State Shorthand Reporting Services,
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 03693-2014
AGENCY DKT. NO. DOL 14-001

Issued: December 31 , 2021

I. BACKGROUND

Pursuant to N.J.S.A. 43:21-14(c), on August 8, 2013 the New Jersey Department of Labor and Workforce Development ("Department" or "Respondent") assessed State Shorthand Reporting Services ("Shorthand" or "Company" or "Petitioner") for unpaid contributions to the Department's unemployment and disability benefit funds for the period from 2006 to 2008 and 2011 to 2014 (the "audit period"), in the total amount of $104,116.45 ($38,340.44 for 2006-2008 and $65,776.01 for 2011-2014). Shorthand filed a timely appeal and the matter was transferred to the Office of Administrative Law ("OAL") for a hearing as a contested case.

Shorthand is a registered court reporting agency that provides legal transcription services to attorneys, courts, and public agencies. The principal issue before the Administrative Law Judge ("ALJ") was whether the court reporters engaged by Shorthand during the audit period were employees of the company, and consequently whether Shorthand was responsible under N.J.S.A. 43:21-7 for making contributions to the unemployment and disability benefits funds for those individuals. Under N.J.S.A. 43:21-1 *et seq.* (the Unemployment Compensation Law, or "UCL"), the term "employment" is defined broadly to include any service performed for remuneration or under any contract of hire, written or oral, express or implied. N.J.S.A. 43:21-19(i)(1)(A). Once it is established that a service has been performed for remuneration, that service is deemed to be employment subject to the UCL, unless and until it is shown to the satisfaction of the Department either that the service is exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7), (i)(9), or (i)(10), which contain 27 separate specialized exemptions from UCL coverage, or that the service and the individual performing the service meet the statutory test for independent contractor status found at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), commonly referred to as the "ABC test."

Under the UCL, in order to successfully assert any of the 27 separate specialized exemptions set forth at N.J.S.A. 43:21-19(i)(7), (i)(9), and (i)(10), a putative employer must establish not only that the services are covered under the terms of the particular UCL exemption, but also that those services are exempt under the Federal Unemployment Tax Act ("FUTA"), or that contributions with respect to those 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 relevant exemption in this case is at N.J.S.A. 43:21-19(i)(10):

> Services performed by a legal transcriber, or certified court reporter certified pursuant to P.L.1940, c.175 (C.45:15B-1 et seq.), shall not be deemed to be employment subject to the "unemployment compensation law," R.S.43:21-1 et seq., if those services are provided to a third party by the transcriber or reporter who is

> referred to the third party pursuant to an agreement with another legal transcriber or legal transcription service, or certified court reporter or court reporting service, on a freelance basis, compensation for which is based upon a fee per transcript page, flat attendance fee, or other flat minimum fee, or combination thereof, set forth in the agreement.
>
> For purposes of this paragraph (10): "legal transcription service" and "legal transcribing" mean making use, by audio, video or voice recording, of a verbatim record of court proceedings, depositions, other judicial proceedings, meetings of boards, agencies, corporations, or other bodies or groups, and causing that record to be printed in readable form or produced on a computer screen in readable form; and "legal transcriber" means a person who engages in "legal transcribing."

If a putative employer cannot establish a specialized exemption from UCL coverage, it is also possible to assert an exemption under the UCL by meeting the statutory criteria for independent contractor status under the ABC test. A putative employer has the burden to establish the following with regard to the services and the individual performing those services:

> (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 business for which such service is performed, or that such services 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).

These statutory criteria, commonly referred to as the "ABC test," are written in the conjunctive. Therefore, where a putative employer fails to meet any one of the three criteria listed above with regard to an individual who has performed a service for remuneration, that individual is considered to be an employee and the service performed is considered to be employment subject to the requirements of the UCL; in particular, subject to N.J.S.A. 43:21-7, which requires an

employer to make contributions to the unemployment compensation fund and the State disability benefits fund with respect to its employees.

It is not disputed that Shorthand paid its court reporters an "appearance fee" and/or a "per page fee" for their work, depending upon if a transcript was ordered. (Tr. 2[1], 7:1-8:4, 13:6-15). Shorthand issued Form 1099s to the court reporters documenting these payments, as detailed in the auditor's report. (Tr. 2, 13:6-15). As a threshold matter, I find that this constitutes "remuneration" under the UCL for services rendered.

I also note that the Certified Court Reporters Association of New Jersey submitted a letter in support of Shorthand's position on December 17, 2017. I view the Association's submission as akin to an *amicus* brief, have included it in the record, and have considered it accordingly.

