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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2150-22**

**PENNSAUKEN DIAGNOSTIC
CENTER, LLC,**

Petitioner-Appellant,

v.

**NEW JERSEY DEPARTMENT
OF LABOR AND WORKFORCE
DEVELOPMENT,**

Respondent-Respondent.

Argued May 20, 2024 – Decided June 17, 2024

Before Judges Mawla and Marczyk.

On appeal from the New Jersey Department of Labor and Workforce Development, Docket No. DOL 20-022.

Thomas J. Hagner argued the cause for appellant (Hagner & Zohlman, LLC, attorneys; Thomas J. Hagner and Thomas A. Hagner, on the briefs).

Ian M. Fiedler, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Ian M. Fiedler, on the brief).

PER CURIAM

Petitioner Pennsauken Diagnostic Center, LLC ("PDC") appeals from a March 16, 2023 final administrative action of the Commissioner of the Department of Labor and Workforce Development ("DOL") finding PDC responsible for contributions to the unemployment compensation and disability benefits funds under the New Jersey Unemployment Compensation Law ("UCL"), N.J.S.A. 43:21-1 to -71, between 2015 and 2018. The issue on appeal is whether the Commissioner properly found that the radiologists were PDC's employees who are subject to the provisions of the UCL rather than exempt independent contractors under the ABC test.¹ We affirm.

I.

PDC is a New Jersey limited liability company, which performs medical imaging, radiology, and ultrasound services in Pennsauken and Hamilton Township. On October 15, 2012, PDC entered into a Professional Services Agreement (the "agreement") with Personal Touch Radiology, LLC ("PTR") whereby PTR's radiologists would interpret diagnostic images for PDC's patients. PTR is a radiology medical practice with offices in New Jersey. PTR

¹ As discussed below, the UCL sets forth the so-called ABC test for evaluating whether workers are employees or independent contractors. N.J.S.A. 43:21-19(i)(6)(A) to (C).

had approximately ten business relationships similar to the one it had with PDC. Dr. Lisa Sheppard, the owner of PTR, served as PDC's medical director under the agreement.

Dr. Sheppard selected Drs. Caldwell, Stebbins, and Traflet "to provide professional services for PDC and vetted them to ensure they had proper qualifications." Dr. Sheppard's husband, Brett Boal, was PTR's non-clinical manager. Boal submitted invoices to PDC for the professional services performed by the radiologists, and PDC paid the radiologists directly for their services.

Under paragraph 2.1 of the agreement, PDC required PTR and its radiologists to "provide professional services to PDC's diagnostic-imaging patients," and "render services and promptly prepare, or cause to be prepared, appropriate and timely reports and medical record documentation." The radiologists were required to read PDC's images, generate transcripts, and provide reports to PDC, who in turn received payment for those services from insurance companies.

Paragraph 2.4 of the contract, entitled "No Interference by Corporation" states: "[PTR] and the radiologists shall employ their own methods and exercise their own professional judgment in the performance of the professional services,

and shall not be subject to the control or direction of PDC with respect to the performance of such professional services, unless otherwise required by law."

Additionally, paragraph 3.1 of the contract, entitled "Independent Contractor Relationship" states that:

Radiologists shall be the employees or independent contractors of PTR, and not employees of [PDC]. [PDC] shall be liable for its own debts, obligations, acts[,] and omissions, including the payment of all required withholding, social security and other taxes or benefits on behalf of [PDC] employees only, and not for any employees or independent contractors of PTR.

Pursuant to paragraphs 5.1 and 5.2, compensation rates for PTR's professional services were set forth in Exhibit B of the agreement. Under paragraph 5.2, PDC was required to compensate "PTR by checks made payable directly to a [r]adiologist as agreed with PTR," and required that "[PDC] shall pay the [c]ompensation to PTR or its [r]adiologists in accordance with [PDC] payroll policies but no later than thirty . . . days after the last day of the month in which the [c]ompensation was earned." Additionally, under paragraph 6.1, the agreement required "each [r]adiologist shall maintain, at the [r]adiologist's expense, professional liability insurance"

The agreement also specified the amount of compensation to be paid to PTR per image read. It further stated under Exhibit A that "PTR [was]

responsible to provide adequate [r]adiologist staffing and coverage to provide [r]adiology reports in a timely fashion," and "[t]he parties will work together so all reports will be ready within [twenty-four] hours."

