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DECISION AND NOTICE OF DECISION
DECISIÓN Y AVISO DE LA DECISIÓN TOMADA

NOV 06 2014

A.L.J. Case No. 013-35860

Mailed and Filed:

IN THE MATTER OF:

ER NO:48-41624

HARRY'S NURSES REGISTRY IN
8825 163RD ST
JAMAICA NY 11432-4046

RAYMOND NARDO
129 THRID ST
MINEOLA NY 11501

NYS DOL UI SPECIAL AUDIT
ATTN: S.STEURENTHAL
75 BROAD ST RM 1601
NEW YORK NY 10004-

Department of Labor Office: LND

Hearing Requested: October 04, 2013

A.S.O.-NYC-ATT: R. USMANI

PLEASE TAKE NOTICE that this decision has been duly mailed on the date listed above. If you appeared at the hearing and are not satisfied with this decision, you may appeal within **TWENTY DAYS** from the date this decision was mailed. **READ IMPORTANT INFORMATION ON REVERSE SIDE REGARDING YOUR RIGHT TO APPEAL.** Any party who failed to appear at the hearing has the right to apply 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.

POR FAVOR TOME NOTA: esta decisión 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, puede apelar dentro de **VEINTE DIAS** contados a partir de la fecha en que esta decisión fue enviada por correo. **LEA LA INFORMACIÓN IMPORTANTE AL REVERSO SOBRE SUS DERECHOS DE APELACIÓN.** Cualquiera de las partes que falle en comparecer a la audiencia, tiene el derecho de solicitar que se reabra su caso. Para que dicha solicitud sea otorgada, la parte interesada debe solicitarlo dentro de un periodo de tiempo razonable y debe establecer buena causa por no haber comparecido a la audiencia.

DOCUMENTO IMPORTANTE. PUEDE OBTENER UNA TRADUCCIÓN DEL MISMO LLAMANDO
AL 1-888-209-8124 (FUERA DEL ESTADO DE NUEVA YORK 1-877-358-5306)

ISSUES:

Employer's Application to Reopen Case No. 013-07916.
 Amount of contributions due under the Unemployment Insurance Law.

The Department of Labor issued the initial determination, dated September 14, 2012, assessing HARRY'S NURSES REGISTRY (hereinafter referred to as the "agency") \$273,230.12 (not reflecting accruing

interest charges) in additional contributions due for the period beginning with the first quarter of 2008 through the fourth quarter of 2010, based on remuneration paid to the individuals included in the audit as employees. The employer requested a hearing and objected contending that the individuals included in the audit were independent contractors.

The Employer has applied to reopen A.L.J. Case No. 013-07916. In that case, the Administrative Law Judge sustained the initial determination based upon the employer's failure to appear at a hearing on June 10, 2013.

Hearings were held at which testimony was taken. There were appearances on behalf of the employer and the Commissioner of Labor.

FINDINGS OF FACT: The agency is an employment agency providing primarily nurses and licensed practical nurses to hospitals, nursing homes and private individuals. The agency places advertisements in newspapers soliciting interest from nurses and licensed practical nurses. Once the agency has established the qualifications of such individuals responding to the advertisements, those individuals are then registered with the agency. When a hospital, nursing home, or private individual requests for example a nurse from the agency, the agency provides a list to the hospital of likely candidates and the hospital can then choose who to retain from the list. The agency then negotiates a fee for the chosen candidate. The individual then is paid through the agency. The agency provides no supervision to the those from the list placed at hospitals, nursing homes or with private individuals. Supervision can be or is provided by the facilities or individuals those from the list are placed with. Those on the list provide their own transportation and supplies and are not reimbursed by the agency for any expenses. The agency provides no training or instruction. Those registered with the agency can work with other agencies at the same time as they are working with the agency herein.

Sometime at or about 1999, the Department of Labor issued a determination assessing a contribution charge of \$22,585.33 against the agency. That assessment was based on payments made by the agency to nurses registered with it for the period from 1993 to 1995. The employer objected to that assessment and requested a hearing. Hearings were held and in a decision issued on June 9, 1999 (ALJ Case No. 099-03419), the assessment was overruled. No appeal was taken from the decision issued.

The agency continues to operate essentially in the same way as it did when the above noted decision was issued.

Regarding the instant additional contributions due for 2008 to 2010, the Department of Labor based its assessment on its audit report indicating a list of persons paid by the agency and listed as nurses; based upon the Department's determination that the agency was operating as a home health care service – the agency's website discusses only home health care, i.e. Harry's Home Care, etc.; based upon the agency having a home health care license and having had such license since 1992; and based upon the Department having conducted a survey of persons who performed services for the agency in which all respondents indicated that they provided their services as home health care.

The Department of Labor representative cited three determinations – all three have not been appealed from or hearings requested. Those determinations found that three individuals – a nurse, a home aide, and a licensed practical nurse were employed by the agency. The determinations noted that the earnings of each and all other persons similarly employed required contributions or additional assessments from the first quarter of 2008.

The employer did not appear for the hearing scheduled on June 10, 2013 because its counsel required additional time to prepare its case.

OPINION: On application duly made, an Administrative Law Judge may reopen a case where a decision was made upon or following the default of a party if such party shows good cause for the default. (See, Appeal Board Rule 12 NYCFR 461.8.) The credible evidence establishes that the employer failed to appear at the

hearing in A.L.J. Case No. 013-35860 because of the above noted reason. I find that such circumstances constitute good cause for the default and that the application to reopen is therefore granted.

Pursuant to Labor Law § 560 (1), any employer shall become liable for contributions under Labor Law, Article 18, if the employer has paid remuneration of \$300 or more in any calendar quarter. Such liability shall commence on the first day of such calendar quarter. Pursuant to Labor Law § 517 (1), remuneration means every form of compensation for employment paid by an employer to an employee; whether paid directly or indirectly by the employer, including salaries, commissions and bonuses. Pursuant to Labor Law § 511 (1), employment means any service under any contract of employment for hire, express or implied, written, or oral.

The 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 – the decision overruled the assessment that based upon the nurses registered with the agency were its employees. While the Department of Labor representative asserted otherwise, it is undisputed that the audit report only lists nurses – no reference is made to home aides or licensed practical nurses. Additionally, the survey referred to in the Audit Field Report does not indicate how many individuals were surveyed and the circumstances of their relationship to the agency. Further that these individuals provided their services as “home” health care does not compel or even necessarily lead to a conclusion that the agency exercised sufficient control or supervision over these individuals that it can be concluded that they were the agency’s employees. Moreover, the Department 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. Similarly the agency’s website indicating Harry Home Care suggests another entity apart from Harry’s Nurses Registry, Inc. Even if Harry’s Home Care is part of Harry’s Nurses Registry, I fail to see how such a circumstance compels a conclusion that the individuals registered with the agency during the contribution period at issue are employees. Finally, while the Department of Labor representative refers to the above noted three determinations, the audit report only lists nurses. The audit report does not show that the agency employed in a similar fashion since the first quarter of 2008 others than those three individuals. Significantly, the Department of Labor’s witness, a district manager, who was involved in the audit essentially reiterated the substance of the audit report and demonstrated his unfamiliarity with the circumstances of the arrangements between the agency and to those to whom the agency made payments. The witness did not know where those persons performed services and for whom the services were performed. Indeed the owner of the agency did not deny in this case or in the 1999 case that the agency paid directly those on its registry or list who accepted work at hospitals, nursing homes or with private individuals. As such, the Department finding an additional contribution due of \$273,230.12 has concluded too much from too little and relied on evidence – the audit report - that is too general and too vague. Accordingly, the Department has failed to provide sufficient evidence to support the additional contribution and the determination at issue must be overruled.

DECISION: The employer’s application to reopen ALJ Case No. 013-07916 is granted.

The employer’s objection, contending that the individuals included in the audit were independent contractors, is sustained

The initial determination, the initial determination, dated September 14, 2012, assessing HARRY’S NURSES REGISTRY (hereinafter referred to as the “agency”) \$273,230.12 (not including accruing interest charges) in addition^{al} contributions due for the period beginning with the first quarter of 2008 through the fourth quarter of 2010, based on remuneration paid to the individuals included in the audit as employees, is overruled.



/s/ Manuel Marks

Administrative Law Judge