II. PROCEDURAL HISTORY

A. ALJ'S SEPTEMBER 24, 2018 ORDER DENYING SUMMARY DECISION

Upon being transmitted to OAL, the case was originally assigned to ALJ Robert Bingham. (Summary Decision, p. 2). Judge Bingham ordered that the matter be placed on an inactive list at the request of the parties due to the processing of an IRS Form SS-8 (which asks the IRS to determine whether under federal law a worker is considered an employee or independent contractor for purposes of federal employment taxes and income tax withholding) on the theory that its outcome could affect the pending case. Ibid. Thereafter the matter was assigned to ALJ Sarah Crowley, and Shorthand filed a motion for summary decision on June 27, 2017. Ibid. The matter was again placed on the inactive list because of a pending case, Jersey Shore Reporting v. NJDOL, that could have affected the outcome as well. Ibid.

[1] "Tr. 1" refers to the transcript of the OAL hearing conducted on May 29, 2019, and "Tr. 2" refers to the transcript of the same hearing conducted on May 30, 2019.

In its motion for summary decision Shorthand argued that its court reporters were independent contractors and not employees, as well as that the company could assert a specialized exemption under the UCL, and therefore the company was not required to contribute to the State funds. Ibid. For 2011 and subsequent years, the company argued that it was not liable because in that year, the State Legislature amended the UCL to "specifically exempt court reporters from coverage under the law, pursuant to N.J.S.A. 43:21-19(i)(10)." Id. at 3. In a footnote, the ALJ cited my July 19, 2018 remand decision in Jersey Shore Reporting, which held that the Legislature did not intend to exempt such services unless there was a corresponding exemption under the Federal Unemployment Tax Act ("FUTA"). Ibid. The footnote also indicated that Shorthand had received an opinion letter from the IRS concerning a FUTA exemption, but not a determination. Ibid.

The Department argued that during the audit period the court reporters were employees under the UCL and not independent contractors, and therefore the company was liable. Ibid. The Department also argued that for 2011 onward there was no blanket exclusion from UCL coverage for court reporters, and the company could not avail itself of the exemption because it did not hold a corresponding exemption under FUTA. Ibid.

In her decision, the ALJ found that there were genuine issues of material fact that necessitated a hearing to determine Shorthand's liability for 2008 and 2009.[2] Id. at 9. Consequently, the ALJ denied the company's motion for summary decision relative to its contributions for these two years. Id. at 9-10. As for liability from 2011 onward, the ALJ found

[2] The ALJ indicated that the audit period was from 2006-2009 and 2010-2013. I believe this was in error and the actual audit period was 2006-2008 and 2011-2014. Consequently, I take her decision to mean that summary decision was denied for 2006-2008 and 2011-2014, rather than 2008-2009 and 2010-2013 as indicated in the text.

that the Legislature "amended the UCL in 2010 to specifically exempt services performed by legal transcribers," but asserted that, despite acknowledging my 2018 remand decision in Jersey Shore Reporting, it was an open question as to whether a corresponding FUTA exemption was required as well to assert the specialized exemption. Id. at 10. On this basis, the ALJ denied the company's motion for summary decision from 2011 onward, finding that there was a genuine issue of material fact "as to the effect and extent of the amendments to the UCL, and the need for a corresponding FUTA exemption." Ibid.

C. ALJ'S OCTOBER 31, 2019 INITIAL DECISION

In a decision delivered on October 31, 2019 the ALJ found that Shorthand had no liability for the entire audit period.[3]

In a footnote, the ALJ cited my July 19, 2018 remand decision in Jersey Shore Reporting v. NJDOL as showing that the Department "has ruled that the intention of [the 2010 legislative amendment to the UCL] was to provide for an exemption, only when someone has received a corresponding FUTA exemption." (Initial Decision, p. 7). The footnote reads:

> The New Jersey Legislature amended N.J.S.A. 43:21-19(i)(10) in 2010 to exempt court reporters from the provision of the UCL. However, the DLWD has ruled that the intention of that amendment was to provide for an exemption, only when someone has received a corresponding FUTA exemption. Jersey Shore Reporting v. NJDOL (citations omitted). No corresponding FUTA exemption was demonstrated **in this case**. (emphasis added).[4] Ibid.

The ALJ did not analyze whether Shorthand had established a FUTA exemption. The remainder of her decision was an analysis of whether the court reporters were exempt from UCL coverage as independent contractors.

[3] The ALJ indicated in this decision that the audit period was from 2006-2009 and 2011-2014. As described above, this was in error.

[4] As will be discussed below, there is a dispute as to which case the expression "in this case" refers to.

