of payment within the ambit of the owner-operator exemption, and petitioner's reliance in support of its legislative intent argument upon Governor Christie's rejection of a 2013 bill, which, according to petitioner, proposed a "drayage" exception to the owner-operator exemption. Regarding the latter, respondent noted that the 2013 bill had never been signed into law by the Governor and had not been reposted for passage by the Legislature, adding that the plain language of the currently enacted statute, N.J.S.A. 43:21-19(i)(7)(X) controls.

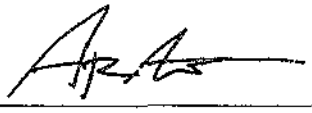
sufficient to meet the test. Thus, in accordance with my November 4, 2016 remand decision, and pursuant to N.J.A.C. 12:16-23.2(a)(4), so long as petitioner is able to demonstrate to my satisfaction that the services provided to it by the drivers during the audit period meet the IRS test for independence, those services are exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7)(X). As to application of the IRS test for independence to the instant matter, I hereby accept the ALJ's findings of fact and her conclusion that petitioner has met its burden; which is to say, I conclude, for the reasons set forth within the ALJ's initial decision, that petitioner has provided sufficient evidence of a FUTA exemption under N.J.A.C. 12:16-23.2(a)(4) to satisfy the requirement of N.J.S.A. 43:21-19(i)(7). Therefore, I hereby conclude that the services provided to BDD by owner-operator/truck drivers during the audit period are exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7)(X).

ORDER

Therefore, it is hereby ordered that the Department's assessment against BDD for unpaid contributions to the unemployment compensation fund and State disability benefits fund for the audit period 2006 through 2009 is reversed.

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
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