In 2019, the DOL conducted an audit of PDC's books and records for the period of 2015 through 2018. As a result of this audit, the DOL determined PDC was liable for unpaid unemployment and disability contributions on behalf of the radiologists,² because it did not satisfy its burden under the ABC test to rebut the presumption that the radiologists were employees and assessed PDC for unpaid unemployment and disability contributions under the UCL. PDC appealed from the DOL's determination, and the matter was transferred to the Office of Administrative Law for a hearing before an Administrative Law Judge ("ALJ") as a contested case.

William Kinder, an auditor with the DOL, testified on behalf of the DOL regarding his actions in conducting the PDC audit. The ALJ accepted Kinder's testimony as credible. Kinder testified the radiologists did not meet the ABC test for independent contractor status.

² There were various other workers involved in the audit that are not subject to this appeal.

The ALJ also considered the testimony of PDC's witnesses Greg Gallo, CPA³; Boal; Shazeen Ali, an owner/member of PDC; and Faisal Ali, Shazeen's husband and an owner/member of PDC.⁴ Boal testified about Dr. Sheppard's work outside PDC, her independent businesses, and that she did not read radiographic studies at PDC's facilities but did so at her home. As to Dr. Stebbins, Boal testified he did not "know what percentage of time, but [he knew] that [Dr. Stebbins] would actually go to [PDC's] Hamilton [location] and read there." Regarding Drs. Caldwell and Traflet, Boal testified he did not "know the details" of where they performed their work for PDC.

Shazeen⁵ testified the radiologists did not have specific hours, did not come to the office, and PDC had no say in their reports. To her knowledge, the radiologists read for other practices. She further testified she did not track their hours, and they had their own insurance.

Ali testified he was the initial founder of PDC, along with Shazeen and Nazish Khan, his sister-in-law. He described the relationship between PDC and

³ Gallo largely testified—which is not relevant here—as to his belief that Shazeen was an owner of PDC.

⁴ The individual radiologists did not testify.

⁵ We refer to Shazeen and Faisal by their first names because they share the same surname. We intend no disrespect.

PTR's radiologists as independent contractors because there was "no way [PDC could] control it" as it was "pretty much . . . illegal to dictate [to] radiologists how to do their job."

The ALJ affirmed the DOL's determination that the radiologists did not satisfy the ABC test in a detailed twenty-nine-page decision. The ALJ found PDC failed to prove any of the ABC test's three prongs as to the radiologists, except with respect to Dr. Sheppard concerning prong C, because PDC demonstrated she "was engaged in independently established businesses and only derived a very small percentage of her income from PDC."

Following a de novo review, the Commissioner accepted the ALJ's recommendation to affirm the DOL's assessment against PDC for unpaid contributions on behalf of the radiologists. The Commissioner ultimately found the radiologists were PDC's employees rather than independent contractors under the ABC test.

Regarding prong A, the Commissioner concluded that PDC failed to meet its burden which, because the ABC test is conjunctive, was alone sufficient to find the radiologists were employees. He agreed with the ALJ's findings and conclusions that the radiologists were subject to the control or direction of PDC. The Commissioner adopted the ALJ's conclusion that PDC's actions

demonstrated indicia of direction or control over the radiologists, including: (1) the overall relationship that led to the radiologists' work and the key terms and conditions of the work were set by PDC; (2) PDC controlled the workflow; (3) after PDC performed the diagnostic imaging, the radiologists were required to log into PDC's portal to determine which diagnostic images to read; (4) PDC required the radiologists' reports be prepared within twenty-four hours; (5) PDC paid the radiologists directly for their services at a set rate pursuant to the agreement with PTR;⁶ (6) PDC—not PTR—billed patients and insurance companies for the radiologists' services; and (7) PDC bore the risk of loss for the services performed by the radiologists. Even though the Commissioner held that PDC failed to meet its burden of proving prong A, he went on to address prongs B and C.

Under prong B, the Commissioner found PDC failed to demonstrate that the radiologists performed services either (a) outside of PDC's usual course of business or (b) outside of PDC's places of business. Regarding prong B's usual course of business analysis, the Commissioner found PDC established that the radiologists' services were performed within PDC's usual course of business.