Applying the A prong of the ABC test, the ALJ found that the reporters received no supervision from the company; were not told how to perform their job; did not follow a dress code; did not receive training from the company; followed State regulations where required; purchased and used their own equipment; traveled at their own expense; did not receive fringe benefits; did not perform their work at the company's offices; were free to accept or decline work from the company; and were permitted to work for Shorthand's competitors. Id. at 9-10. Overall, the ALJ found that Shorthand did not reserve the right to control or direct the activities of its reporters, and viewed the reporters as enjoying a similar level of independence to the agency nurses in Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super. 135 (App. Div. 1990). Id. at 10. Consequently, according to the ALJ, Shorthand met the A prong. Ibid.

Under the B prong, the ALJ found that the court reporters did not report to Shorthand's offices, rather they were sent to different businesses to perform work. Ibid. The ALJ considered them to be similarly situated to the agency nurses in Trauma Nurses, Inc., *supra*, and the carpet installers in Carpet Remnant Warehouse v. NJDOL, 125 N.J. 567 (1991), in that they did not perform work at their company's offices. Ibid. Therefore, according to the ALJ, Shorthand met the B prong. Ibid.

Under the C prong, the ALJ found that, similar to the agency nurses in Trauma Nurses, Inc., the reporters could and did work for other agencies while continuing to accept work from Shorthand. Id. at 12. She further found that it was likely that if a particular agency failed the reporters could pick up work at another agency, and this demonstrated that they could survive the termination of their relationship with Shorthand and continue to operate as professionals. Ibid. Therefore, according to the ALJ, Shorthand met the C prong. Ibid.

D. EXCEPTIONS AND REPLY

The Department filed exceptions to the ALJ's initial decision, and Shorthand filed a reply in opposition.

The Department argued that in the disputed footnote described above, the ALJ conceded that Shorthand had not established a FUTA exemption. (Exceptions, p. 2). The Department also asserted that the ALJ erred in her application of the ABC test. Ibid.

In reply, Shorthand disputed the Department's assertion that the ALJ had determined in the footnote that Shorthand had not established a FUTA exemption. (Reply, p. 2). Rather, according to Shorthand, in remarks at the beginning of the hearing the ALJ clarified that she had only ruled in this way in the summary decision because she was aware of my 2018 remand decision in Jersey Shore Reporting, and that since the ALJ in that case had been reversed, ALJ Crowley accepted my remand decision as a matter of law and "chose not to get reversed again." Ibid. Shorthand then defended the ALJ's analysis of the ABC test. Finally, Shorthand argued that the SS-8 letter that it received from the IRS should have sufficed to establish a FUTA exemption. Id. at 15-16.

III. DISCUSSION

Upon *de novo* review of the record, and after consideration of the ALJ's Initial Decision as well as the exceptions and replies filed by the parties, I hereby REVERSE the ALJ's Initial Decision.

A. THE SIGNIFICANCE OF THE DISPUTED FOOTNOTE

As a threshold matter, as described above, the significance of the ALJ's footnote on page 7 of her initial decision is disputed. It reads:

> The New Jersey Legislature amended N.J.S.A. 43:21-19(i)(10) in 2010 to exempt court reporters from the provision of the UCL. However, the DLWD has ruled that the intention of that amendment was to provide for an exemption, only when someone has received a corresponding FUTA exemption. Jersey Shore Reporting

> v. NJDOL (citations omitted). No corresponding FUTA exemption was demonstrated **in this case**. (emphasis added) (Initial Decision, p. 7).

The Department asserts that the phrase "in this case" means that the ALJ has determined that Shorthand has failed to establish a corresponding FUTA exemption, while Shorthand asserts that "in this case" was a reference to my remand decision in Jersey Shore Reporting – an acknowledgement that the petitioner in that case had failed to establish a FUTA exemption.

I agree with Shorthand's position. Whether Shorthand has proved that it established a specialized exemption under the UCL is a central element of the ALJ's review (and mine), and it is unlikely that the ALJ would have reached a conclusion on the issue in a footnote. I will now analyze the issue in full.

B. WHETHER SHORTHAND HAS ESTABLISHED A SPECIALIZED EXEMPTION

In order to assert a specialized exemption under the UCL, a putative employer must establish not only that the services are covered under the terms of the particular UCL exemption, but also that those services are exempt under FUTA. Under N.J.A.C. 12:16-23.2, there are only three methods by which a putative employer can establish a FUTA exemption. The regulation states:

> (a) Evidence that services are not covered under FUTA may include among other things:
>
> 1. Private letter ruling(s) from the Internal Revenue Service;
>
> 2. An employment tax audit conducted by the Internal Revenue Service after 1987 which determined that there was to be no assessment of employment taxes for the services in question; however, the determination must not have been the result of the application of Section 530 of the Revenue Act of 1978; or
>
> 3. Determination letter(s) from the Internal Revenue Service.

