



**Garden State Property Services,
Incorporated,**
Petitioner,

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

v.

**New Jersey Department of Labor
and Workforce Development,**
Respondent.

**FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER**

**OAL DKT. NO LID 02443-22
AGENCY DKT. NO. DOL 22-007**

Issued: October 10, 2023

The appeal of Garden State Property Services, Inc. (GSPS or petitioner) concerning an unemployment and temporary disability assessment of the New Jersey Department of Labor and Workforce Development (Department or respondent) for unpaid contributions by petitioner to the unemployment compensation fund and State disability benefits fund for the period from 2016 through 2019 (“the audit period”) was heard by Administrative Law Judge Kathleen M. Calemme (ALJ). In her initial decision, the ALJ concluded that GSPS had failed to present sufficient proofs to establish that 36 of the 39 individuals who had been engaged by GSPS during the audit period to perform property inspections were genuine independent contractors exempt from coverage under the New Jersey Unemployment Compensation Law (UCL), N.J.S.A. 43:21-1 et seq., applying the test for independent contractor status set forth at N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), commonly referred to as the “ABC test.” However, regarding the remaining three property inspectors engaged by GSPS during the audit period – Joseph A. Sorce, John Weimmer, and Ricardo Negron – the ALJ concluded that GSPS had met its burden under the ABC test to establish that each was an independent contractor. Therefore, the ALJ upheld the amounts assessed by the Department against GSPS for unpaid contributions to the unemployment compensation fund and State disability benefits fund

on behalf of the 36 property inspectors with respect to which she found that GSPS had failed to meet its burden under the ABC test. However, the ALJ ordered the reversal of the Department's assessment against GSPS for unpaid contributions on behalf of Sorce, Weimmer, and Negron.

The issue to be decided is whether the property inspectors engaged by GSPS during the audit period were employees of GSPS and, therefore, whether GSPS was responsible under N.J.S.A. 43:21-7 for making contributions to the unemployment compensation fund and the State disability benefits fund with respect to the work performed by those individuals.

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

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

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

N.J.S.A. 43:21-19(i)(6).

The ABC test is written in the conjunctive. Therefore, where a putative employer fails to meet any one of the three criteria listed above with regard to an individual who has performed a service for remuneration, that individual is considered to be an employee and the service performed is considered to be employment subject to the requirements of the UCL; in particular, subject to N.J.S.A. 43:21-7, which requires an employer to make contributions to the unemployment compensation fund and the State disability benefits fund with respect to its employees.

Relative to Prong "A" of the ABC test, the ALJ concluded that GSPS had successfully established as to all 39 property inspectors that they were free from control or direction by GSPS. The ALJ based her conclusion on her findings that the property inspectors: (1) provided their own equipment, (2) set their own schedules, (3) were free to accept or decline work as it was offered, and (4) were "permitted" by GSPS to work for themselves and/or other employers. The ALJ also found within her initial decision that

(1) each of the property inspectors had been paid a price per inspection that was set by GSPS, not by the property inspectors, (2) GSPS maintained the client relationships and solicited the work performed by the property inspectors, and (3) GSPS secured the accounts and provided property inspectors with the location of the property to be inspected, the basic reason for the inspection, and the timeframe within which the inspection needed to be completed. Nevertheless, the ALJ believed that the latter facts were outweighed by the facts listed earlier, mitigating in favor of her conclusion that GSPS had met its burden under Prong “A.”

As to Prong “B” of the ABC test, the ALJ found with regard to all 39 property inspectors that, because “the property inspectors perform their services in the field, determined by the location of the property [they are inspecting on behalf of GSPS],” and because the property inspectors “are not required to report to the physical office maintained by GSPS,” then “[a]ll inspections occurred outside of all places of business maintained by GSPS.” Thus, the ALJ concluded regarding all 39 property inspectors that GSPS had met its burden under prong “B.”