⁶ The Commissioner noted that "the invoices for Dr. Sheppard and the other radiologists were issued by [PTR] to PDC, but the payments were made directly by PDC to each radiologist."

Specifically, he agreed that the radiologists' services, namely reading and interpreting PDC's diagnostic images, were a necessary and integral part of PDC's course of business.

As for the second part of prong B, the Commissioner concluded PDC failed to demonstrate the radiologists performed services outside of all of PDC's places of business. The Commissioner noted that Boal's testimony established that both Drs. Sheppard and Stebbins performed services at PDC's physical locations. The Commissioner highlighted Boal's testimony that Dr. Sheppard "would . . . go [to PDC's locations] particularly for review[] of . . . filings, either insurance companies or state filings or radiology. [Dr. Sheppard was] a supervisor of the clinical side[,] review[ed] the operation to make certain that the filing [was] accurate and reflect[ed] correctly the operation."

Regarding Dr. Stebbins, Boal testified he did not "know what percentage of time, but [he knew] that [Dr. Stebbins] would actually go to [PDC's] Hamilton [location] and read there." With respect to Drs. Caldwell and Traflet, Boal testified he did not "know the details" of where they performed their work for PDC.⁷

⁷ The Commissioner did not accept the ALJ's conclusion that the radiologists' use of PDC's portal to read and interpret PDC's diagnostic images "transformed

The Commissioner then noted that "[t]he only evidence . . . offered by PDC to support its assertion that the radiologists performed all of their work . . . outside of [PDC's] locations" was Shazeen's testimony that the radiologists did not come to PDC's offices. However, the Commissioner found this testimony "self-serving," ambiguous, and contradicted by Boal's testimony. Based on Boal's testimony, the ambiguity of Shazeen's statement, and the absence of any first-hand testimony from the radiologists, he concluded PDC failed to establish the radiologists worked outside of all of PDC's places of business.

Under prong C, the Commissioner relied on Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor, 125 N.J. 567 (1991), and Gilchrist v. Division of Employment Security, 48 N.J. Super 147 (App. Div. 1957), for the proposition that PDC must establish that each of the individual radiologists were engaged in an existing independently established business that could continue to exist independent of PDC at the time they rendered services to PDC. He agreed with the ALJ's decision that PDC failed to demonstrate that Drs. Caldwell, Stebbins, and Traflet could continue to exist independently, apart from PDC, given its failure to present documentary support or first-hand

remote locations where the radiologists performed some of their work, including their homes, into extensions of PDC's workplace."

testimony to establish the nature and extent of their other business ventures, unlike the proofs provided regarding Dr. Sheppard.

The Commissioner concluded "it strain[ed] credulity to believe" each of the radiologists—including Dr. Sheppard—were independent contractors when Dr. Sheppard was the medical director for PDC's entire operation; Drs. Sheppard, Caldwell, Stebbins, and Traflet were the radiologists who performed PDC's essential business purpose, namely reading and interpreting diagnostic images; and PDC paid each of the radiologists directly for those integral services. The Commissioner affirmed the DOL's assessment against PDC for unpaid UCL contributions during the audit period.

II.

PDC argues the individual radiologists in question were misclassified by the DOL. More particularly, PDC asserts it demonstrated that each of the four radiologists were at all times free from any control or direction by PDC. It further asserts it demonstrated that the services provided by the radiologists were both outside PDC's usual course of business and, with the exception of Dr. Stebbins, the radiologists performed their work outside of all of PDC's places of business. PDC next contends it established that all of the radiologists were both customarily engaged as radiologists independent of PDC. It further asserts the

DOL's determination of liability on the part of PDC was based solely on the fact that PDC issued checks to the radiologists directly.

The scope of our review is narrow. We review decisions "made by an administrative agency entrusted to apply and enforce a statutory scheme under an enhanced deferential standard." East Bay Drywall, LLC v. Dep't of Labor & Workforce Dev., 251 N.J. 477, 493 (2022) (citing Hargrove v. Sleepy's, LLC, 220 N.J. 289, 301-02 (2015)). That enhanced deference stems, in part, from "the executive function of administrative agencies." Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995). "An agency's determination on the merits 'will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). The reviewing court "does not substitute its judgment of the facts for that of an administrative agency." Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 587 (2001) (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988)). Rather, the reviewing court "defer[s] to matters that lie within the special competence" of the administrative agency. Balagun v. N.J. Dep't of Corr., 361 N.J. Super. 199, 202 (App. Div. 2003). The party challenging the administrative action

bears the burden of making that showing. Lavezzi v. State, 219 N.J. 163, 171 (2014).