Until 2018, it was possible for a putative employer to provide "documentation of responses to the 20 tests required by the Internal Revenue Service to meet its criteria for independence." In that

year, the Department amended the regulation to limit it to the three current forms of proof. 50 N.J.R. 1026(a).

Because of this rule change, and because of the "time of decision" doctrine, I will not consider Shorthand's advocacy that the Department should apply the IRS test itself to determine that the company has established a FUTA exemption. As explained by our Supreme Court, a "time of decision" problem arises when "there is a change in the relevant law that governs the disposition of the issues on appeal." Riggs v. Tp. of Long Beach, 101 N.J. 515, 520-521 (1986). The question in such cases is "which law should control the reviewing court's decision: the law in effect when the issues arose and were initially presented for the lower tribunal's determination or the new or amended law that is in effect at the time the appellate court must render its decision." Ibid. With respect to agency action:

> There is no longer any question but that a court decides an appeal with reference to the state of law at the time of resolution of the appeal (citations omitted). No sufficient reason has been advanced to absolve administrative bodies, exercising quasi-judicial functions, from similarly deciding appeals in the context of the law as it exists at the time that administrative appeal is decided. Walker v. N.J. Dept. of Institutions & Agencies, Div. of Public Welfare, 147 N.J. Super. 485, 489 (App. Div. 1977).

Thus, in the context of agency action, appeals must be decided under the context of the law as it exists at the time of decision. This principle has been repeatedly upheld by our courts and agencies. See e.g. In re Protest of Coastal Permit Program Rules, 354 N.J. Super. 293, 333 (App. Div. 2002) (court reviewing agency action required to use most current version of regulations); Newton Board of Education v. NJDOE, 2005 N.J. AGEN LEXIS 463 (2005) ("An administrative agency must apply the law at the time of its decision, otherwise the administrative body would issue orders contrary to the existing legislation.") Maragliano v. Land Use Bd. of Township of Wantage, 403 N.J. Super. 80, 83 (App. Div. 2008) ("Under the time of decision rule, an agency or reviewing

court will apply the law in effect at the time of its decision rather than the law in effect when the issues were initially presented."); James Durr t/a Durr Wholesale Florist v. NJDEP, 2010 N.J. AGEN LEXIS 13 (2010) ("The "time of decision" rule holds that generally a reviewing court or an administrative agency that is reviewing a pending matter should apply the law in effect at the time that it decides the matter, so that the legislative determination as to the issue is not thwarted."); Commissioner, NJDOBI v. Peter A. Ladas, 2004 N.J. AGEN LEXIS 938 (2004) ("The "time of decision" rule provides that, in administrative decision making, where a case is pending and there is a change in the law, the law that is in effect at the time a decision is rendered is generally applicable."). Following these principles, Shorthand can only use three forms of proof in establishing a FUTA exemption: a private letter ruling from the IRS, an IRS audit, and an IRS determination letter.

On July 14, 2016, in response to a letter that it had submitted earlier to the IRS,[5] Shorthand received a letter from the IRS that stated:

[5] Although not discussed by the ALJ in either of her decisions, I feel compelled to describe the circumstances of an earlier fraudulent letter, purporting to come from the IRS, that was submitted to the Department on Shorthand's behalf. According to Shorthand's counsel, an accountant retained by the company, Richard Dalbo, instructed Shorthand to write a letter to the IRS chief counsel asking for a formal review of the employment status of court reporters. (Tr. 1, 28:2-7). Dalbo prepared the letter and Shorthand mailed it to the IRS. (Tr. 1, 28:7; Exh. P-5). No response was received for some time. (Tr. 1, 210:3-11). According to Colleen Fisher, the company's secretary-treasurer, at some point Dalbo called Fisher and said, "Great news. We got a letter, and it came to the office." (Tr. 1, 210:14-15). Dalbo then faxed a letter to Shorthand, dated May 14, 2012 and on IRS letterhead, and purporting to be from an IRS attorney named Paul J. Carlino, that concluded that the court reporters engaged by Shorthand were not employees and "are indeed exempt from FUTA and Tax withholding." (Tr. 1, 28:12-18; Exh. P-5). This letter was also sent to the Department's auditor. (Tr. 1, 211:7-10). Soon after, the company "learned by visits from federal agents" that the May 14, 2012 letter "was actually a fraudulent letter and had not been prepared by the IRS." (Tr. 1, 29:9-13). The company was told that the matter was under investigation by the US Attorney's office. (Tr. 1, 29:14-15, 22-23). Investigators from that office visited the company, informed them that they should have no further contact with Dalbo, and could not use the May 14, 2012 letter for any purpose whatsoever. (Tr. 1, 30:1-9). As of May 29, 2019, Shorthand has no information about the outcome of the investigation. (Tr. 1, 30:9-14). Shorthand

