



171 A.D.3d 1410, 99 N.Y.S.3d 113, Unempl.Ins.Rep.  
(CCH) P 12,985, 2019 N.Y. Slip Op. 03114

**\*\*1** In the Matter of Harry's Nurses Registry, Inc.,  
Doing Business as Harry's Home Care, Appellant.  
Commissioner of Labor, Respondent.

Supreme Court, Appellate Division,  
Third Department, New York  
525982  
April 25, 2019

CITE TITLE AS: Matter of Harry's Nurses  
Registry, Inc. (Commissioner of Labor)

#### HEADNOTE

Unemployment Insurance  
Employee or Independent Contractor  
Home Care Staffing Agency's Indicia of Control over  
Important Aspects of Services Performed by Health Care  
Workers


Raymond Nardo, Mineola, for appellant.  
Letitia James, Attorney General, New York City (Dawn A.  
Foshee of counsel), for respondent.

Lynch, J.P. Appeal from a decision of the Unemployment  
Insurance Appeal Board, filed February 7, 2017, as  
superceded by a decision filed September 6, 2018, which  
assessed Harry's Nurses Registry, Inc. for additional  
unemployment insurance contributions.

Harry's Nurses Registry, Inc., doing business as Harry's  
Home Care (hereinafter HNR), is a staffing agency that  
provides health care services to its clients, which consist of  
hospitals, nursing homes and private patients. To provide  
these services to its clients, HNR retains the services of  
registered nurses, licensed practice nurses, certified home  
health aides and personal care aides (hereinafter collectively  
referred to as health care workers). Following an audit  
for the years 2008, 2009 and 2010, the Department of  
Labor issued an initial determination \*1411 that assessed  
HNR for additional unemployment contributions based  
upon remuneration paid to its health care workers. HNR

objected to the determination, and, following hearings, an  
Administrative Law Judge, among other things, sustained  
the objection, overruling the Department's assessment of  
unemployment insurance contributions for the at-issue  
period. Upon administrative review, the Unemployment  
Insurance Appeal Board, in a February 2017 decision,  
reversed the Administrative Law Judge's decision and  
upheld the Department's initial determination assessing  
unemployment insurance contributions, and this appeal  
ensued.

In May 2018, while this appeal was pending, the Board  
sua sponte reopened its February 2017 decision pursuant  
to Labor Law § 534 "to reconsider all issues," and, upon  
request, this appeal was held in abeyance pending the Board's  
further proceedings. In a September 2018 decision, the Board  
rescinded its prior February 2017 decision, reversed the  
decision of the Administrative Law Judge and sustained the  
Department's initial determination. In so doing, the Board  
found that the health care workers were employees of HNR  
and, further, that the Board was not bound by a prior  
unappealed Administrative Law Judge decision from June  
1999 that found HNR's health care workers that it had retained  
to be independent contractors. This appeal was subsequently  
restored to the Court's calendar, and supplemental briefing  
ensued.<sup>1</sup>

We affirm. HNR's sole contention on appeal is that the Board's  
September 2018 decision was improper because it is bound by  
the prior unappealed Administrative Law Judge decision from  
1999 finding that, for the audit years 1993, 1994 and 1995,  
HNR's health care workers were independent contractors.<sup>2</sup>  
We disagree. The Board is not "required to conform to  
the precedent established in [a] prior unappealed decision  
[of \*1412 an Administrative Law Judge] or offer a rational  
explanation for not doing so" (*Matter of Ingle [Mechanical  
Secretary, Inc.—Commissioner of Labor]*, 129 AD3d 1424,  
1426 [2015], quoting *Matter of Bull [Yansick Lbr. Co.—  
Sweeney]*, 235 AD2d 722, 723 [1997], *lv dismissed* 90 NY2d  
913 [1997]; see generally Labor Law § 621 [3]). Moreover,  
the underlying determination under review covered a different  
audit period, and the Board articulated its reasons for deciding  
this matter differently—to wit, that this case presented  
additional factors or indicia of control over important aspects  
of the work performed by the health care workers that were  
not present or identified in the prior 1999 decision of the  
Administrative Law Judge (see  *Matter of Charles A. Field  
Delivery Serv. [Roberts]*, 66 NY2d 516, 520 [1985]; *Matter of*

*Ingle [Mechanical Secretary, Inc.—Commissioner of Labor]*, 129 AD3d at 1426; *Matter of McKenna [Can Am Rapid Courier—Sweeney]*, 233 AD2d 704, 705 [1996], *lv denied* 89 NY2d 810 [1997]). Accordingly, we discern no basis upon which to disturb the determination of the Board.

Clark, Mulvey, Aarons and Rumsey, JJ., concur. Ordered that the decision is affirmed, without costs.

#### FOOTNOTES

<sup>1</sup> We note that the merits of the Board's September 6, 2018 decision are reviewable by this Court on the pending appeal, as HNR is aggrieved by that decision in essentially the same manner as it was by the appealed-from decision (*see Matter of Tracy [Commissioner of Labor]*, 145 AD3d 1218, 1219

and n [2016]; *Matter of McCauley [Commissioner of Labor]*, 104 AD3d 973, 973 [2013]).

<sup>2</sup> We do not consider HNR's argument that the record does not contain substantial evidence to support the Board's determination that HNR's health care workers are employees for purposes of the unemployment insurance law. "This contention was improperly raised for the first time in [HNR's supplemental reply memorandum of law] to this [C]ourt" (*People v Ford*, 69 NY2d 775, 777 [1987]; *see Matter of Jay's Distributions, Inc. v Boone*, 148 AD3d 1237, 1241 [2017], *lv denied* 29 NY3d 918 [2017]; *see generally* Rules of App Div, All Depts [22 NYCRR] § 1250.8 [b], [d]) and was also not raised in HNR's supplemental brief submitted to this Court.

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