On appeal, the judicial role in reviewing an administrative action is generally limited to three inquires:

(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;

(2) whether the record contains substantial evidence to support the findings on which the agency based its action; and

(3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).]

"When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. 19, 28 (2007). Furthermore, "[w]here there is substantial evidence in the record to support more than one regulatory conclusion, it is the agency's choice which governs." In re Adoption of Amends. to Ne., Upper Raritan, Sussex Cnty., 435 N.J. Super. 571, 583 (App Div. 2014) (quoting Murray v. State Health Benefits Comm'n, 337 N.J. Super. 435, 442

(App. Div. 2001)). "If the Appellate Division is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm even if the court feels that it would have reached a different result itself." Id. at 584 (quoting Clowes, 109 N.J. at 588).

The statutory framework at issue in this appeal, the UCL, N.J.S.A. 43:21-1 to -71, "was designed to act as a cushion 'against the shocks and rigors of unemployment.'" East Bay, 251 N.J. at 494 (quoting Carpet Remnant, 125 N.J. at 581). Whether a putative employer is required to pay into the unemployment compensation and disability benefits funds under N.J.S.A. 43:21-7 turns on whether its workers are employees or independent contractors. Id. at 484-85. Importantly, "[b]ecause the statute is remedial, its provisions have been construed liberally, permitting a statutory employer-employee relationship to be found even though that relationship may not satisfy common-law principles [of employment]." Id. at 494 (second alteration in original) (quoting Carpet Remnant, 125 N.J. at 581).

The UCL sets forth the ABC test for making that determination. Id. at 495; N.J.S.A. 43:21-19(i)(6)(A) to (C). Any service performed for remuneration under any express or implied contract is presumed to be employment unless the ABC test is satisfied. East Bay, 251 N.J. at 495. The statutory test reads:

Services performed by an individual for remuneration shall be deemed to be employment . . . unless and until it is shown to the satisfaction of the division 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;

(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).]

Because the statutory ABC test is formulated in the conjunctive and presumes that services for remuneration constitute employment, the party challenging the DOL's determination of an employer-employee relationship has the burden of "establish[ing] the existence of all three criteria." East Bay, 251 N.J. at 495 (quoting Carpet Remnant, 125 N.J. at 581). The ABC test "is fact-sensitive, requiring an evaluation in each case of the substance, not the form, of the relationship." Id. at 496 (quoting Carpet Remnant, 125 N.J. at 581). "The factfinder must look beyond the employment contract and the payment method

to determine the true nature of the relationship." Ibid. 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 contribution requirements under the UCL, in particular, N.J.S.A. 43:21-7.

A.

Prong A, known as the "control test," requires proof "that the provider of services 'has been and will continue to be free from control or direction over the performance of such services.'" Carpet Remnant, 125 N.J. at 582 (quoting N.J.S.A. 43:21-19(i)(6)(A)). "The person must establish not only that the employer has not exercised control in fact, but also that the employer has not reserved the right to control the individual's performance." Ibid. Factors to consider 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." Id. at 590.

Here, PDC argues the radiologists were neither employees nor independent contractors of PDC, as they worked for a different company. It

further asserts it demonstrated that each of the four radiologists were at all times free from any control or direction by PDC. Additionally, PDC contends that the Commissioner erred in finding there was direction or control because PDC did not influence to any degree the workflow for any of the individuals. It also relies on the fact that the agreement in this case was between PDC and PTR and expressly stated that the radiologists were not subject to PDC's direction or control.⁸

Initially, we observe our Supreme Court has noted, "[t]he factfinder must look beyond the employment contract and the payment method to determine the true nature of the relationship." East Bay, 251 N.J. at 496. Here, despite the contractual language between PDC and PTR, which provided that the radiologists were not employees of PDC, the Commissioner looked to the substance of the relationship. He looked to certain indicia of direction or control PDC exercised over the radiologists as set forth above.

This case is distinct from the putative employer in Trauma Nurses v. Board of Review, 242 N.J. Super. 135, 137 (App. Div. 1990). There, the

⁸ PDC also asserts the radiologists were not required to prepare reports within twenty-four hours, notwithstanding the contract provision, which provided: "the parties will work together so all reports will be ready within [twenty-four] hours."

employer was akin to an agency who provided nurses to hospitals on a temporary basis. Ibid. The nurses were not obligated to adhere to a specific set of rules imposed by their employer, but rather they were required to comply with the policies and procedures of the institution where they were placed. Id. at 144-45. Each of those nurses negotiated their own hourly rate, and the putative employer acted as a broker for nurses by placing them with hospitals on a temporary basis. Id. at 137. Here, the radiologists' pay rate was set forth in the agreement without their own negotiation. However, as noted above, PDC, like the hospital and unlike the putative employer in Trauma Nurses, controlled the workflow, and the radiologists were required to log into PDC's portal to determine which diagnostic images to read and were required to issue reports within twenty-four hours.

The court in Trauma Nurses noted:

where the type of work requires little supervision over details for its proper prosecution and the person performing it is so experienced that instructions concerning such details would be superfluous, a degree of supervision no greater than that which is held to be normally consistent with an independent contractor status might be equally consistent with an employment relationship.

[242 N.J. Super. at 146.]

Because the radiologists were professionals, it is not contested that they would have required little supervision over the details of their work. However, that is not dispositive because even though PDC did not require the radiologists to work any set hours, there is substantial evidence in the record, as noted above, to support the Commissioner's determination that PDC exhibited direction or control over the radiologists "equally consistent with an employment relationship." Ibid.

We recognize PDC's arguments as to prong A are not without some merit. However, even "where there is substantial evidence in the record to support more than one regulatory conclusion, it is the agency's choice which governs." In re Adoption of Amends., 435 N.J. Super. at 583 (quoting Murray, 337 N.J. Super. at 442). Here, the Commissioner's findings as to prong A were not arbitrary and capricious, and there was ample evidence in the record to support its decision.

Because PDC must establish the DOL was arbitrary, capricious, or unreasonable with respect to all three prongs, its failure to meet its burden of proving prong A alone is sufficient to find the radiologists were employees, rather than independent contractors. See East Bay, 251 N.J. at 495-96. Nevertheless, we will briefly address PDC's remaining arguments.

B.

Prong B under the ABC test is an alternative test that requires the radiologists' "work to be 'outside the usual course of the business' or 'outside of all the places of business' of the potential employer." Id. at 496 n.3 (quoting N.J.S.A. 43:21-19(i)(6)(B)). The Court in Carpet Remnant declined to define the term "usual course of the business" and held "the places of business of the enterprise" are limited to "only . . . those locations where the enterprise has a physical plant or conducts an integral part of its business." 125 N.J. at 584-85; see also East Bay, 251 N.J. at 496 n.3 (suggesting the DOL promulgate regulations clarifying what constitutes the "usual course of business" in light of the modern prevalence of remote work).

Regarding the first part of prong B, PDC contends the Commissioner erred because it demonstrated that the services provided by the radiologists were outside PDC's usual course of business. Essentially, PDC argues that its business was fundamentally different than that of PTR, because PDC conducted the imaging, and the radiologists read and interpreted the images.

The Commissioner concluded PDC did not establish that the services performed by the radiologists were outside of PDC's ordinary course of business. The entire business purpose of PDC was to conduct diagnostic imaging. In

Trauma Nurses, the Court held that a broker of nursing personnel to hospitals was not in the "usual course" engaged in providing health care services and therefore is not the employer of the personnel it refers. 242 N.J. Super. 147. Here, however, PDC is engaged in healthcare services—namely radiology services—and the radiologists provided such services, which were vital to the business. In order for PDC operate, it required radiologists to read and interpret those images. In other words, the work of the radiologists was in the usual course of PDC's business. The Commissioner's conclusion that the radiologists' services were performed within PDC's usual course of business was not arbitrary or capricious.