> We received your request for a determination of employment status, for federal employment tax purposes, concerning the work relationship between you and the workers reflected on your Form SS-8 for the period from 1/1/2006 through present.
>
> This letter is based solely on the information you provided on Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding. **This letter isn't a determination letter and isn't binding**. The sole purpose of this letter is to provide you with assistance in meeting your filing requirements.
>
> Based on the information you provided, we conclude that an employer/employee relationship does not exist in the situation you described. (emphasis added) (Exh. R-2, p. 58).

This is the primary piece of evidence that Shorthand has submitted as evidence that it has established a FUTA exemption, and can thereby assert the specialized exemption for court reporters in the UCL.

As to the form of the letter, it is clearly not an IRS audit. A review of the IRS's guidance documents indicates that its treatment of a "private letter ruling" and "determination letter" with respect to employment status are largely similar. In Internal Revenue Bulletin 2021-1,[6] it states:

> **Letter ruling requests regarding employment status** (employer/employee relationship) from Federal agencies and instrumentalities or their workers must be submitted to the Internal Revenue Service at the address set forth on the current Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*. (emphasis added)

At another point in the same guidance document, it states:

> In employment and excise tax matters, Directors issue determination letters in response to taxpayers' written requests on completed transactions over which they have examination jurisdiction.
> **All determination letter requests regarding employment status** (employer/employee relationship) made by taxpayers that are not Federal agencies and instrumentalities or their workers, must be submitted to the Internal Revenue Service at the address set forth on the current instructions for Form SS-

asserts that it is the victim of fraud, and there was nothing in the record to dispute this. (Tr. 1, 31:4-7).

[6] Located at https://www.irs.gov/irb/2021-01_IRB (accessed December 13, 2021)

8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*. (emphasis added)

The document thus refers to both "determination letters" and "letter rulings" with respect to questions about employment status. In response to the question, "What effect will a determination letter have?" the guidance document answers, "A determination letter issued by a Director has the same effect as a letter ruling issued to a taxpayer under section 11 of this revenue procedure." I take this to mean that the functional effect of letter rulings and determination letters are the same.

The official instructions for filing Form SS-8[7] state that after reviewing all the relevant information:

> The IRS will generally issue a formal determination to the firm or payer (if that is a different entity), and will send a copy to the worker. A determination letter applies only to a worker (or a class of workers) requesting it, and the decision is binding on the IRS if there is no change in the facts or law that form the basis for the ruling. **In certain cases, a formal determination will not be issued. Instead, an information letter may be issued. Although an information letter is advisory only and is not binding on the IRS, it may be used to assist the worker to fulfill his or her federal tax obligations.** In other very limited circumstances the IRS may issue a courtesy letter that the worker may rely on to fulfill his or her federal tax obligations. (emphasis added)

I view the July 14, 2016 letter from the IRS to Shorthand as an "information letter" as described in the Form SS-8 instructions. The letter Shorthand received plainly states that it isn't a determination letter and is not binding, and its purpose was to provide assistance in meeting tax filing requirements. This comports with the description of an "information letter" in the Form SS-8 instructions.

Whatever one considers the specific form of the letter, the important thing to note is that it does not make a formal finding as to whether Shorthand has established a FUTA exemption under the IRS test. It asserts that an employer-employee relationship does not exist, but that does not

[7] Located at https://www.irs.gov/pub/irs-pdf/iss8.pdf (accessed December 13, 2021)

bear on the question of the FUTA exemption. Because there is no finding as to the FUTA exemption, Shorthand's advocacy for the Department to consider the letter as establishing a FUTA exemption would place the Department in the exact position that it sought to avoid by changing the rule in 2018. As we wrote in the rule adoption, "the entire purpose of the proposed amendment is that the Department would no longer be conducting its own analysis under the IRS test for independence in order to determine the existence of a FUTA exemption." 50 N.J.R. 2012(a). Since Shorthand has not submitted conclusive proof directly from the IRS under N.J.A.C. 12:16-23.2, I FIND that it has not established that it is exempt from FUTA.

I would also note that this position is supported by the ALJ who, in her 2018 summary decision, stated in a footnote that "although Shorthand has received an opinion letter with respect to a FUTA exemption, **a determination was not obtained**." (emphasis added) (Summary Decision, p. 3). Furthermore, in her October 31, 2019 initial decision, the ALJ did not analyze whether Shorthand had established a FUTA exemption, and only engaged in the ABC analysis. Thus, it appears that the ALJ concluded that Shorthand had not established a corresponding FUTA exemption.