Relative to Prong “C” of the ABC test, the ALJ concluded regarding all of the property inspectors that had been engaged by GSPS during the audit period, with the exception of Joseph A. Sorce, John Weimmer, and Ricardo Negron, that GSPS had failed to meet its burden. The ALJ explained that “Part C of the ABC test calls for an enterprise or individual that exists and can continue to exist independently of and apart from the particular service relationship,” adding, “[t]he enterprise or individual must be able to financially survive the termination of the relationship.” With regard to Joseph Sorce, following are the ALJ’s findings and conclusions in their entirety as to whether GSPS had met its burden under Prong “C:”

The Form 1040, Schedule C for 2016 from Joseph A. Sorce that showed one hundred percent of his gross income of \$7,681 came from GSPS, supported the Department’s classification of Sorce as an employee. However, Sorce also submitted a Form 1040 Schedule C for a business, Prosorce Home Improvements, LLC for 2018 showing income of \$18,958, but no income was attributed by the Department to GSPS. In addition, Sorce responded to the auditor’s Worker Classification Questionnaire by stating that he also had a full-time job for which he received a W-2. Sorce signed the questionnaire, certifying his statements as true. Accordingly, I CONCLUDE that Sorce’s full-time employment and 2018 tax return satisfied the C criteria that he could exist independently and apart from his relationship with GSPS.

With regard to John Weimmer, the ALJ found that, “Weimmer [had] testified that his primary business prior to his retirement was buying, renovating, and selling houses,” adding, “[h]is livelihood was not dependent on the income he earned from GSPS.” Based on this, and this alone, the ALJ concluded that GSPS had met its burden under Prong “C” of the ABC test relative to Weimmer. Regarding Ricardo Negron, following are the ALJ’s findings and conclusions as to whether GSPS had met its burden under Prong “C:”

Ricardo Negron provided competent evidence to the Department through his Form 1040, Schedule Cs for the years 2016 through 2018, for inspector services. According to the documents, his income in 2016 of \$72,287, and in 2017, of \$84,584, did not come from GSPS. In 2018, twenty-eight percent of [Negron's] gross income of \$90,474 came from GSPS for his business, High Integrity Field Inspections. Negron also submitted a combined tax statements for Forms 1098, 1099, 5498 for Tax Year 2018, for American Dream Home Enterprises, LLC. He submitted Miscellaneous 1099 Income forms for High Integrity Field Inspections doing business for various companies, including GSPS. Accordingly, I CONCLUDE that these tax statements are reliable proof to show that Ricardo Negron maintained a business independent of and apart from GSPS. Under the Carpet Remnant test, "the [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." I CONCLUDE that Ricardo Negron satisfied Part C of the ABC Test.

Based on the foregoing, the ALJ recommended that the Department's assessment against GSPS for unpaid contributions to the unemployment compensation fund and the State disability benefits fund for Sorce, Weimmer, and Negron be reversed, and that the Department's assessment against GSPS for unpaid contributions to the unemployment compensation fund and the State disability benefits fund for the other 36 property inspectors whose services had been engaged by GSPS during the audit period be affirmed. Thus, the ALJ reduced the Department's total assessment by the amount assessed against GSPS for the services performed by Sorce, Weimmer, and Negron. Both petitioner and respondent filed exceptions.

In its exceptions, relative to each of the three prongs of the ABC test, respondent maintains the following:

Prong "A"

Respondent asserts that in order to satisfy Prong "A" of the ABC test, GSPS must demonstrate that it did not exercise control over the services performed by the property inspectors and that it did not reserve the right to control the individuals' performance of those services, adding that GSPS need not have controlled every facet of the property inspectors' services for those individuals to be deemed employees under the UCL. As to the relevant facts, respondent maintains that the testimony of GSPS President, George Terebinsky, reveals the following: (1) GSPS contracts with companies like Wells Fargo and Mortgage Contracting Services to perform home inspections for houses with mortgages in distress, (2) GSPS "solicits workers" using word of mouth, a national registry and newspaper advertising, (3) GSPS requires a background check for all property inspectors, (4) GSPS requires property inspectors to have their own equipment, (5) GSPS sets the rate of pay for the property inspectors, (6) GSPS sets the timeline for the work to be done, (7) GSPS finds replacement workers if the property inspector cannot

perform the duties, and (8) GSPS processes the completed work orders with its clients and deals directly with the clients. Respondent concludes that based on the foregoing, GSPS has failed to meet Prong “A” of the ABC test and the ALJ’s conclusion to the contrary should be reversed.

