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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1581-15T2

GARDEN STATE FIREWORKS, INC.,

Petitioner-Appellant,

v.

NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,

Respondent-Respondent.

Argued September 14, 2017 – Decided September 29, 2017

Before Judges Alvarez, Currier, and Geiger.

On appeal from the New Jersey Department of Labor and Workforce Development, Agency Docket No. 13-005.

August N. Santore, Jr., argued the cause for appellant.

Alan C. Stephens, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Mr. Stephens, on the brief).

PER CURIAM

Plaintiff Garden State Fireworks, Inc. is a New Jersey corporation that manufactures, stores and sells fireworks, and

facilitates firework shows; pyrotechnicians are hired to conduct and shoot the fireworks at the shows or displays. The New Jersey Department of Labor and Workforce Development (the Department) conducted a routine audit of the company and determined that plaintiff had improperly classified some of the pyrotechnicians it hired to run fireworks displays as independent contractors rather than employees. As a result, the Department ordered plaintiff to pay unemployment compensation and disability contributions for these technicians. Plaintiff appealed, and the Department's order was reversed after trial in the Office of Administrative Law (OAL). However, in a final administrative action, the Commissioner of the Department reversed the Administrative Law Judge's (ALJ) order, finding that the pyrotechnicians should be classified as employees of the company, not independent contractors. After a review of plaintiff's arguments, in light of the record and applicable principles of law, we reverse.

Following a routine audit, the Department advised plaintiff that it owed $30,167.30 for unemployment compensation and disability contributions it had not paid for certain individuals it had classified as independent contractors and not employees of the company. After plaintiff requested a hearing, the matter was transferred to the OAL for further proceedings.

During the hearing, the Department presented its auditor, Carol Balfour. Balfour testified that she reviewed the business records of the company and noted that the pyrotechnicians hired by plaintiff to conduct the fireworks displays were listed on 1099 forms as "subcontractors." She sent out letters to the "subcontractors" requesting additional information. Balfour applied the statutory "ABC test"[1] and determined that the pyrotechnicians did not meet the requirements of the test. Specifically, the auditor concluded that plaintiff directly controlled the pyrotechnicians' activities, employed staff members who performed the same services, and offered no proof that the pyrotechnicians were in an independently established occupation or profession. As a result, Balfour categorized the pyrotechnicians as employees and found plaintiff liable for various unpaid contributions.

Nunzio Santore, Jr., one of plaintiff's co-owners, testified that the company has twenty-five to thirty-five full and part-time employees who work at its facility doing light manufacturing, sorting, assembling, and packing of fireworks. When a display is ordered for a specific show, the employees pack the selected

[1] N.J.S.A. 43:21-19(i)(6)(A)-(C) is the statute that governs the determination of whether an individual is classified as an employee or independent contractor. It is commonly referred to as the "ABC test."

fireworks onto trucks. A pyrotechnician is then hired for the specific show. The technician comes to the facility to pick up the packed truck and drives it to the site. The technician sets up the show, shoots off the fireworks and cleans up after the show, returning the empty truck to plaintiff's facility.

Not surprisingly, plaintiff is busiest between Memorial Day and Labor Day, with eighty percent of its business taking place in the week surrounding July 4th. Several of the full-time employees of the company also perform fireworks displays. Those individuals receive a W2 form and are paid on the payroll with the required tax contributions.

Santore described the pyrotechnicians who receive 1099s as individuals who only work one to three days a year for the company. Almost all of the pyrotechnicians are in a full-time occupation or business and come from a variety of backgrounds, including doctors, teachers, firefighters, and policemen. According to Santore, on July 4th, the company uses more than one hundred technicians in firework displays all over the State. Although he occasionally goes to a site to check on a crew, neither he nor anyone else at the company supervises the pyrotechnicians. They receive a flat fee for each show they perform.

Santore also informed the ALJ that plaintiff carries workers compensation and general liability insurance coverage for the

pyrotechnicians as well as its W2 employees. In his experience of running the business for over forty years, Santore stated that he has never had a pyrotechnician file an unemployment claim.

Several pyrotechnicians also testified as witnesses for plaintiff. Daniel Papa, a full-time police officer, stated that he has set up and run fireworks displays for plaintiff. He advised that plaintiff's employees have never directed him as to how to set up the displays, which fireworks to launch, when to launch, or specified the length of the fireworks display. Papa denied ever seeking or expecting unemployment compensation from plaintiff.

Lawrence Neville, owner of a lawn care company, testified that he had performed three or four fireworks displays per year for plaintiff for the past ten to twelve years. He also stated that plaintiff has never directed him as how to perform the fireworks displays. He denied ever working in the plant. Neville added that he did not expect that he could file for unemployment compensation at the conclusion of a fireworks show.

Anthony Brown testified that he worked full time as a landscaper and performed several fireworks displays yearly for plaintiff. Like the other pyrotechnicians, Brown stated that if he ceased doing the fireworks displays, there would be no impact on his income or lifestyle.

