

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Application of Harley J. McLain for Renewal of the Registration of Kirpal Nurses (a/k/a Kirpal Nurses, LLC, and/or Kirpal Nurses Holding Co.), d/b/a/ Kind Hearts, as a Supplemental Nursing Services Agency

**ORDER GRANTING
DEPARTMENT'S MOTION
FOR SUMMARY DISPOSITION
AND RECOMMENDATION**

On June 10, 2009, the Department of Health (Department or MDH) issued a Notice of and Order for Prehearing Conference alleging that renewal of the registration of Kirpal Nurses (a/k/a Kirpal Nurses, LLC, and/or Kirpal Nurses Holding Co.), d/b/a Kind Hearts (Kirpal) to operate as a supplemental nursing services agency should be denied.

A prehearing conference was scheduled for July 30, 2009, but was continued at the request of Kirpal's owner, Harley J. McLain, to allow him additional time to seek the assistance of counsel. The prehearing conference was held on September 11, 2009. Mr. McLain appeared on his own behalf without counsel. The Department stated that the sole issue was whether the business operated by Mr. McLain meets the statutory definition of a Supplemental Nursing Services Agency (SNSA). A schedule was set for the Department to file a motion for summary disposition and for Kirpal's response.¹

On November 12, 2009, the Department filed its Motion for Summary Disposition, with accompanying documents, requesting that the Administrative Law Judge (ALJ) issue a recommendation granting summary disposition in its favor. The Department asserted that Kirpal's application to renew its registration as a SNSA should be denied because Kirpal failed to show that each temporary employee provided by Kirpal to health care facilities is an employee of Kirpal and is not an independent contractor, as required by Minn. Stat. § 144A.72, subd. 1 (9).

Kirpal's response to the Motion for Summary Disposition was due by December 17, 2009, but no response was filed.

¹ Prehearing Order, September 14, 2009.

By letter dated January 6, 2010, the Department requested that the ALJ rule on its motion and waived its right to file a reply since Kirpal had not filed a response to its motion. Thus, the record on the motion closed on January 7, 2010, upon receipt of the Department's request.

Appearances: Jocelyn F. Olson, Assistant Attorney General, on behalf of MDH; Harley J. McLain on behalf of Kirpal.

For the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER and RECOMMENDATION

IT IS HEREBY ORDERED: The Department's Motion for Summary Disposition is GRANTED.

IT IS HEREBY RECOMMENDED: That the Department deny the renewal of the registration of Kirpal Nurses (a/k/a Kirpal Nurses, LLC, and/or Kirpal Nurses Holding Co.), d/b/a Kind Hearts, as a Supplemental Nursing Services Agency.

Dated: January 19, 2010

s/Beverly Jones Heydinger

Beverly Jones Heydinger
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Order Granting Department's Motion for Summary Disposition and Recommendation. Under Minn. Stat. § 14.61,² the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Dr. Sanne Magnan, Commissioner of the Department of Health, 625 Robert Street North, PO Box 64975, St. Paul, MN 55164-0975 (651) 201-4799, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62,

² Except as noted, Minnesota Statutes are cited to the 2008 Edition.

subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Standard for Summary Disposition

Summary disposition is the administrative equivalent of summary judgment.³ The standards for summary disposition in a contested case proceeding are equivalent to the standards for summary judgment under Rule 56.03 of the Minnesota Rules of Civil Procedure.⁴ The ALJ may recommend summary disposition of the case or any part of the case “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.”⁵ A genuine issue is one that is not a sham or frivolous. A fact is material if its resolution will affect the result or outcome of the case.⁶

When considering a motion for summary disposition, the ALJ must view the facts in the light most favorable to the non-moving party and resolve all doubts and factual inferences in that party’s favor.⁷ MDH, as the moving party, has the initial burden to show that there is no genuine issue concerning any material fact.⁸ To successfully resist a motion for summary disposition, the non-moving party cannot rely upon general statements or allegations, but must show by substantial evidence that there are specific facts in dispute that have a bearing on the outcome of the case.⁹ “Substantial evidence” refers to the legal sufficiency of the evidence and not the quantum of evidence.¹⁰ Speculation alone, without some concrete evidence, is insufficient to survive summary

³ *Pietsch v. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004); Minn. R. 1400.5500 (K) (2007).

⁴ See Minn. R. 1400.6600 (the Minnesota Rules of Civil Procedure may apply to motions in contested cases as appropriate).

⁵ Minn. R. Civ. P. 56.03; *Osborne v. Twin Town Bowl, Inc.* 749 N.W.2d 367, 371 (Minn. 2008) (citing *Anderson v. State Dep’t of Natural Res.*, 683 N.W. 2d 181, 186 (Minn. 2005)); *Sauter v. Sauter*, 244 Minn. 482, 484-85, 70 N.W.2d 351, 353 (Minn. 1955)

⁶ *O’Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996); *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Dep’t of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

⁷ *Osborne*, 749 N.W.2d at 371; *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

⁸ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁹ *Papenhausen v. Schoen*, 268 N.W.2d 565, 571 (Minn. 1978).

¹⁰ *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69-70 (Minn. 1997); *Murphy v. Country House, Inc.*, 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976).

disposition.¹¹ However, if reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.¹²

In this instance, since Kirpal failed to respond to the Department's motion, the ALJ will determine whether the Department has met its initial burden of showing that there is no genuine issue concerning any material fact, and, if so, whether the Department is entitled to summary disposition as a matter of law.

Background

Supplemental nursing services agencies (SNSAs) provide temporary employees such as nurses, nursing assistants, nurse aides and orderlies, to health care facilities such as hospitals, outpatient surgery centers, nursing homes and home care agencies.¹³ In 2001, the Minnesota Legislature enacted Minn. Stat. §§ 144A.70 to 144A.74, which govern SNSAs.¹⁴

Pursuant to Minn. Stat. § 144A.71, subd. 1, a person who operates a SNSA must register the SNSA with the Department. In order to be registered, a SNSA must meet the minimum criteria listed in Minn. Stat. § 144A.72, subd. 1. One of the criteria is that "the supplemental nursing services agency shall document that each temporary employee provided to health care facilities is an employee of the agency and is not an independent contractor."¹⁵ This criterion was added to section 144A.72, subdivision 1, in 2002.¹⁶ In May 2002, the Department posted the changes in the law on its website and on August 1, 2002, the Department mailed to each registered SNSA a letter providing notice of the necessary steps to demonstrate compliance with the new provisions.¹⁷

Summary of Facts

The Department has set forth the following facts in the Affidavit of Mary Absolon, Health Survey and Compliance Manager, Division of Compliance Monitoring, and Jocelyn F. Olson, Assistant Attorney General, and exhibits to those affidavits. Kirpal failed to dispute any of the facts asserted.

Kirpal's business has been registered with the Department as a SNSA since September 1, 2001. Kirpal's most recent Certificate of Registration was effective January 2, 2007, and expired January 1, 2008.¹⁸ Renewal of this Certificate of Registration is the subject of this proceeding.

¹¹ *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993).

¹² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *DLH, Inc.*, 566 N.W.2d at 69.

¹³ Minn. Stat. § 144A.70, subds. 4 and 6.

¹⁴ Act of June 30, 2001, ch. 9, art. 7, §§ 2-6, 2001 Minn. Laws 1st Sp. Sess. 2400-03.

¹⁵ Minn. Stat. § 144A.72, subd. 1 (9).

¹⁶ Act of March 26, 2002, ch. 287, § 3, 2002 Minn. Laws 390-91.

¹⁷ Affidavit of Mary Absolon (Absolon Aff.) para. 4 and Exhibits (Exs.) 2 and 3.

¹⁸ Absolon Aff., Ex. 4.

Francis (Frank) L. McLain is Kirpal's agent or office manager.¹⁹ On November 17, 2008, Frank McLain was found guilty in U.S. District Court, District of Minnesota, of nine counts of failure to account for or pay over employment taxes for Kirpal nursing staff and office workers from approximately 2001-2004. He was sentenced to four years in prison followed by three years of supervised release, and a fine of \$75,000.²⁰ The court found that Frank McLain had failed to pay \$826,447.53 in unemployment taxes for Kirpal nursing staff and \$53,655.43 in unemployment taxes for its office workers.²¹

Harley J. McLain (McLain), Frank's brother, is the current owner of Kirpal.²² On November 30, 2007, McLain submitted an application for renewal of Kirpal's Certificate of Registration for the one-year period beginning January 2, 2008.²³ On page 3 of the Renewal Application, McLain attested that based on his personal knowledge and belief, each temporary employee that Kirpal provided to health care facilities is an employee of Kirpal and not an independent contractor. He also attested in the application that Kirpal withholds required income tax on employee wages and makes periodic payments of those funds to the state and federal government.²⁴

On December 20, 2007, McLain sent a letter to the Department stating that it was his sincere belief that he is not responsible for employee income tax withholding, as explained in a letter to the Department dated August 29, 2007.²⁵ In his August 29, 2007, letter, McLain informed the Department that Kirpal is not an "employer" and has no "employees." Moreover, he expresses his view that withholding taxes from the persons who work for Kirpal is unconstitutional.²⁶ The Department did not act on Kirpal's Renewal Application for 2008, but Kirpal continued to operate while the application was pending.²⁷

On December 24, 2008, McLain submitted an application for renewal of Kirpal's Certificate of Registration for the year 2009. As he did in 2008, McLain attested that each temporary employee provided to health care facilities is an employee of Kirpal and is not an independent contractor, and that Kirpal withholds required income tax and makes the appropriate periodic tax payments.²⁸ However, on page 2 of the 2009 Renewal Application, McLain crossed out the word "employees" and substituted in handwriting the words "independent contractors."²⁹ In the accompanying cover letter, McLain reiterated that it his sincere belief that he is not responsible for employee

¹⁹ Absolon Aff., para. 6. See *also* Affidavit of Jocelyn F. Olson (Olson Aff.), Ex. 1.

²⁰ Olson Aff., Exs. 2, 3.

²¹ Olson Aff., Ex. 2 at 5, 6.

²² Absolon Aff., para. 7 and Ex. 5 at 2.

²³ Absolon Aff., Ex. 5.

²⁴ Absolon Aff., Ex. 5 at 2, 3.

²⁵ Absolon Aff., para 8 and Exs. 6 and 7.

²⁶ Absolon Aff., Ex. 7 at 5.

²⁷ Absolon Aff., para 9.

²⁸ Absolon Aff., Ex. 8.

²⁹ *Id.*, at 2.

income tax withholding, for the reasons expressed in his August 29, 2007, letter to the Department.³⁰

On April 8, 2009, the Department notified McLain of its intent to refuse to renew Kirpal's Certificate of Registration on the grounds that Kirpal does not meet the minimum statutory criteria. The letter notified McLain of his right to request a contested case hearing.³¹

On May 14, 2009, McLain submitted a request for a contested case hearing.³²

MDH's Position

The Department's position is straightforward. Kirpal does not meet the minimum SNSA criteria set forth in Minn. Stat. § 144.72, subd. 1 (9), because, based on Kirpal's own representation, the temporary employees provided by Kirpal to health care facilities are independent contractors and not employees of Kirpal. Since Kirpal fails to meet the statutory criteria that are required as a condition of registration, its SNSA registration cannot be renewed.

The Department points to three specific instances in which Kirpal has specifically stated that it does not meet the requirement of subdivision 1 (9). In the December 20, 2007, letter to the Department, McLain states his sincere belief that he is not responsible for employee income tax withholding, for the reasons explained in his letter of August 29, 2007. The August letter informed the Department that Kirpal is not an employer and has no employees. Second, on the Renewal Application for 2009, page 2, McLain crossed out the word "employees" and substituted the phrase "independent contractors," in response to a question asking how many employees of SNSA would provide services. Third, McClain's December 24, 2008, cover letter to the Renewal Application for 2009, restates his belief that he is not responsible for the employee income tax withholding, reconfirms the views expressed in the letter of August 29, 2007, and informs the Department that Kirpal is not an employer and has no employees.

Kirpal has not offered any argument to refute the Department's view of the statute, nor has it offered any evidence to explain or contradict the evidence presented by the Department. Much of what the Department has relied upon in reaching the decision to refuse to register Kirpal as a SNSA is taken from Kirpal's own written statements to the Department. He has asserted in his submissions to the Department that the statutes that govern registration of SNSAs are unconstitutional.

Analysis

The Department has done no more than the Legislature has directed. Prior to registering an agency as an SNSA, the Department must determine that the criteria for registration are met. In this case, Kirpal's own representations are that it does not

³⁰ Absolon Aff., Ex. 9.

³¹ Absolon Aff., Ex. 10.

³² Absolon Aff., Ex. 11.

employ the workers that it assigns to health care facilities. Thus, it fails to meet one of the criteria for registration, and the Department may not register it as an SNSA. It is apparent that Kirpal does not accept the statutory criteria and believes that it can operate without employing the workers to be assigned to health care facilities. So long as Kirpal takes that position and the statute includes the criteria that each person assigned to a health care facility be an employee of the agency and not an independent contractor, the Department may properly exercise its authority to refuse the registration.

In his submissions to the Department, Kirpal challenged the constitutionality of the duly enacted statutes. However, Kirpal has failed to raise the issue in this proceeding. The ALJ does not have jurisdiction to address the constitutionality of the statutes, but may preserve the issue for consideration on appeal when it is properly raised.³³

For all of the reasons set forth, Kirpal has failed to demonstrate that there are any material facts in dispute and has not offered any legal argument to support its position. As a matter of law, the Department is entitled to refuse to renew the registration of Kirpal as a supplemental nursing services agency.

B.J.H.

³³ See Minn. Stat. § 14.69, allowing the court of appeals to reverse an agency decision if the decision is in violation of constitutional provisions.