Prong “B”

With regard to Prong “B” of the ABC test, which requires that in order to establish independent contractor status, one must prove that the service at issue is either outside the usual course of business for which the 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, respondent notes that the Court in Carpet Remnant Warehouse, Inc. v. Department of Labor, 125 N.J. 567 (1991), defined the phrase “all places of business” to mean those locations where the enterprise has a physical plant or conducts an integral part of its business. Relative to the latter part of that definition, respondent maintains that since GSPS is in the business of providing mortgage services that include property inspections, and since those property inspections are provided to petitioner’s mortgage company clients pursuant to contracts between petitioner and the mortgage companies, the properties where those inspections are performed are locations where GSPS conducts an “integral part of its business.” Similarly, respondent maintains that since the principal part of petitioner’s business enterprise is providing mortgage services, including property inspections, the performance of property inspections to satisfy petitioner’s obligations and responsibilities under the contracts between GSPS and its mortgage company clients is a service performed within, not outside of, petitioner’s usual course of business. Consequently, respondent urges the Commissioner to reverse the ALJ’s conclusion that GSPS has met its burden under Prong “B” of the ABC test.

Prong “C”

Respondent does not object to the ALJ’s conclusion that GSPS failed to meet its burden under Prong “C” of the ABC test relative to 36 of the 39 property inspectors whose services it had engaged during the audit period. However, respondent *does* take issue with the ALJ’s conclusion relative to property inspectors Joseph A. Sorce, John Weimmer, and Ricardo Negron, that GSPS has met its burden under Prong “C.” Specifically, regarding Mr. Sorce, respondent characterizes as “flawed” the ALJ’s conclusion that evidence of Mr. Sorce’s “full-time job for which he received a W-2” demonstrates that Mr. Sorce was customarily engaged in an independently established trade, occupation, profession or business, thereby satisfying Prong “C” of the ABC test. Respondent explains that the mere fact that an individual holds other simultaneous employment in a related or unrelated trade, occupation or profession does not support the conclusion that the individual is an independent contractor or that he/she is ineligible for unemployment compensation benefits, adding that the UCL envisions multiple employment, N.J.S.A. 43:21-3(d)(B)(i)(ii), N.J.S.A. 43:21-14.1, N.J.S.A. 43:21-19(u), and thus the mere fact that Mr. Sorce (or any other property inspector) could have been or was employed by others while working for GSPS does not preclude a finding that Mr. Sorce was an employee of GSPS. Similarly, with regard to Mr. Negron, respondent

maintains that, absent any evidence addressing the majority of the Prong “C” factors enumerated in Carpet Remnant Warehouse, *supra*; such as the duration and strength of the putative employee’s business, the number of customers and their respective volume of business, and the number of employees, earnings from sources other than GSPS that were listed on Mr. Negron’s personal tax return and additional 1099s for 2018 constitute proof of multiple employment, not the existence of an independently established business enterprise. Finally, as to Mr. Weimmer, respondent asserts the following:

[T]he ALJ erred in the interpretation of the ABC test for Mr. Weimmer’s facts and circumstances. John Weimmer formed a business called Priority One. The business operated through 2016 [the first year of the audit period] when Mr. Weimmer decided to stop operating his inspection services business. Mr. Weimmer approached Mr. Terebinsky about giving [GSPS] his clients. As part of the transfer, Mr. Weimmer requested that he be hired to service one of the clients, National Field Rep. (NFR). [GSPS] agreed to allow Mr. Weimmer to service the NFR account post transfer. Mr. Weimmer was treated the same as all other inspectors. The work was assigned to him through [GSPS], the work was performed by Mr. Weimmer, a work order was prepared and [GSPS] paid Mr. Weimmer for the services.