Plaintiff's accountant, Generoso Romano, testified that he worked with plaintiff during an Internal Revenue Service (IRS) audit for the tax years of 2006 through 2010. The audit included a review of the 1099s that had been issued to the pyrotechnicians and their classification as "independent contractors." Following the completion of the audit, the IRS sent plaintiff a Form 886-A, advising that after reviewing plaintiff's 1099s, it "determined that we will not change the status of the pyrotechnicians you paid as independent contractors. These workers meet the safe harbor provisions of industry practice under Section 530 of the Revenue Act of 1978 based on the study done by the American Pyrotechnics Association." Based on the IRS's determination, Romano testified that plaintiff felt "comfortable . . . in treating [the pyrotechnicians] as independent contractors[.]" The American Pyrotechnics Association study was admitted into evidence.

In April 2015, ALJ Mumtaz Bari-Brown issued a written, comprehensive decision, finding that the pyrotechnicians hired by plaintiff were independent contractors, thus reversing the Department's determination. The ALJ informed that the matter was governed by the statutory "ABC test" under N.J.S.A. 43:21-19(i)(6)(A)-(C). She also relied on case law application of the statute, including Carpet Remnant Warehouse, Inc. v. Dep't of Labor, 125 N.J. 567 (1991). In that case, the Court was asked to

determine whether carpet installers that performed services for a carpet distributor were independent contractors. Carpet Remnant, supra, 125 N.J. at 571. The Court confirmed that the ABC test was the governing statute. Id. at 582.

The ABC test becomes applicable only after a determination that the service provided constitutes "employment," which is defined as "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). "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." Carpet Remnant, supra, 125 N.J. at 581. Those criteria are:

> (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)(A)-(C)].

The failure to satisfy any one of the three criteria results in an "employment" classification. That determination is fact-sensitive, requiring an evaluation in each case of the substance, not the form, of the relationship. Carpet Remnant, supra, 125 N.J. at 581. The ABC test determines whether employers and employees are obligated to pay unemployment compensation taxes as well as whether workers are eligible to receive unemployment benefits. Id. at 582.

The ALJ addressed each prong of the test individually. Regarding prong "A," the judge found:

> 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. 43:21-19(i)(6)(A).

The ALJ also found that the pyrotechnicians satisfied prong "B" of the ABC test. Unlike plaintiff's full-time workers, the technicians did not work at plaintiff's factory. All three technicians who testified said that their only contact with

plaintiff was picking up materials and filling out some initial paperwork for their fireworks displays. Furthermore, plaintiff's factory workers performed different services than the technicians' services at the fireworks display site. The judge concluded:

> I am persuaded by the credible evidence presented by Garden State that the subcontractors perform services outside of all the employer's places of business. Therefore, I CONCLUDE that Garden State satisfied Prong B, and established that the services are "performed outside of all the places of business of the enterprise for which said service[s] [are] performed."

In addressing prong "C," the ALJ pointed out that none of the contractors relied on plaintiff for their income, nor had any of them ever applied for unemployment or disability benefits. The judge found it irrelevant that the technicians did not maintain independent pyrotechnic companies. She explained that the statute only requires that the contractor be "customarily engaged in an independently established trade, occupation, profession or business[;]" it does not require that the independently established business be part of the same industry. Based on the technicians' testimony, the judge also concluded that it would not have been practical for any of the individuals to form an independent business to display fireworks only once or twice per year. Therefore, the judge found:

> Garden State's subcontractors are customarily engaged in an independently established trade, occupation, profession or business. Indeed, they are employed full-time and part-time in other industries and professions. Moreover, I am persuaded by the credible evidence presented by petitioner that if the subcontractors were to suffer a loss of income from Garden State it would not significantly impact their financial situation or necessitate an application for unemployment benefits.

As plaintiff met its burden of providing evidence sufficient to meet all three prongs, the ALJ concluded that the pyrotechnicians were independent contractors, and she, therefore, reversed the Department's determination. [2]

In a final administrative action, the Department disagreed with the ALJ's conclusions. The Commissioner asserted that the ALJ misunderstood the holding in Carpet Remnant and incorrectly concluded that plaintiff met all three prongs of the ABC test, particularly prong "C." In discussing prong "C," the Commissioner stated that:

> [T]he 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

[2] The ALJ considered the IRS's classification of the pyrotechnicians as independent contractors. While recognizing the determination was neither "controlling [n]or dispositive," she found the determination could, however, suggest that her conclusion was not unreasonable.

> 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.

The Department also found that plaintiff had not met prongs "A" and "B" as plaintiff controlled all of the pyrotechnicians, and all of the sites of fireworks displays are integral parts of its business. The Commissioner rejected the ALJ's determination and ordered plaintiff to remit the unpaid unemployment and temporary disability contributions.

Plaintiff now appeals from the Department's determination, asserting that it erred in its application of the ABC test.

