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PO BOX 637 MAIL STOP 6F
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DECISION AND NOTICE OF DECISION

A.L.J. Case No. 098-03419

Mailed and Filed: **FILED** 9 1999

E.R. No. 48-41624

IN THE MATTER OF:

HARRY'S NURSES REGISTRY IN
8325 163RD ST
JAMAICA NY 11432

ALLAN N. TAFFET
PARADISE & ALBERTS, LLP
630 THIRD AVENUE
NEW YORK NY 10017

MARC HEINEMAN UITA
25-15 QUEENS PLAZA NORTH
LONG ISLAND CITY NY 11101-9999

Department of Labor Office; LND
A.S.O. - NYC-ATT: R. D. CRAWFORD

Hearing Requested: February 12, 1999

PLEASE TAKE NOTICE that this decision has been duly mailed on the date stated above. If you appeared at the hearing and are not satisfied with this decision, you may appeal within THIRTY DAYS from the date this decision was mailed. Any party who failed to appear at the hearing has the right to apply to the local office to reopen the case. For the application to be granted, the party must apply within a reasonable time and must establish good cause for its failure to appear. READ IMPORTANT INFORMATION ON REVERSE SIDE.

POR FAVOR TOMAR NOTICIA que esta decision ha sido debidamente enviada por correo en la fecha que aparece arriba. Si usted asistió a la audiencia y no está satisfecho con la decisión, usted puede apelar dentro de los TREINTA DÍAS a partir de la fecha en que esta decisión fue enviada por correo. Cualquiera de las partes que faltó en comparecer a la audiencia, tiene derecho de aplicar en su oficina local para que se abra su caso. Para que la apelación sea aceptada, la parte interesada debe aplicar dentro de un período de tiempo razonable y debe establecer buena causa por no haber comparecido a la audiencia. LEA INFORMACIÓN IMPORTANTE AL REVERSO.

ISSUES: Employer's Application to Reopen Case No. 098-35147 and 098-29575.
Amount of contributions due under the Unemployment Insurance Law.
Status of persons as employees as defined by the Law.

FINDINGS OF FACT:

A hearing was held in which the employer, their representative, and a witness and representative for the Commissioner of Labor appeared and testimony was taken.

This is the employer's application to reopen Case No. 097-35147 and 098-29575 in which default decisions were entered due to the employer's non-appearance.

By initial determination the Commissioner of Labor, the employer was assessed with contributions due in the amount of \$22,585.33 for the period of the first quarter of 1993 through the fourth quarter of 1995. The employer objected to the additional contributions on the basis that payments made to nurses were as independent contractors and not employees.

The employer did not appear at the previously scheduled hearing scheduled for December 17, 1997 because he had not met with his representative and had asked that the case be closed with the right to reopen. The claimant's representative had attempted to have an informal conference with the Commissioner of Labor concerning the case prior to going to the hearing.

The employer did not appear at the previously scheduled hearing scheduled for February 8, 1999, because he missed a flight from Haiti to return after a family funeral.

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The employer is an employment agency which contracts with hospitals, nursing homes, and private individuals for the replacement of registered nurses, licensed practical nurses, and nursing assistants. These persons are already employed in full-time jobs, but work through the employer to be placed during their free time. The employer places ads in the paper which indicates that the person should bring their license, a physical, and a job reference. The employer is contacted by hospitals and nursing homes when they need replacements on a daily, weekly, or monthly basis. The employer provides the hospitals and nursing homes with a list of likely candidates for their positions from persons who register at the employer's agency. The hospital or nursing home would then make a request for a specific individual and would make the decision whether that person would continue in the position as needed. The employer negotiates the fee for the individual based on the experience of the individual and the amount that the nursing home or hospital is willing to pay. The individual is then paid from the agency or from the facility as required. The employer provides no supervision of the individuals once they are placed in a facility. Supervision is given by those persons in a supervisory capacity at each facility. If a particular nurse has to be out sick or is absent from her assignment, she would call a pool of nurses registered with the employer and contact another nurse herself to cover the position. The nurses do not have to attend meetings at the employer's business, perform no services there, and have no performance evaluations. The nurses provide all of their own transportation, and supplies, and are not reimbursed for any expenses. The nurses provide their own liability insurance and are given no instruction, or training, by the employer. Each nurse is free to work with various agencies at the same time that she is working for the employer.

OPINION: The credible evidence establishes that the employer did not exercise sufficient supervision, direction, or control, over the services performed by the nurses to establish their status as employees. Although the nurses registered with the employer, it was the hospital or nursing homes that granted or revoked privileges to the nurses and decided on their rate of pay, hours, and duties. It was a hospital or nursing home staff member who would discipline the nurses and supervise the performance during their work. The nurses were free to work at their own job or for competing employers and agencies.

I note that there have been prior decisions involving employers who furnish medical professionals to hospitals. These cases are not dispositive of the case at hand, however, as the "issue of whether one is an employee rather than an independent contractor is a mixed question of fact and law for the Board to resolve". Matter of State Services PC 148 AD 2nd 903, 904, affirmed Appeal Board No. 379,030. In the Matter of South Shore Medical Services PC AD 2nd (decided May 21, 1992), affirming Appeal Board No. 396, 843, the factors that were deemed relevant in finding an employment relationship to exist included the employer's determining the medical professionals' assignments and hours of work and the fact that the employer could dismiss the professionals if they failed to maintain the necessary qualifications or acted inappropriately. In the case at hand, the employer did not control the nurses' assignments, hours, or duties. As well, the employer was not responsible for granting or revoking privileges or for disciplining the nurses. Accordingly, I find that the present case is distinguishable from these cases and therefore I find that the employer is not liable for the assessment of contributions herein.

The employer has shown good cause for its failure to appear at the previously scheduled hearing. Therefore, their applications to reopen Case No. 097-35147 and 098-29575 are hereby granted in the interest of justice.

DECISION: The employer's applications to reopen are hereby granted. The determination of the Commissioner of Labor is overruled.

/s/ JEAN BELL

Administrative Law Judge

amb 5/11/99
dm 6/4/99
dm 6/9/99