The following are petitioner’s exceptions in pertinent part:

GSPS must disagree with prong C of the ABC rule. I, George Terebinsky, know from being in this industry that if an inspector loses a client that inspector can easily go and find work in this industry through the many other companies that perform the same services that GSPS does. In my many years in the business I have seen national companies go out of business and the inspectors do a little bit of research to find out who took over the work. In other words, if somebody is willing to work in this industry, they can find work if they are a reliable person and can get the work done correctly.

As far as working for several different entities [constituting] multiple employment, I don’t know how that is possible. If someone is my employee, I expect to have control over when work is performed, how work is performed and in what order the work is performed. If somebody works for five or six different companies as an employee, I don’t know how that is manageable by any of the employers. Based on this I believe that any inspector that worked for 2 or more entities should be considered as satisfying prong C of the ABC test.

In closing, I’d like to mention that according to the testimony presented, the Honorable Judge Callemmo seems to have agreed with a good portion of the ABC test as being met by GSPS. As I tried to express throughout this process to all involved from the DOL that common sense shows that

the inspectors are in fact independent. I think the Judge saw that in testimony as well. I see that Mr. Kilgore disagrees with Judge Calemno's initial decision citing various case law in his letter of exceptions. I have to disagree with Mr. Kilgore. In my opinion, the ABC law is impossible to meet in 99.9% of cases. As Cheri Mokrcek mentioned in her initial statement after the audit was completed that inspectors did not meet prong A of the ABC test because GSPS gave the inspectors work. The work has to be given by somebody or some company. The work is not going to knock on the door of the inspector. Inspectors seek out companies to obtain work from in the geographic area they cover.

It seems that after 37 years in this business operating it the only way I know and was taught, to be forced out of business by this process is totally unfair. There are multiple companies such as mine that will take my clients and give the work to inspectors and pay them with a 1099. This puts GSPS [at a] huge disadvantage and I would not be able to compete with the lower pricing of my competitors. The only way to make this equitable to GSPS is to change the industry over so everyone is equal, including companies that use subs in NJ but are out of State. You put GSPS out of business, but the same issue exists throughout the industry and would take many years to correct judging by the fact that my audit took 4 years. Also, as I have mentioned that business has already slowed due to Federal laws put in place during the Covid pandemic making it impossible for GSPS to stay in business under those directives and this DOL action.

CONCLUSION

Upon *de novo* review of the record, and after consideration of the ALJ's initial decision, as well as the exceptions filed by petitioner and respondent, I hereby accept the ALJ's recommended order affirming the Department's assessment and dismissing petitioner's appeal regarding 36 of the 39 property inspectors engaged by GSPS during the audit period. However, I reject the ALJ's reversal of the Department's determination that GSPS had employed property inspectors Joseph A. Sorce, John Weimmer, and Ricardo Negron, during the audit period and I find that petitioner is liable for unpaid contributions to the unemployment compensation and State disability benefits funds on behalf of all 39 property inspectors, including Sorce, Weimmer, and Negron, for the audit period, 2016 through 2019.

Regarding Prong "A" of the ABC test, I disagree with the ALJ that petitioner has successfully demonstrated that the property inspectors were free from control or direction over the performance of the services they had performed for GSPS. Rather, I find that the overwhelming weight of the evidence in the record supports the conclusion that the property inspectors were *not* free from control or direction over the performance of their work. That is, I agree with respondent that the following, contained in the testimony of

Mr. Terebinsky, reflects a degree of control over the property inspectors that is consistent with an employment relationship and belies petitioner's assertion that these individuals were free from direction and control by GSPS: (1) GSPS contracts with mortgage companies to perform property inspections, (2) GSPS *solicits* individuals to work for it performing those property inspections, (3) GSPS sets the rate of pay for the property inspectors, (4) GSPS requires a background check for each property inspector it engages to perform services, (5) GSPS *requires* property inspectors to have their own equipment, (6) GSPS sets the timeline for the work to be done, (7) GSPS finds replacement workers if the property inspector cannot perform the duties, and (8) GSPS negotiates with its mortgage company clients the price paid for the services performed by its property inspectors, processes the completed work orders with its mortgage company clients for the work performed by its property inspectors, accepts payment from its mortgage company clients for the services performed by its property inspectors and then pays the property inspectors for the work performed at the rate of pay set by GSPS. For the record, I also disagree with the ALJ's conclusion that the property inspectors being "free to accept or decline work as it was offered" is persuasive evidence that the property inspectors were free from control or direction by GSPS. The Court in East Bay Drywall v. Dep't of Labor and Workforce Dev., 251 N.J. 477 (2022), expressly questioned the "probative value" of "refusal to accept or complete work," explaining that "generally speaking and subject to personal contractual obligations, even wholly dependent employees may choose to work for more than one employer or abruptly resign from their position" and, "like an employee, even a bona fide independent contractor is not free from the pressure to accept a job." Id.