We are mindful that we have a limited role in reviewing decisions of an administrative agency. Philadelphia Newspapers, Inc. v. Bd. of Review, 397 N.J. Super. 309, 317 (App. Div. 2007) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). "Therefore, if, in reviewing an agency decision, an appellate court finds sufficient, credible evidence in the record to support the agency's conclusions, that court must uphold those findings even if the court believes that it would have reached a different result." Id. at 318 (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988)).

"Conversely, a reviewing court is not bound to uphold an agency determination unsupported by sufficient evidence." Ibid.

(citing Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). We do not act simply as a rubber stamp of an agency's decision where it is not supported by substantial, credible evidence in the record as a whole or it is arbitrary, capricious or unreasonable. Ibid.

To satisfy prong "A," plaintiff must show that the "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[.]" N.J.S.A. 43:21-19(i)(6)(A). This prong requires a company to establish not only that it "has not exercised control in fact, but also that the employer has not reserved the right to control the individual's performance." Carpet Remnant, supra, 125 N.J. at 582. Factors indicative of control include: "whether the worker is required to work any set hours or jobs, whether the enterprise has the right to control the details and the means by which the services are performed, and whether the services must be rendered personally." Philadelphia Newspapers, supra, 397 N.J. Super. at 321 (quoting Carpet Remnant, supra, 125 N.J. at 590).

Here, plaintiff provided the technicians with the required supplies and then gave them virtually complete control over the performance of the fireworks displays. The technicians testified that none of plaintiff's employees directed them as to which

fireworks to launch, when to launch, or how to set up the displays. The Department's determination that plaintiff controlled the technicians' performance lacks fair support in the evidence. See Philadelphia Newspapers, supra, 397 N.J. Super. at 323 (concluding "the record is devoid of evidence demonstrating that claimant was customarily engaged in an independently established trade or activity from the mere delivery of [the company's] newspapers 'at the time of rendering the service involved'").

Prong "B" requires a showing that the services are outside of either the employer's usual course of business or all of the employer's places of business. Carpet Remnant, supra, 125 N.J. at 584. The Department concluded that plaintiff's places of business included everywhere it conducted a fireworks display. As the Court stated in Carpet Remnant, such a definition of "place of business" would render a person's ability to satisfy the alternative standard of prong "B" "practically impossible." Id. at 592. The Court, therefore, refined the standard to refer "only to those locations where the enterprise has a physical plant or conducts an integral part of its business." Ibid. The Court determined that the residences of all of the claimant's customers where carpet was installed were "clearly 'outside of all [its] place of business.'" Ibid. (quoting N.J.S.A. 43:21-19(i)(6)(B)). Here, we can similarly conclude that the Department's broad

interpretation of "place of business" was not supported by prior judicial considerations of the statute and would render this required prong meaningless as the standard could never be met. We are satisfied that the pyrotechnicians' work conducted entirely at locations outside of plaintiff's primary plant satisfied prong "B."

In its discussion of the ALJ's determination of prong "C," the Department declared it to be "fatally flawed." We disagree. This prong is satisfied "when a person has a business, trade, occupation, or profession that will clearly continue despite termination of the challenged relationship." Philadelphia Newspapers, supra, 397 N.J. Super. at 323. If the person is so "dependent on the employer" that upon "termination of that relationship" he would "join the ranks of the unemployed," then the prong would not be satisfied. Carpet Remnant, supra, 125 N.J. at 585-86.

Here, the record revealed that the pyrotechnicians were all either retirees or full-time employees outside of their work for plaintiff. Although only three of the more than one hundred pyrotechnicians testified, the parties agreed that their testimony constituted a wholly representative sample of the technicians. All three of the technicians that testified stated that they did not rely on plaintiff as their primary source of income and would

never have expected unemployment compensation from plaintiff. Santore testified that he had never had a pyrotechnician request or even inquire about receiving unemployment compensation after the fireworks shows were completed. The technicians only performed services for plaintiff during one or two weeks of each year, and none of them relied on plaintiff as the main source of their income. We are satisfied that the Department erroneously applied prong "C" as interpreted by the governing case law.

As we have stated, the ABC test is fact-sensitive. We look to the substance of the relationship, not solely its form. See Carpet Remnant, supra, 125 N.J. at 581. Here, it is difficult to conceive that an individual who does work for a company one to three days a year, while working full-time in another profession, could be reasonably considered an employee of that company. As the Court stated in Carpet Remnant, "in cases in which satisfaction of the C standard convincingly demonstrates a person's ineligibility for unemployment benefits, it would be inappropriate for the Commissioner to apply the A or B tests restrictively and mechanically if their applicability is otherwise uncertain." Id. at 590.

Based on our review of the record, we find insufficient evidence to support the Commissioner's determination that the

pyrotechnicians did not meet the ABC test. We, therefore, reverse the Department's determination.

Reversed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION