Case No.

New York Supreme Court

Appellate Division - Third Department

In the Matter of

HARRY'S NURSES REGISTRY INC. d/b/a
HARRY'S HOME CARE
88-25 163RD St.
Jamaica, NY 11432

Petitioner-Appellant,

- against -

NEW YORK STATE DEPARTMENT OF LABOR,

Respondent-Respondent.

BRIEF FOR PETITIONER-APPELLANT

RAYMOND NARDO
Attorney for Petitioner-Appellant
129 Third Street
Mineola, New York 11501
(516) 248-2121

Appeal Board Case No. 583421

Appeal Press, LLC - (914) 761-3600 (212) 267-6602 (18058)

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PRELIMINARY STATEMENT

In 1999, the Commissioner of Labor assessed the Petitioner-Appellant Harry's Nurses Registry, Inc. ("Harry's Nurses") with Unemployment Insurance contributions from the first quarter of 1993 through the fourth quarter of 1995 (A. 710). Harry's Nurses objected and requested a hearing on the basis that its nurses were independent contractors, not employees (*Id.*). Based on testimony and evidence presented at the hearing, an Administrative Law Judge ("ALJ") noted that Harry's Nurses "is an employment agency which contracts with hospitals, nursing homes, and private individuals for the replacement [sic] of registered nurses, licensed practical nurses, and nursing assistants" (A. 711). The ALJ ruled, on June 9, 1999, that the nurses were independent contractors, not employees (A. 710-712).

In 2010, an auditor for the Department of Labor conducted another audit of Harry's Nurses (A. 659-660). The auditor's field report picked up the nurses as employees, but "inasmuch as a prior decision held

nurses to be independent contractors, the assignment was returned to the district office as a Revised Audit, instructing the auditor to *exclude the nurses*" (A. 659, emphasis added). However, "before the Revised Audit was completed and closed, UI Tax Service became aware of new information which indicated that the employer was not operating as indicated in the original hearing, *i.e.* an employment agency which referred nurses to hospitals and nursing homes, but was operating a home health care service" (A. 659). More specifically, the field report noted that "Labor Standards has provided this office with a copy of NYS Department of Health letter dated January 27, 1992 in which Harry's Nurses Registry, Inc., application for home health care licensing was approved" (A. 659). The Department of Labor assessed a penalty based solely on this "new" information which allegedly indicated that Harry's Nurses was "not operating as discussed in the original hearing" (A. 659).

Harry's Nurses again requested a hearing. After numerous hearing dates, on November 6, 2014, a second

ALJ ruled that the nurses employed by Harry's Nurses were independent contractors, relying, in part, on the doctrine of collateral estoppel (A. 772-74). The Unemployment Insurance Appeal Board ("UIAB"), on appeal, issued a remand order on August 16, 2016 (A. 11). More evidence was gathered, and the UIAB overruled two prior ALJs, holding that the nurses employed by Harry's Nurses are employees (A. 6-9). Though Harry's Nurses addressed the issue of collateral estoppel in the underlying hearing - verbally and with a memorandum of law - the UIAB simply ignored the prior decision between the same parties, on the same issue, in the same forum, and ruled that the nurses were employees and that Harry's Nurses was liable for contributions. This appeal ensued.

SUMMARY OF ARGUMENT

The Commissioner of Labor brought the same case, in the same forum, involving the same parties, in 1999. That ALJ squarely ruled that Harry's Nurses "is an employment agency which contracts with hospitals, nursing homes, and private individuals for the replacement [sic] of registered nurses, licensed practical nurses, and nursing assistants" (A. 711), and that its nurses were independent contractors. The well-settled doctrine of collateral estoppel, which provides uniformity and stability to judicial decisionmaking, and conserves judicial resources, mandates that Harry's Nurses remain as independent contractors, based on the unappealed 1999 decision of the ALJ (A. 710-11).

The DoL initially agreed, and prepared to close the audit with the same result, until it allegedly found "new information which indicated that the employer was not operating as indicated in the original hearing" (A. 659). It is undisputed that this "new information" was an application submitted for a home health care agency

which was granted in 1992, which pre-dated the period of the original audit, predated the ALJ's 1999 decision by more than 7 years (A. 659) and predated the 2010 audit by 18 years. There was nothing "new" about this "new information." Since Harry's Nurses continued to operate by placing nurses in hospitals, nursing homes, and with private individuals, the UIAB is estopped from reversing the ALJ's 1999 decision, which was never appealed, and which ruled that the nurses were independent contractors.

STATEMENT OF FACTS

In 1999, the Commissioner of Labor assessed Harry's Nurses with contributions from the first quarter of 1993 through the fourth quarter of 1995 based on the fact that its nurses were miscategorized as independent contractors, instead of employees (A. 710-711). Harry's Nurses requested a hearing and, after both sides presented documents and testimony, the ALJ ruled that the nurses were independent contractors (A. 710-711). The ALJ noted that Harry's Nurses is "an employment agency which contracts with hospitals, nursing homes, and private individuals for the replacement [sic] of registered nurses, licensed practical nurses, and nursing assistants" (A. 711). The ALJ noted that the nurses "provide all of their own transportation, and supplies, and are not reimbursed for any expenses. Three nurses provide their own liability insurance and are given neither instruction nor training by the employer. Each nurse is free to work with various agencies at the time that she is working for the employer" (A. 711). The employer could

not grant or revoke privileges, or discipline the nurses (A. 711). The ALJ concluded that the employer "did not exercise sufficient supervision, direction, or control, over the services performed by the nurses to establish their status as employees" (A. 711).

In 2010, an auditor for the Department of Labor conducted another audit of employees of Harry's Nurses (A. 659-660). The auditor's field report picked up the nurses as employees, but "inasmuch as a prior decision held nurses to be independent contractors, the assignment was returned to the district office as a Revised Audit, instructing the auditor to *exclude the nurses*" (A. 659, emphasis added). However, "before the Revised Audit was completed and closed, UI Tax Service became aware of a new information which indicated that the employer was not operating as indicated in the original hearing, *i.e.* an employment agency which referred nurses to hospitals and nursing homes, but was operating a home health care service" (A. 659). More specifically, the field report noted that "Labor Standards has provided this office with a copy of NYS

Department of Health letter dated January 27, 1992 in which Harry's Nurses Registry, Inc., application for home health care licensing was approved" (A, 659). Harry's Nurses was assessed a contribution penalty solely based on this allegedly "new" information which indicated that it was "not operating as discussed in the original hearing" (A. 659). According to the DoL's field report, Harry's Nurses' application for home health care licensing was approved 9 years before the initial audit period, 7 years before the ALJ's decision, and 18 years before the second audit. Despite the fact that this license is the linchpin of the 2010 audit, one DoL witness testified that he did not know if Harry's Nurses even had a license for home health care (Tr. 92-93), and the other testified that he did not know of the home health care license until the Unemployment proceedings began (Tr. 215-16).

Despite the ALJ's 1999 decision, never appealed from, Commissioner barreled forward with its audit, trying to find a different result for the same workers in the same workplace performing the same duties.

Again, Harry's Nurses was assessed with liability; again, Harry's Nurses requested a hearing; again, the ALJ ruled that Harry's Nurses were independent contractors (A. 772-774).

During the hearing, the Commissioner did not dispute that the prior ALJ ruled that the nurses were independent contractors (A. 121); nor did it seek to appeal or reopen that case (A. 126); nor did it dispute that the license to operate a home health care agency was dated January 27, 1992 - 18 years before the second audit (A. 124). At the time of the 1999 hearing, the Department of Labor witness testified that the ALJ could have, or should have, known that Harry's Nurses was licensed as a home health care agency (A. 124). Nonetheless, the Commissioner contended that the nurses and home health aides were not independent contractors (A. 169).

Harry Dorvilier testified that Harry's Nurses provides nurses to "[h]ospitals, nursing homes and private patients" (A. 247). He testified that the activities and operation of Harry's Nurses prior to the

findings of the ALJ in 1999, and through the period of the Commissioner's second audit, were the same (A. 269-70; 302). Despite the home health agency license, Harry's Nurses only employed two home health aides (A. 272). The rest were practical nurses or registered nurses (A. 301-02).

The nurses are supervised by doctors, not by anyone at Harry's Nurses (A. 303). They travel to assignments through their own means, and they provide their own supplies (A. 304-306). In addition, nurses who cannot make a scheduled assignment can switch with another nurse on the case (A. 315; 325). The nurses are also responsible for their own health insurance, income taxes, and malpractice insurance (A. 597), and they negotiated the rates for their assignments (A. 599).

While the nurses signed "non-compete agreements," these non-competes were, in fact, targeted non-solicit agreements. Specifically, the nurses were permitted to work for any other agencies or employer (A. 596); they were only prohibited from soliciting the services of

the *same* patient whom Harry's Nurses assigned them to (A. 461). They were prohibited from treating a Harry's Nurses patient privately, to the detriment of Harry's Nurses - the broker who located the assignment (A. 461).

Since the same facts were previously decided by an ALJ, and there was no change in the manner in whicih Harry's Nurses operated, the ALJ ruled that the nurses were still independent contractors (A. 772-74). Specifically, the ALJ ruled that "[t]he first hand, sworn testimony of the owner of the agency establishes that during the contribution period at issue the agency functioned and operated essentially as it had been operating when the decision from 1999 was issued" (A. 774). The ALJ also ruled that "the Department [of Labor] leaves unexplained how mere possession of a home health care license establishes that the individuals registered or listed with the agency are the employees of the agency" (A. 774). The ALJ also found that the Department of Labor "concluded too much from too little and relied on evidence - the audit report - that is too

general and too vague" (A. 774). After an appeal, the UIAB remanded the case to the ALJ for factfinding (A. 10-12), and then the UIAB issued a terse decision, without even addressing the issue of collateral estoppel, finding the nurses to be employees (A. 6-9). This appeal followed.

ARGUMENT

POINT I.

SINCE THIS MATTER WAS FULLY AND FAIRLY LITIGATED, AND DECIDED, BY AN ALJ IN 1999, THE DOCTRINE OF COLLATERAL ESTOPPEL PREVENTS IT FROM BEING RE-LITIGATED

Collateral estoppel precludes a party from re-litigating an issue which has been raised, and decided, against that party in a prior proceeding. *See, W.O.R.C. Realty Corp. v. Town of Islip*, 104 A.D.3d 677, 677 N.Y.S.2d 448, 449 (2d Dep't 2013). The function of collateral estoppel is to serve the public's interest in promoting judicial economy and conserving the resources of litigants. *See, Mayes v. UVI Holdings, Inc.*, 280 A.D.2d 153, 158, 723 N.Y.S.2d 151, 155 (2d Dep't. 2001). In addition, it provides stability to the judicial system by preventing conflicting decisions on the same facts. The Court of Appeals has squarely held that the doctrine is applicable to the quasi-judicial determinations of administrative agencies where (1) the issue sought to be precluded is identical to a material issue necessarily decided by the

administrative agency in a prior proceeding, and (2) there was a full and fair opportunity to litigate the issue before an administrative tribunal. *See, Auqui v. Seven Thirty One Ltd. Partnership*, 22 N.Y.3d 246, 980 N.Y.S.2d 345, 347 (2013); *see, also, Jeffreys v. Griffin*, 1 N.Y.3d 34, 39, 769 N.Y.S.2d 184, 188 (2003). The party seeking to apply collateral estoppel bears the burden of establishing identity of issue, while the opponent must demonstrate the absence of a full and fair opportunity to be heard. *See, Mavco Realty Corp. v. M. Slayton Real Estate, Inc.*, 77 A.D.3d 892, 893, 909 N.Y.S.2d 759, 761 (2d Dep't. 2010).

"The doctrine of collateral estoppel is 'applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies . . . when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law." *In Re Bartenders Unlimited, Inc.*, 289 A.D.2d 785, 786 (3d Dep't. 2001). Whether or not collateral estoppel applies depends upon "general

notions of fairness involving a practical inquiry into the realities of the litigation." *Jeffreys*, 1 N.Y.3d at 41, *quoting, Matter of Halyalkar v. Board of Regents of the State of N.Y.*, 72 N.Y.2d 261 (1998).

Collateral estoppel is routinely applied at Unemployment Insurance hearings. For instance, in *In Re Fox*, 233 A.D.2d 645, 649 N.Y.S.2d 748 (3rd Dep't. 1996), the employee lost a disciplinary hearing under § 75 of the Civil Service Law. The Third Department held that, "claimant was given a full and fair opportunity to litigate the issue at that hearing. Inasmuch as this identical issue was before the Board, we find that the Board properly accorded collateral estoppel effect to the ALJ's factual findings." *Id.* at 646, 749 (citation omitted). More specifically, the Third Department "has previously determined that the Unemployment Insurance Appeal Board must give collateral estoppel effect to decisions of the Civil Service Commission when there is an identity of issue." *In re Lester*, 149 A.D.2d 220, 541 N.Y.S.2d 617, 618 (3d Dep't. 1989).

The application of collateral estoppel is required where the issue has already been decided. In *In re Guimarles*, 68 N.Y.2d 989, 991, 510 N.Y.S.2d 558 (1986), the UIAB refused to apply collateral estoppel to an arbitrator's decision, and the Court of Appeals reversed, holding that, "[t]he Appellate Division and the Appeal Board erred in not giving collateral estoppel effect to the arbitrator's factual findings regarding claimant's conduct and to his conclusion of insubordination" (citation omitted). Since arbitration and Civil Service Law hearings are entitled to collateral estoppel at Unemployment Insurance hearings, so too must be the decisions of Unemployment Insurance ALJ's. As set forth in *In re Bull*, 235 A.D.2d 722, 652 N.Y.S.2d 809, 811 (3d Dep't. 1997)(emphasis added), "If the ALJ's decision is not appealed, it is binding upon the parties to the proceeding and entitled to *preclusive effect* as fully as if it were the decision of the ultimate administrative arbiter, here the Board. That is the clear import of Labor Law § 620(3) and § 623(1)."

In the instant matter, the Department of Labor sought to re-litigate the same issue previously decided by an ALJ in 1999 - whether nurses working for Harry's Nurses were employees or independent contractors. The ALJ, in 1999, decided that "[t]he employer is an employment agency which contracts with hospitals, nursing homes, *and private individuals* for the replacement [sic] of registered nurses, licensed practical nurses and nursing assistants" (A. 711)(emphasis added). After a full and fair opportunity for a factual hearing, where both parties presented testimony and evidence, the ALJ ruled, in 1999, that the nurses were independent contractors, not employees (A. 710-11). Unsurprisingly, after *another* hearing in 2014, a subsequent ALJ reached the same conclusion based, in part, on collateral estoppel (A. 772-74).

The Commissioner of Labor allegedly based its subsequent 2010 audit on "new information" (A. 659). As set forth in the Commissioner's own documentation, Harry's Nurses acquired a home healthcare license in

1992 - *seven years prior to the 1999 hearing* (A. 659), and 18 years prior to the 2010 audit. The home healthcare license was not "new" in 2010. In fact, Harry's Nurses acquired it before the commencement of the initial 1993 to 1995 audit period. The DoL disingenuously based its 2010 investigation on "new information" which predated the 1993 audit and 1999 decision.

Collateral estoppel compels the conclusion about that the nurses are independent contractors as set forth in the unappealed 1999 decision of the ALJ. This remains true because, as the subsequent ALJ noted, Harry's Nurses "functioned and operated essentially as it had been operating when the decision from 1999 was issued" (A. 774). Harry's Nurses still contracts with hospitals, nursing homes, and private individuals for the placement of nurses. Thus, "absent an explanation by the agency, an administrative agency decision which, on essentially the same facts as underlaid a prior agency determination, reaches a conclusion contrary to the prior determination is arbitrary and capricious."

In re Charles A. Field Delivery Service, Inc., 66 N.Y.2d 516, 518, 498 N.Y.S.2d 111, 114 (1985). Consequently, the decision of the ALJ in 1999 estops the UIAB from finding that the nurses at Harry's Nurses are employees, and the February 7, 2017 decision of the UIAB should be reversed.

POINT II.

§ 632(2) OF THE LABOR LAW DOES NOT PRECLUDE COLLATERAL ESTOPPEL

§623(2) of the Labor Law provides that:

> No finding of fact or law contained in a decision rendered pursuant to this article by a referee, the appeal board or a court shall preclude the litigation of any issue of fact or law in any subsequent action or proceeding; provided, however, that this subdivision shall not apply to causes of action which (i) arise under this article, (ii) seek to collect or challenge liability for unemployment insurance contributions

Courts may prevent ALJ or UIAB findings from precluding claims or issues in subsequent cases. *See, e.g., Engel v. Calgon Corporation,* 114 A.D.2d 108, 498 N.Y.S.2d 877 (3d Dep't. 1986). However, this does not apply in the present situation because the statute expressly excludes actions which "arise under this article," as the present action does, and further excludes actions which seek to collect liability for unemployment insurance contributions. Consequently, the findings of the ALJ in 1999 bind the Commissioner of Labor, the subsequent ALJ, and the UIAB, and the nurses at Harry's

Nurses are therefore independent contractors.

CONCLUSION

For the foregoing reasons, petitioner-appellant requests that this Court vacate, annul, and set aside respondent-respondent's Order, dated February 7, 2017, finding that its nurses were employees, with costs, and for such other and further relief as this Court deems just and equitable.

Dated: Mineola, New York
November 30, 2017

Respectfully submitted,

Raymond Nardo

RAYMOND NARDO, Esq.
Attorney for Petitioner-Appellant
HARRY'S NURSES REGISTRY, Inc.
129 Third Street
Mineola, New York 11501
(516) 248-2121