For these reasons, I FIND that Shorthand has not established a FUTA exemption, and thereby has not established an exemption from UCL coverage under N.J.S.A. 43:21-19(i)(10).

D. THE ALJ ERRED IN FINDING THAT SHORTHAND MET ALL ELEMENTS OF THE ABC TEST

The ALJ also found that Shorthand had met all elements of the ABC test. I disagree with this determination.

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

While it is true the record showed that Shorthand's court reporters had some flexibility with respect to where and when they performed their work, and had some ability to negotiate their rate of pay and contract directly with Shorthand's clients, the ALJ erred in determining that this meant that the company did not exercise control (or retained the ability to exercise control) over their work under the A prong.

In her initial decision, the ALJ found that the reporters received no supervision from the company; were not told how to perform their job; did not follow a dress code; did not receive training from the company; followed State regulations where required; purchased and used their own equipment; traveled at their own expense; did not receive fringe benefits; did not perform their work at the company's offices; were free to accept or decline work from the company; and were permitted to work for Shorthand's competitors. (Initial Decision, pp. 9-10). Consequently, according to the ALJ, Shorthand met the A prong. Ibid.

However, critical aspects of the reporters' work were controlled by Shorthand. Collen Fisher, the company's secretary-treasurer, testified that work was assigned by the company by contacting court reporters the day before a proceeding to check their availability. (Tr. 1, 176:18-23). Thus, Shorthand was responsible for finding the work in the first place. Judge Crowley also found that the company negotiated the rate that was charged to clients without input from the

reporters. (Initial Decision, p. 5). Third, per Shorthand's independent contractor agreement and in practice as well, the reporters were paid whether or not a client pays the company, placing the risk of loss entirely on the company. (Tr. 1, 112:23-113:7; Exh. R-2, p. 11).

Fourth, Shorthand kept nearly all aspects of client management for itself. If a client was concerned about the delivery of the transcript, or if a reporter was running late, the client would contact Shorthand and not the reporter. (Tr. 2, 12:21-25; 19:20-20:12). Fifth, the company performed most of the administrative work of producing the transcript, billing clients, and scheduling court reporters. (Tr. 2, 26:4-10; 27:6-10).

As the ALJ herself aptly summarized, all of the court reporters testified to roughly the same work arrangements:

> THE COURT: I mean we pretty much – we know what they do. There is no, you know –
>
> MS. MARTIN: Okay. All right, Judge.
>
> THE COURT: I don't know. There is no smoking gun. Still it is what it is, and they take one position on it, and you take another. I think you could parade 18 [court reporters] in here and they're going to say –
>
> MS. MARTIN: They'd all say the same thing.
>
> THE COURT: I call in, they tell me where to go, I provide my equipment, I provide the software, I do what I'm told, they don't control how I get there or what I do, I submit it and I'm done, and they think it's an employee situation, and you think it's not. (Tr. 1, 222:8-21).

Thus, while the court reporters have flexibility in determining how they complete their work, the overall relationship that leads to the work, and the key terms and conditions concerning the work – such as finding and maintaining relationships with clients, assigning the work to the reporters, how much a client is charged, recovering from clients if they fail to pay, and so forth – are all set by Shorthand. This is indicative of employee status, as it vests the company with authority over

significant formal elements of employment. With such restrictions in place, Shorthand exercises effective control and direction over the performance of services.

I view this case as similar to Transcriptions, Ltd. v. NJDOL, 1994 N.J. AGEN LEXIS 1097 (1994) (aff'd by Commissioner of Labor). That case involved a determination of UCL coverage against an agency that provided medical transcription services, with terms of work that are similar to the court reporters here:

> The petitioner is in the business of providing medical transcription services for hospitals located throughout the United States. The petitioner picks up recording tapes which have been dictated by hospital physicians or staff and types the contents of these tapes onto forms prescribed by the various hospitals. The petitioner performs these typing services in two ways. Some tapes are transcribed by in-house transcriptionists who work at the offices of the respondent. There seems to be no dispute that these transcriptionists are employees of the petitioner and subject to unemployment compensation and temporary disability benefit taxes. Other tapes are transcribed by other transcriptionists who have a contract with the petitioner and work at home [or] their own place of business. The petitioner delivers tapes to these transcriptionists on a daily basis in the transcriptionists' homes or places of business. The transcriptionists decide what material they will accept. These transcriptionists can reject work offered to them. However, if they accept the work, it must normally be completed by the next day. Material prepared by these transcriptionists must be in a form required by the hospital providing the tape, and the transcriptionists can transcribe the material at any location a at any time. They may also subcontract the work out to another person. These transcriptionists are paid by the number of pages they produce. They are paid a gross amount for their typed product, and no taxes are taken out. At the end of each year the petitioner prepares for these transcriptionists an IRS 1099 Form. The respondent does not offer these transcriptionists fringe benefits, paid vacation, or educational opportunities. These transcriptionists may also work for other employers if that is their wish. The respondent requires that the transcriptionists be certified by the American Association of Medical Transcribers. Id. at *3-4.

