COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

March 24, 2021

Middlesex, ss.

Docket Nos. LB-19-0456, LB-19-0457

BORIS SAPOZHNIKOV, MASSACHUSETTS CHIROPRACTIC CENTER, LLC and UNION CHIROPRACTIC CLINIC, LLC, Petitioners

v.

OFFICE OF THE ATTORNEY GENERAL-FAIR LABOR DIVISION, Respondent

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DECISION

Appearance for the Petitioners:

Boris Sapozhnikov
Union Chiropractic Clinic
210 Park Ave., Suite 256
Worcester, MA 01609

Appearance for Respondent:

Lisa C. Price, Esq.
Assistant Attorney General
Office of the Attorney General
Fair Labor Division
1 Ashburton Place, Rm. 1813
Boston, MA 02108

Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

Wage and Hour Laws violations - Appealed citations issued by Office of Attorney General-Fair Labor Division - Summary Decision - Misclassification of former employee chiropractor as independent contractor - Failure to pay wages timely to chiropractor employee and office worker - Unopposed summary decision motion by Fair Labor Division - Absence of genuine or material factual dispute as to employee status, restitution owed, or any erroneous assessment of civil penalty for violations alleged - Chiropractor's status as employee for purposes of Massachusetts Wage and Hour Laws established as matter of law absent proof of any element of independent contractor status set out at M.G.L. c. 149, § 148B(a) - Summary decision as to employee status of chiropractor granted absent opposition to motion and with no evidence in record showing that all the three statutory prerequisites for independent contractor status were met - Statutory requirements for independent contractor status controlled as matter of law in determining chiropractor's employee status, rather than provision in parties' "service agreements" that chiropractic services were to be rendered by licensed chiropractor as "independent contractor" - With credit allowed for undisputed payment of office worker's unpaid wages, and undisputed partial payment of restitution amount claimed by Fair Labor Division on behalf of chiropractor, motion for summary decision granted and appealed citations affirmed.

Background

Petitioners Boris Sapozhnikov, Massachusetts Chiropractic, LLC and Union Chiropractic Center, LLC appealed two citations issued to them by respondent Office of the Attorney General-Fair Labor Division on August 22, 2019 for alleged violations of the Massachusetts Wage and Hours Laws.

In Docket No. LB-19-0456, the petitioners challenged Citation No. 19-04-54246-001, issued to them for their alleged misclassification of an employee (chiropractor Dr. Sudeep

Chawla) as an independent contractor from August 27, 2018 to April 22, 2019, in violation of M.G.L. c. 149, § 148B. The Citation ordered the petitioner to pay a $ 2,500 civil penalty for the alleged violation.

In Docket No. LB-19-0457, the petitioners challenged Citation No. 19-04-54246-002, for their alleged failure, without specific intent, to make timely payment of wages to two employees—$16,200 to Dr. Chawla, and $281.01 to Yari Jusino, an office worker—from January 28, 2019 to April 24, 2019, in violation of M.G.L. c. 149, § 148. The Citation ordered the petitioners to pay restitution in the amount of $23,467.01, of which $6,986 had been paid directly to the employees, leaving a restitution balance due of $16,481.01. The citation also ordered the petitioners to pay a $5,800 civil penalty for the alleged violation.

In total, the two citations demanded payment by the petitioners of $16,481.01 in restitution, and $8,300 in civil penalties, for a grand total of $24,781.01.[1]

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[1]/ Liability of the two limited liability companies and their sole manager, Mr. Sapozhnikov, was predicated by the Fair Labor Division upon *Cook v. Patient EDU, LLC*, 465 Mass. 548, 989 N.E.2d 847 (2013). *See* Division's Motion for Summary Decision at 6 (Feb. 12, 2020). In *Cook*, the Supreme Judicial Court reversed the dismissal of an action by an LLC's former employees for unpaid wages against the LLC and its two managers for failure to state a claim for relief under M.G.L. c. 149, § 148, on the ground that the statute imposed personal liability for unpaid wages upon officers and managers of corporations, and an LLC was not a corporation. The Court held that the statute applied to limited liability companies. It also held that a manager or other officer of an LLC, limited liability partnership or other limited liability business entity:

> may be a 'person having employees in his service,' and thus may be civilly or criminally liable for violations of G.L. a. 149, § 148, if he 'controls, directs and

The petitioners filed separate appeals challenging each of the citations on September 3, 2019. In both appeals, the petitioners claimed that they never had an employer-employee relationship with Dr. Chawla. Instead, the petitioners claimed that:

(1) They had a contractual relationship with Island Chiropractic, Inc. (Island), a Florida corporation of which Dr. Chawla was the president and sole officer;

(2) On August 27, 2018, Island entered into agreements, one with Massachusetts Chiropractic Center, LLC and the other with Union Chiropractic Clinic, under which Island would provide chiropractic services; and

(3) Island was therefore an independent contractor, and Dr. Chawla was the sole officer of Island and, if he was an employee, was employed by Island, rather than by any of

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> participates to a substantial degree in formulating and determining policy' of the business entity . . . .

Cook; 465 Mass. at 556, 989 N.E.2d at 853. Mr. Sapozhnikov's participation to a substantial degree ins formulating and determining the policy of Massachusetts Chiropractic Center, LLC and Union Chiropractic Clinic, LLC is not disputed. *See* Material Facts Not Genuinely Disputed, Undisputed Material Fact 3, below at 15; *compare Castellani v. Fair Labor Div*., Docket No. LB-10-522, Partial Summary Decision (Aug. 12, 2013)(LLC's former CEO and manager appealing citation for failure to pay wages timely to LLC employees denied summary decision establishing has lack of participation to a substantial degree in formulating and determining LLC policy; although he asserted in an affidavit that his role and responsibilities at the company diminished while a workout consultant, retained at the direction of the LLC's largest secured creditor, assumed an increasing degree of control over the company's operations and finances, the assertion was lay opinion, rather than fact, based in part upon his perception of diminished control as a manager, and in part on a letter agreement that allegedly outlined the workout consultant's control over the company but that was not included in his summary decision motion).

the petitioners.

As to the citation for failure to pay wages timely, the petitioners admitted paying wages late to Ms. Jusino because Mr. Sapozhnikov had been unable to attend to payroll or delegate that function to anyone else and had undergone serious surgery (a quadruple bypass) in April 2019. They claimed to have paid Ms. Jusino in full for the hours she had worked at both of the LLC petitioners' chiropractic clinics. As for Dr. Chawla, the petitioners asserted that the chiropractic clinics had "an outstanding obligation" to Island, which was, in their view, an "account payable," the payment of which depended as a practical matter upon the clinics' receipt of insurance reimbursement for the chiropractic services they rendered to their patients.

I held a prehearing conference on November 19, 2019 at DALA. During the conference, the petitioners filed copies of two August 27, 2018 "professional service agreements," each of which provided that the relationship between Island, as "service provider," and either Massachusetts Chiropractic Center or Union Chiropractic Clinic, as "company," is "that of independent contractors, and none shall be considered an agent or representative of the other for any purpose." (Agreements (both) at 4, subheading XI ("Miscellaneous"), para. A.)

It was my understanding from my discussion with the parties during the prehearing conference that the petitioners did not dispute the amount Dr. Chawla was owed for services

rendered to patients he saw at the two chiropractic clinics, although they continued to claim (consistent with their appeals) that the amount was not restitution for unpaid wages and that the amount was owed to Island. The Division asserted, consistent with the theory underlying the appealed citations, that Dr. Chawla was an employee of the petitioners, primarily on account of the degree of control that the petitioners maintained over Dr. Chawla's hours, the work he was to perform, and where he performed them (meaning at Massachusetts Chiropractic Center or at Union Chiropractic Clinic). Mr. Sapozhnikov asserted that Dr. Chawla selected which patients he would treat and where and when he would treat them, and then agreed to take over the care of any other patients at Massachusetts Chiropractic Center or Union Chiropractic Clinic.

Both chiropractic service locations had been closed by the time I held the prehearing conference. Mr. Sapozhnikov stated during the conference that he would be contacting insurance providers to whom billings for Dr. Chawla's services to patients were sent by the petitioners in 2018-19, but that remained unreimbursed and would advise Fair Labor Division counsel of these efforts. The Division also maintained that Ms. Jusino was still owed $281.01 for work she performed from March 19, 2019 to April 19, 2019–approximately 19 hours at the rate of $13 per hour, plus check bounce fees ($24) assessed by Ms. Jusino's bank when another check she received from the petitioners was dishonored when she attempted to deposit it.

Both chiropractic service locations had been closed by the time I held the prehearing conference. Mr. Sapozhnikov stated during the conference that he would be contacting insurance providers to whom billings for Dr. Chawla's services to patients were sent by the petitioners in 2018-19, but that remained unreimbursed, and would advise Fair Labor Division counsel of these efforts. What he hoped to do was to use payments received from these insurers to pay the restitution amount claimed by Citation No. 19-04-54246-002. It was not certain, however, that the insurers would reimburse any of these claims.

The parties agreed at the prehearing conference that they would file a status report by January 21, 2020 regarding the amount of restitution in dispute (if any), whether any of that amount had been paid, whether the parties were requesting that the scheduled hearing be continued to allow further time to attempt resolution of these appeals by agreement, and any other matters they wished to bring to my attention. I also scheduled a hearing to begin on January 30, 2020, and identified the issues to be decided, if these appeals were not resolved by agreement.[2]

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[2]/ The issues to be decided in Docket No. LB-19-0456 (*re* misclassification of an employee as an independent contractor) were:

> (a) Did the petitioners, without specific intent, misclassify Sudeep Chawla as an independent contractor from August 27, 2018 to April 22, 2019, and what factors relevant to classification (including control over work time, work place, and how work was to be performed) show, or do not show, that he was an employee rather than an independent contractor?

The Fair Labor Division filed a status report on January 2, 2020. It stated that as of December 2, 2019, Mr. Sapozhnikov had paid the full restitution amount due to Yari Jusino ($281.01); however, Mr. Sapozhnikov had also advised the Division that as of January 2, 2020, he had only $4,000 to pay toward the $16,200 restitution amount the Division sought on behalf of Dr. Chawla. Mr. Sapozhnikov still hoped to use the insurance reimbursement payments he expected to receive from third-pater sources to pay this amount.

Based upon the Fair Labor Division's January 2, 2020 Status Report, I converted the hearing scheduled for January 30, 2020 to a status conference. The main purpose of the

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If Dr. Chawla was petitioners' employee and was therefore misclassified as an independent contractor:

(b) Was the $2,500 civil penalty assessed by the citation for this violation excessive?

The issues to be decided in Docket No. LB-19-0457 (*re* wages not paid timely to two employees) were:

(a) Did the petitioners fail, without specific intent, to make timely payment of wages to:

(I) Yari Jusino, in the amount of $281.01 for timekeeping work she performed from January 28, 2019 to April 24, 2019?

(ii) Sudeep Chawla, in the amount of $16,200, for treating chiropractic patients and related work from January 28, 2019 to April 24, 2019?

If so:

(b) Was the $5,800 civil penalty assessed by the citation for this violation excessive?

conference was to determine whether the payment of what the Division claimed as the undisputed amount owed to Dr. Chawla (whether as an employee or as payment due under a contract) could be made as Mr. Sapozhnikov received payment from insurance providers to whom the petitioners had submitted billings in 2018-19 for Dr. Chawla's services to patients.

I did not reschedule the hearing; instead, I reserved to each of the parties their respective rights to proceed at a later date with a hearing as to genuine issues of material fact (if any), or to move for an accelerated disposition via summary decision based upon the absence of any genuine issue of material fact requiring adjudication via a hearing. Indeed, the Division expected that it would file a motion for summary decision, and I notified the parties that if it did so I would discuss the motion with the parties during the status conference. I also advised the parties that I would discuss with them whether I should retain jurisdiction while Mr. Sapozhnikov paid the remaining balance of the restitution amount for Dr. Chawla without a formal determination of whether he was an employee of the petitioners or not., and that "[p]rogress, or expected progress, in resolving unpaid claims sent to the insurers in question for Dr. Chawla's services, will be a factor in evaluating how to proceed here." *Order Converting Hearing to Status Conference* at 2 (Jan. 6, 2020).

Both parties appeared at the January 31, 2020 status conference. By permission I had granted to him previously on account of his health situation, Mr. Sapozhnikov appeared

telephonically. Based upon my discussion with the parties, many of the material facts appeared to be undisputed, including the nature of the businesses of the petitioner LLCs and Dr. Chawla's Florida corporation, and the balances that the petitioners owed to Dr. Chawla and Ms. Jusino.

Mr. Sapozhnikov asserted that he had paid the $4,000 he had on hand (by check made payable to the Commonwealth), and that he was still awaiting what he still estimated to be $60-70,000 of insurance payments owed for Dr. Chawla's chiropractic services. As of the January 31, 2020 status conference, the Division had not confirmed receipt of this partial payment. (See *Order Following Status Conference* at 2-3 (Jan. 31, 2020).)

The parties also clarified their respective positions on the outstanding misclassification issue:

The Fair Labor Division asserted that regardless of the agreements between the petitioners and Island Chiropractic, Inc., Dr. Chawla was an employee for purposes of the Massachusetts Wage and Hour Laws under the "three prong test" specified by M.G.L. c. 240, § 148B because (a) he was not free from control and direction in performing chiropractic services, whether under the written contract or as occurred; (b) these services were not performed outside the usual course of the employer's business; and (c) Dr. Chawla was not customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the services performed. The Division's

position emphasized one of these "prongs"—the petitioners' alleged control over Dr. Chawla's hours and workplace, and how his work was to be performed. (*Id*.)

Although the petitioners maintained that Dr. Chawla was an independent contractor rather than an employees, they did not contest the restitution amounts the Division claimed on behalf of the chiropractor and Ms. Jusino. Although the two chiropractic clinics had been closed, and Mr. Sapozhnikov had been incapacitated for some time as a result of undergoing a quadruple bypass operation in April 2019, he still intended to contact insurance providers who owed reimbursement payment for Dr. Chawla's services despite being billed for those services in 2018 and 2010, and use the insurance proceeds he collected to pay the restitution amounts the Division seeks, without conceding that these were untimely wage payments to employees (as opposed to overdue payments under written contract). (*Id*.)

Following the status conference, I ordered that:

> (1) The Division could proceed with filing and serving a motion for summary decision in these appeals, and if it did, the petitioners were required to file and serve a response and/or a cross-motion for summary decision within the time allowed—seven days under the applicable rules, *see* 801 C.M.R. §1.01(7)(a)1, or any additional time allowed for filing a response if the petitioners requested additional time. *See* 801 C.M.R. § 1.01(7)(a)2.
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> (2) So that the petitioners could continue trying to obtain insurance payments for past chiropractic services rendered and send additional payments of the restitution amount at issue to the Fair Labor Division, I would defer acting on pending summary decision motions and/or cross-motions for 60 days (meaning through and including April 3, 2020).

> (3) In the interim, the parties were to report any further payments made by the petitioners to reduce or pay off the restitution amount, and in any event they were to file a status report by April 3. 2020.

(*Order Following Status Conference* at 5.)

Neither party objected to this Order.

The Division filed and served a motion for summary decision sustaining the appealed citations on February 12, 2020. It argued that the petitioners "cannot establish that the citations were erroneously issued." The motion was supported by the affidavit of Fair Labor Division Investigator Fransheska Alcantara, sworn-to February 11, 2020. The affidavit describes the Investigator's review of the petitioner LLCs' corporate filings with the Secretary of the Commonwealth, and notes that the latest such filings showed that Mr. Sapozhnikov was the sole manager of both LLCs. Copies of the filings were attached as exhibits to the Investigator's affidavit. The Investigator also mentioned, and attached, her April 11, 2019 request to the petitioners for payroll records, noting that she received "most, but not all" of these records on July 1, 2019. Investigator Alcantara described the issuance of the citations to the petitioners, copies of which were attached as exhibits to her affidavit. The Investigator stated that during the November 19, 2019 prehearing conference, which she attended, Mr. Sapozhnikov did not dispute that Dr. Chawla performed chiropractic services at the LLCs' respective locations or that he owed Dr. Chawla the restitution amount, although he disputed the Fair Labor Division's assertion that Dr. Chawla was an employee.

Investigator Alcantara also stated that the Division received a check from the petitioners on December 2, 2019 for $281.01, representing full restitution owed to Ms. Jusino, and, on January 7, 2020, four money orders totaling $4,000 as partial payment of restitution owed to Dr. Chawla. The Investigator also recalled that during the January 30, 2020 status conference, Mr. Sapozhnikov stated that he did not dispute the restitution he owed Dr. Chawla.

The petitioners filed no response to the Division's summary decision motion, or any motion requesting additional time to do so. In March, 2020, DALA's offices were closed by the Commonwealth in view of the Governor's COVID 19-related health emergency declaration, and DALA and its administrative magistrate and support staff attempted to process its workload via remote work as best as available resources, restrictions on office access and social distancing requirements allowed.

On March 31, 2020, the Division filed a status report advising that neither it nor Dr. Chawla had received any correspondence from the petitioners or further payment of the restitution amount he was owed. The Division requested, therefore, that its motion for summary decision be decided. The time I set for deferring action on the motion expired shortly afterward.

The petitioners filed no response to the Division's pending summary decision motion.

Material Facts Not Genuinely Disputed

I find that the following material facts are not genuinely disputed based upon the unopposed motion for summary decision, a search of the record including materials filed at the prehearing and status conferences, and my discussions with the parties during both conferences regarding the issues to be adjudicated via a hearing if the appeals were not determined by summary decision.

1. Petitioner Massachusetts Chiropractic Center, LLC is a Massachusetts limited liability company organized pursuant to M.G.L. c. 156C, with a principal place of business at is 210 Park Avenue, Suite 256, Worcester, Massachusetts 01609.

(a) Petitioner Boris Sapozhnikov is the sole manager of Massachusetts Chiropractic Center, LLC.

(b) The general character of the business of Massachusetts Chiropractic Center LLC, as stated in its most recent filings with the Secretary of the Commonwealth, is:

> [t]o engage in providing chiropractic and wellness services to clients that require such service, marketing and promotion thereof and to engage in any business useful in connection therewith . . . .

(Massachusetts Chiropractic Center LLC: Business Entity Summary; 2019 Annual Report; and Certificate of Organization dated Aug. 10, 2017; available at the Secretary of the Commonwealth Corporations Division website: https://corp.sec.state.ma.us/corpweb/

CorpSearch/CorpSearch.aspx.)

2. Petitioner Union Chiropractic Clinic, LLC is a Massachusetts Limited Liability Company organized pursuant to M.G.L. c. 156C, with a principal place of business at 1242 River Street, Hyde Park, Massachusetts 02136.

(a) Petitioner Boris Sapozhnikov is the sole manager of Union Chiropractic Clinic, LLC.

(b)The general character of the business of Union Chiropractic Clinic, LLC, as stated in its most recent filings with the Secretary of the Commonwealth, is:

> [t]to engage in providing rehabilitation and wellness services to clients that require such service, marketing and promotion thereof and to engage in any business useful in connection therewith . . . .

(Union Chiropractic Clinic, LLC: Business Entity Summary, 2018 Annual Report, and Certificate of Organization dated Nov. 17, 2015; available at the Secretary of the Commonwealth Corporations Div. website: https://corp.sec.state.ma.us/corpweb/ CorpSearch/CorpSearch.aspx.)

3. As the sole manager of Massachusetts Chiropractic Center LLC and Union Chiropractic Clinic, LLC, Mr. Sapozhnikov alone controlled or directed each LLC's policies and operations, including employee hiring, firing or wage payment, during the period in

question (August 27, 2018 to April 22, 2019).[3]

4. Sudeep Chawla is a Chiropractor licensed by the Massachusetts Board of Registration of Chiropractors, and a Chiropractic Physician licensed by the Florida Board of Chiropractic Medicine.

5. Dr. Chawla is the president and sole officer of Island Chiropractic, Inc., a Florida for-profit corporation with a principal place of business at 1404 Rock Wood Drive, Saugus, Massachusetts 01906. (Island Chiropractic, Inc., Florida Entity Detail sheet and 2021 Florida Profit Corporation Annual Report, available at Florida Department of State, Div. of Corporations website entity search page: https://dos.myflorida.com/sunbiz/search/.

6. On August 27, 2018, Island Chiropractic, Inc. entered into separate written "professional service agreements" with Massachusetts Chiropractic Center, LLC and Union Chiropractic Clinic, LLC for the provision of "chiropractic and related services." The text

[3]/ The General Laws define an LLC as "an unincorporated organization founded under [M.G.L. c. 156C] and having 1 or more members." M.G.L. c. 156C, § 2(5). An LLC is formed when "one or more authorized persons . . . execute a certificate of organization" and file it with the Secretary of the Commonwealth. M.G.L. c. 156C, §§ 12(a), (b). Among other things, the LLC certificate must state the "general character" of the LLC's business. M.G.L. c. 156C, §§ 12(a)(7). It must also state the names and addresses of its managers if the LLC has managers when it is formed, M.G.L. c. 156C, § 12(a)(5); otherwise, the LLC must file an amended certificate providing this information when its managers are designated. M.G.L. c. 156C, § 13(c). If an LLC has at least one manager, the manager or managers, as the case may be, manage and control the LLC rather than the LLC's members, unless an operating agreement provides otherwise. M.G.L. c. 156C, § 24(b); *see also* M.G.L. c. 156C, § 23 (allowing an LLC to name or designate a manager).

of the Professional Service Agreements (collectively, "Agmt.") was congruent. The Agreements included the following provisions:

(a) Massachusetts Chiropractic Center, LLC and Union Chiropractic Clinic, LLC were each identified as a Massachusetts LLC that "operates a chiropractic office." (Agmt. at 1, first unnumbered para.)

(b) Island was to provide chiropractic services "in accordance with applicable policies and procedures" of the LLC, and the applicable "measures of performance standards" were those defined in the LLC's separate "Service Performance Standards." (Agmt. at 1, § I.B.)

(c) Island was responsible for maintaining minimum malpractice insurance with liability coverage limits of $500,000 per occurrence and $1 million aggregate per each one-year policy term. (*Id*. at 1, § I.C.)

(d) Island's performance of chiropractic services under the Agreement was "subject to the oversight" of the LLC "to ensure {LLC's] standards of quality are met among other concerns." (*Id*. at 1, § II.A.)

(e) Island was required to "obtain full credentialed status with third party payers of [the LLC's] choosing prior to providing chiropractic services. (*Id*. at 1, § III.A.)

(f) Island was to be paid $450 per day for chiropractic services. (*Id*. at 2, §

V.B.)