Regarding the second part of prong B, PDC argues that the radiologists, with the exception of Dr. Stebbins, performed their work outside of all of PDC's places of business. While Shazeen denied any of the radiologists worked from PDC's location, the Commissioner found this statement to be ambiguous and self-serving. Furthermore, Boal's testimony established that Drs. Sheppard and Stebbins actually performed work at PDC's physical locations.

Regarding Drs. Caldwell and Traflet, Boal testified that he did not know whether they worked at one of PDC's physical locations. The Commissioner found that, because neither of them personally testified, PDC did not establish

that either of them worked outside of PDC's physical places of business. In other words, Shazeen's ambiguous testimony, coupled with the lack of personal testimony from the radiologists, was insufficient to establish the radiologists worked outside of all of PDC's physical places of business. The Commissioner's conclusions regarding prong B were sufficiently supported by the record, and we discern no basis to disturb his findings.

C.

Under prong C, the test is whether the radiologists were "customarily engaged in an independently established trade, occupation, profession or business." N.J.S.A. 43:21-19(i)(6)(c). "[T]he [prong] C standard is satisfied when a person has a business, trade, occupation, or profession that will clearly continue despite termination of the challenged relationship." East Bay, 251 N.J. at 497 (second alteration in original) (quoting Carpet Remnant, 125 N.J. at 586). Importantly, "[t]he present tense of the verb, 'is' [as used in the statute], indicates that the employee must be engaged in such independently established activity at the time of rendering the service involved." Gilchrist, 48 N.J. Super at 158. Stated another way, "[i]f the worker 'would join the ranks of the unemployed' when the relationship ends, the worker cannot be considered independent under

prong C." East Bay, 251 N.J. at 497 (quoting Carpet Remnant, 125 N.J. at 585-86).

A non-exhaustive list of the relevant factors to consider under prong C includes: "the duration and strength of the [workers'] businesses, the number of customers and their respective volume of business, the number of employees, and the extent of the [workers'] tools, equipment, vehicles, and similar resources," along with the amount of remuneration the workers received from the putative employer compared to other sources. Carpet Remnant, 125 N.J. at 593. Notably, our Supreme Court has acknowledged that "even wholly dependent employees may choose to work for more than one employer." East Bay, 251 N.J. at 498.

PDC argues all of the radiologists were engaged in separate professional activities.⁹ It further contends PTR was not dependent on PDC given that it had approximately ten other similar relationships independent from PDC. It further asserts that we should reframe the question. It argues that the question "is not whether the individual [radiologists] had independently established

⁹ We confine our discussion to Drs. Stebbins, Traflet, and Caldwell because the Commissioner agreed with the ALJ that Dr. Sheppard was engaged in several independently established businesses and only derived a small percentage of her income from PDC.

professions . . . but, rather, . . . whether PTR was an independently established business so that if the relationship between PDC and PTR was terminated, what . . . effect [that] would . . . have on the individual [radiologists]." PDC further notes PTR only derived three to four percent of its revenue from PDC.

Regarding Drs. Caldwell, Stebbins, and Traflet, the Commissioner concluded there was insufficient evidence in the record to demonstrate the full nature and extent of the independently established businesses in which those radiologists may have been engaged. Specifically, none of the radiologists testified in the case. Nor was there any sufficient documentary evidence provided to support PDC's argument they were customarily engaged in an independently established business. Although it may be that Drs. Caldwell, Stebbins, and Traflet were engaged in separate and independent businesses which could continue to exist independently of their work with PDC, the burden was on PDC to prove this. Apart from Dr. Sheppard, there was simply insufficient evidence provided to demonstrate their independence. Accordingly, the Commissioner's decision on prong C was not arbitrary or capricious.

Nevertheless, because the ABC test is conjunctive, even if PDC established prong C, it failed to satisfy its burden under both prongs A and B with respect to all of the individual radiologists. Therefore, the Commissioner

did not err in finding that all the radiologists were not independent contractors and correctly found PDC liable for the UCL contributions.


D.

PDC next contends the DOL's determination of liability on the part of PDC was based "solely on the fact that PDC issued checks to the radiologists directly." We are unpersuaded by this argument. Although Kinder testified that the direct payments prompted the audit, the Commissioner ultimately determined PDC did not meet the ABC test, and his decision was not based solely on PDC's method of paying radiologists.

To the extent we have not addressed them, any remaining arguments raised by PDC lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION