



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

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**DECISION OF THE BOARD**

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Mailed and Filed: NOVEMBER 18, 2020

IN THE MATTER OF:

Appeal Board No. 608915

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the determination holding liable for additional contributions in the amount of \$1,971.74, effective January 1, 2013 through December 31, 2016, based on remuneration paid to individuals, (MC, IK, KW, AS, MJ, DS and Dhajeri), 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 Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the employer and the Commissioner of Labor. By decision filed October 10, 2019 (), the Administrative Law Judge granted the employer's application to reopen A.L.J. Case No. 019-06686, sustained the employer's objection, and overruled the determination.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board, insofar as it sustained the determination and concedes AS is not an employee.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The company operates as a medical practice, offering various types of testing and therapy for its patients. It retained the services of part-time medical professionals including MC, DN, MJ, KW, and IK. MC and DN performed cognitive tests. MJ performed physical therapy. KW performed nursing services. IK conducted EEG tests.

The company identified the patients and the service to be performed, provided the medical professionals with the work location, and handled patient complaints and handled the billing. The medical professionals were responsible to provide the test results or other work product to the employer. Checks were made out to each person as an individual, and they would be paid regardless of whether the patient paid the company.

Remuneration made to PD, who owns a web-consulting business and was excluded by the Commissioner from the audit, was mistakenly identified in the audit as made to "Dhajeri."

OPINION: The credible evidence establishes that an employer-employee relationship existed with MC, DN, MJ, KW, and IK. As the individuals in question were providing professional medical services, the relevant standard is whether the employer exercised overall control over the work performed (Matter of Mackey (Prometric Inc.), 120 AD3d 1493 [3rd Dept 2014], Matter of Goddard (Summit Health, Inc.), 118 AD3d 1200, 1201, [3rd Dept 2014]; Matter of Scinta (ExamOne World Wide Inc.), 113 AD3d 959, 960, [3rd Dept 2014]; Matter of Guidici Pietro (Hariton & D'Angelo, LLP), 24 AD3d 1159, 1160, [3rd Dept 2005]).

While MC, IK, KW, MJ, and DS performed only part-time services, the frequency of their services is not dispositive. The company exercised overall control by providing the patients, identifying the service to be performed, providing the facility, requiring test results or other work product, and handling complaints and billing. Additionally, the service providers were paid as individuals and received payment regardless of whether the clients paid. The company did not sufficiently demonstrate that any of the payments were improperly classified, that any of the named individuals operated an independent business, or that MC was in school at the time services were performed. The Court has held that "it is incumbent on the Board to decide like cases the same way or explain the departure" (see Matter of Charles A. Field Delivery Service, Inc., 66 NY2d 516 [1985]). In this regard, the court has found an employment relationship under similar circumstances (see Matter of Williams [Summit Health, Inc.], 146 AD3d 1210 [3rd Dept 2017], Matter of Armbruster [Summit Health Inc.], 138 AD3d 1367 [3rd Dept 2016], Matter of Lustgarten [NY Psychotherapy and Counseling Ctr.], 123 AD3d 1212 [3rd Dept 2014]).

However, the record establishes that the remuneration to PD was mistakenly

assigned to Dhajeri in the audit. Unlike the others in the audit, PD, who is not a medical professional and owns his own web consulting business, was excluded by the Commissioner. We note that the company presented documentation to support its testimony that the remuneration paid to PD was mistakenly assigned to Dhajeri in the audit. Therefore, the remuneration to Dhajeri should be excluded.

Accordingly, we conclude that MC, IK, KW, MJ, and DS provided services as employees in covered employment for the purposes of unemployment insurance.

DECISION: The decision of the Administrative Law Judge is affirmed in part and reversed in part.

The employer's objection, that the individuals included in the audit were independent contractors, is overruled, except for AS and Dhajeri.

The determination, holding liable for additional contributions in the amount of \$1,971.74, effective January 1, 2013 through December 31, 2016, based on remuneration paid to individuals included in the audit as employees, is modified to exclude the remuneration paid to AS and Dhajeri, and as so modified, is sustained.

The matter is referred to the Department of Labor to make the necessary calculations consistent with this decision.

JUNE F. O'NEILL, MEMBER