There are numerous similarities between the at-home medical transcribers in that case and the court reporters here. The medical transcribers largely worked where and when they wanted; they were free to reject or accept assignments; they were permitted to work for other employers; they were not closely supervised by the employing agency; and they were offered little or no fringe benefits. Id. at *4. But, similar to the court reporters here, major formal elements of employment,

such as the rate charged to clients and the creation and maintenance of business relationships, were all controlled by the agency. Id. at *4-12. In that case the ALJ held that the medical transcribers were employees. Id. at 15-16. In his final agency determination, the Commissioner of the Department of Labor agreed, accepting and adopting the findings, conclusions and recommendation of the ALJ. I am persuaded that a similar outcome is warranted here.

Therefore, I FIND that Shorthand has failed to meet Part A of the ABC test.

B PRONG: "Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed."

Under the B prong, the ALJ found that "none of the court reporters in question report to petitioner's place of business," rather "they call and email State Shorthand and are sent out to different businesses to perform the services." (Initial Decision, p. 10). Therefore, the ALJ found that the court reporters performed services outside of Shorthand's offices, and therefore Shorthand had met the second part of the B prong. Ibid. The ALJ did not make a finding as to the first part of the B prong.

Taking the second part of the B prong first, I do not dispute the ALJ's assessment of the infrequency with which the court reporters worked out of Shorthand's corporate offices. But the ALJ did not consider the full scope of the requirement that, in order to meet this part of the B prong, services must be "performed outside of all the places of business of the enterprise for which such service is performed." Shorthand is in the business of providing court reporting services to the legal community. (Exh. R-1, p. 6). Its workers perform their services at law offices and in courtrooms – these locations are where the court reporters are paid an appearance fee for their attendance, and then either an hourly rate for real-time work performed during the proceedings, or a per page rate if a transcript is ordered at the close of proceedings and delivered later. (Exh. R-1,

p. 7). These services are an integral part of Shorthand's business, and delivery of services in these locations is not a random occurrence. Rather, it is specifically determined at the time of acceptance of the contract with Shorthand. These client locations, therefore, must under Carpet Remnant be considered an extension of Shorthand's place of business, as they constitute places "where the enterprise has a physical plant or conducts an integral part of its business." Carpet Remnant Warehouse, *supra*, at 592.

With respect to the first part of the B prong, it is clear that the court reporters are not outside of Shorthand's usual course of business. The company is in the business of providing court reporting and transcription services, and it achieves that through its use of court reporters. On cross-examination, Colleen Fisher, the company's secretary-treasurer, conceded that the court reporters were crucial to her business:

> Q. I – I guess the – the big question in my mind are these court reporters crucial to your business?
>
> A. Well, you need court reporters to do the court reporting, yes.
>
> …
>
> Q. Oh okay, so I'm – I'm talking about so at least – certified court reporters are they essential to your business?
>
> A. They are.
>
> Q. That's so – so if you lost them you – would you have a business?
>
> A. I guess, I don't know. I would have to re-evaluate my business, yes. (Tr. 2, 22:4-23:13).

She further estimated that only 30% of her business's revenue comes from services not performed by court reporters. (Tr. 2, 24:18-20). In the analogous Transcriptions, Ltd. case, the ALJ found that the services performed by the in-home medical transcribers were "a major part of the

petitioner's business," and tended toward a finding of employee status. Transcriptions, Ltd., *supra,* at *15. Once again, I agree.

Consequently, I FIND that Shorthand has failed to meet Part B of the ABC test.

C PRONG: "Such individual is customarily engaged in an independently established trade, occupation, profession, or business."

Under the C prong, the ALJ found that, similar to the agency nurses in Trauma Nurses, Inc., the reporters could and did work for other agencies while continuing to accept work from Shorthand. (Initial Decision, p. 12). She further found that it was likely that if a particular agency failed the reporters could pick up work at another agency, and this demonstrated that they could survive the termination of their relationship with Shorthand and continue to operate as professionals. Ibid. Therefore, Shorthand met the C prong. Ibid.

The ALJ has misread the C prong in several respects. To begin, she largely ignored the results of the Department's thorough audit.