Regarding Prong "B" of the ABC test, I agree with respondent that relative to the property inspectors whose services GSPS engaged during the audit period petitioner has failed to meet its burden; which is to say, petitioner has failed to establish that the services at issue were either outside the usual course of business for which such services were performed, or that such services were performed outside of all the places of business of the enterprise for which such services were performed. In that regard, I would note, as did respondent in its exceptions, the Court in Carpet Remnant Warehouse, supra, defined the phrase "all places of business" to mean those locations where the enterprise has a physical plant *or conducts an integral part of its business.*" (emphasis added). Relative to the latter part of that definition, I agree with respondent that since the principal part of petitioner's business enterprise is the performance of mortgage services, including property inspections, pursuant to the contracts that GSPS maintains with the mortgage companies that are its clients, the properties where those property inspections were performed are locations where GSPS conducts an "integral part of its business." Similarly, I agree with respondent that since the principal part of petitioner's business enterprise is the performance of mortgage services, which includes property inspections, the performance of property inspections by the property inspectors engaged by GSPS to satisfy petitioner's obligations and responsibilities under the contracts with its mortgage company clients were services performed within, not outside of, petitioner's usual course of business.


With regard to Prong “C,” I agree with the ALJ’s conclusion as to 36 of the 39 property inspectors engaged by GSPS during the audit period that GSPS has failed to produce sufficient evidence to establish that they were customarily engaged in an independent business enterprise. However, I disagree with the ALJ’s conclusion that GSPS has met its burden under Prong “C” regarding Joseph A. Sorce, John Weimmer, and Ricardo Negron. That is, instead, I agree with respondent that the statement made by Mr. Sorce on his Worker Classification Questionnaire to the effect that he holds full time “W-2” employment in addition to the work that he performs for GSPS is not evidence that Mr. Sorce was customarily engaged in an independently established business enterprise during the audit period, but rather, is evidence of multiple covered employment. I also agree with respondent that by Mr. Weimmer’s own account, in 2016, the first year of the audit period, he transferred his property inspection business to GSPS in exchange for GSPS hiring him to provide property inspection services to one of Weimmer’s previous clients, now GSPS’s client, National Field Rep, or “NFR”. Thus, the hearing record regarding Weimmer indicates that at all relevant times he was performing property inspections for GSPS in the same manner as were the other property inspectors engaged by GSPS during the audit period; which is to say, as employees of GSPS, not as an independent contractors. With regard to Mr. Negron, the record does appear to indicate that he had a business during the audit period called High Integrity Field Inspections and that during 2016, 2017 and 2018, High Integrity Field Inspections earned more for performing property inspections from sources other than GSPS than it did from GSPS. Nevertheless, as indicated earlier, the ABC test is written in the conjunctive, meaning that GSPS’s failure to meet its burden under any one of the prongs of the ABC test is alone sufficient to find that Mr. Negron was an employee, rather than an independent contractor. Thus, petitioner’s failure to meet its burden under both Prong “A” and Prong “B” is fatal to its claim of UCL-exempt status for the services performed for GSPS by Mr. Negron. As to the remaining 38 property inspectors engaged by GSPS during the audit period, GSPS has failed to meet its burden under all three prongs of the ABC test.

ORDER

Therefore, petitioner’s appeal is hereby dismissed and GSPS is hereby ordered to immediately remit to the Department for the years 2016 through 2019 \$68,330.01 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



Robert Asaro-Angelo, Commissioner
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