In conducting an audit for potential misclassification, it is standard Department practice to contact the purported employer and all purported subcontractors and request that they submit documentation (such as tax returns, business cards, invoices, letterhead, advertisements they have taken out, insurance, and other 1099s) that would help the Department to determine their employment status. (Exh. R-1, p. 7). Since there was no real dispute over whether remuneration had been paid to the court reporters for their services, that established a presumption of employee status unless Shorthand could meet each prong of the ABC test. In practice, as testified to by supervising auditor Tom Fallucca, this meant that if a purported employer did not provide the Department with relevant documents, the Department could lawfully infer that the individual was likely an employee, as no information was provided to rebut the presumption of employee status. (Tr. 2, 98:11-99:2). Fallucca testified:

> Q. And was there – when you sent the letter, or when these – these letters go out to the individual court reporters. Is there any penalty if they don't provide that to the Department of Labor?
>
> A. No, there's no – it's not mandatory that they respond.
>
> Q. Okay. So, as you saw on some of the documents you looked at, many of them didn't respond.
>
> A. That's correct.
>
> Q. And then is it – it would be almost impossible then to make a determination if that worker did not respond, correct?
>
> A. No, because the burden is the – is – is always on the – the entity being audited to provide documentation to prove that these people are independent contractors. (Tr. 2, 98:2-17).

For the 2006-2008 period, the audit record shows that Shorthand provided documentation that was of little value in rebutting the presumption of employee status. (Exh. R-1, p. 7). The company provided a copy of a Yellow Pages directory for certified court reporters that listed five of its court reporters on it, as well as sample invoices. (Exh. R-1, p. 7). The Department's auditor received calls from three court reporters that were no longer with the company, who all stated that they never submitted their names to be advertised in the Yellow Pages directory, nor submitted the invoices presented by Shorthand. (Exh. R-1, p. 7). The auditor concluded that these invoices were not created by the court reporters themselves, but rather were an internal, company-created document to determine each reporter's weekly pay. (Exh. R-1, p. 7).

The Department only received one copy of an IRS Form Schedule C (which is a form submitted to show profit and loss from a sole proprietorship) for this period. (Exh. R-1, p. 7). Being registered and filing taxes as a business can potentially show that an individual has met the C prong, though it is not dispositive. A key element of the Department's analysis of a Schedule C is the proportion of income that comes from each source, on the theory that the greater number of

sources of income, the more likely that an individual can "continue to exist independently of and apart from" his relationship with his putative employer, and thereby show that he engages in an independent business under the C prong. Carpet Remnant Warehouse, *supra,* at 592-593. But this single Schedule C did not demonstrate independence to the auditor's satisfaction. (Exh. R-1, p. 7).

In addition to not adequately considering the audit results, the ALJ erred in finding that the court reporters met the C prong because they were permitted to work for multiple agencies and "if one [agency] goes out of business, they will pick up more work from another agency." (Initial Decision, p. 12). This misreads Carpet Remnant. In order to meet the C prong, it is not enough to establish that these reporters could pick up more work from another agency. Rather, it must be demonstrated that they could "continue to exist independently of and apart from" their relationship with Shorthand as an independent business. Carpet Remnant Warehouse, *supra,* at 592. Put another way, these reporters' purportedly independent businesses will not "plainly persist despite the termination of the challenged relationship," because for many of them they were never independent in the first place. Trauma Nurses, Inc. v. Board of Review, 242 N.J. Super. 135, 142 (App. Div. 1990). What the ALJ is describing is multiple employment – the court reporters can easily go from being an employee at one agency to an employee at another agency.

Finally, turning again to Transcriptions, Ltd., in that case the ALJ found that the in-home medical transcribers "do not maintain their own businesses, nor do they have their own commercial vehicles, business cards, business stationery, worker's compensation insurance, nor do they file income tax returns indicating that they are a business." Transcriptions, Ltd., *supra,* at *15. Although the C prong is particularly fact-sensitive, I am persuaded that the commonalities between

the court reporters here and the in-home medical transcribers indicate that the ALJ's decision in that case was sound, and reinforces my conclusion.

For these reasons, I FIND that Shorthand has failed to meet Part C of the ABC test.

ORDER

For the foregoing reasons, with regard to all court reporters engaged by Shorthand during the audit period, Shorthand is hereby ordered to immediately remit to the Department a total of $104,116.45 ($38,340.44 for 2006-2008 and $65,776.01 for 2011-2014) in unpaid unemployment and temporary disability contributions, along with applicable interest and penalties.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY
THE COMMISSIONER, DEPARTMENT
OF LABOR AND WORKFORCE DEVELOPMENT

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