(g) The LLC alone had the authority to determine the charges for the chiropractic services that Island rendered. (*Id*. at 2, § V.B.)

(h) The LLC was alone responsible for billing patients for chiropractic services that Island provided to the LLC's patients, and for completing and filing all forms needed to obtain payment for those services from third-party providers, including Medicare and Medicaid. Island was not to bill or seek payment from any patient or third-party payer for any of the services it rendered under the Agreement. (*Id*. at 2, § V.B.)

(i) Island assigned and granted to the LLC not only the right to bill and collect for all of the chiropractic services it rendered under the agreement, but also all accounts receivable and proceeds from such accounts arising out of the provision of chiropractic services. Upon termination of the Agreement for any reason, all accounts receivable and outstanding became "the full and exclusive property" of the LLC. The outstanding accounts receivable were "not subject to any claim" by Island "aside from claims for compensation owed under [the] Agreement." (*Id*. at 2-3, § V.C.)

(j) The Services Agreements stated that the relationship between Island and the LLC "is that of independent contractors, and neither shall be considered an agent or representative of the other for any purpose," and nothing in the Agreement was to be

"construed in a manner" that made Island an employee of the LLC. (*Id*. at 4, § XI.A.) (Professional Service Agreements, each dated Aug. 27, 2018, between Island Chiropractic, Inc. and Massachusetts Chiropractic Center, LLC, and between Island Chiropractic, Inc. and Union Chiropractic Clinic, LLC, both filed at the Nov. 19, 2019 prehearing conference.)

7. Dr. Chawla, Island's sole officer, performed the chiropractic services Island was obligated to perform under both Service Provider Agreements during the period August 27, 2018 to April 22, 2019. A major part of this work was providing chiropractic services to persons who were injured in automobile accidents. (Appealed citations, both dated Aug. 22, 2019; Administrative Magistrate's discussion with the parties during the November 19, 2019 prehearing conference and during the January 30, 2020 status conference).

8. Yari Jusino was employed as an office worker by Massachusetts Chiropractic Center, LLC, and/or Union Chiropractic Clinic, LLC and worked for either or both LLCs during the period August 27, 2018 to April 22, 2019. During the period March 19, 2019 to April 19, 2019, Ms. Jusino worked approximately 19 hours at the rate of $13 per hour. Ms. Jusino was not paid for this work, A paycheck for the amount she was owed for this work ($247) was dishonored by her bank, bounced, and she incurred a $24 bounced check fee as a result. (*Id*.)

9. Both LLCs had ceased operating as of November 19, 2019. (*Id*.)

10. At the beginning of 2020, the LLCs were awaiting receipt of payment by third

party insurers for chiropractic services performed by Dr. Chawla. The LLCs had not completed the filing of claims with the third-party insurers for these services on account of Mr. Sapozhnikov's serious illness in 2019. The record does not show the current status of these billings or the amount of payment that the LLCs may have received from third-party insurers for D. Chawla's services. (*Id*.)

11. In early April 2019, the Fair Labor Division received complaints regarding wages not paid to Dr. Chawla and Ms. Jusino, and Dr. Chawla's misclassification as an independent contractor. Division Investigator Fransheska Alcantara reviewed the LLC petitioners filings with the Commonwealth's Secretary of State, issued a payroll records demand to the petitioners, reviewed the payroll records the petitioners sent to her, and attempted to speak with Mr. Sapozhnikov about the allegations in late July 2019, without success. (Fair Labor Div. Motion for Summary Decision, dated Feb. 12, 2020: Affidavit of Inspector Fransheska Alcantara, sworn-to Feb. 11, 2020 ("Alcantara Aff.") at 1-2, paras. 2-5.)

12. On August 22, 2019, the Division issued two citations to the petitioners.

(a) Citation No. 19-04-54246-001 was issued to the petitioners for misclassifying Dr. Chawla as an independent contractor rather than as an employee from August 27, 2018 to April 22, 2019, in violation of M.G.L. c. 149, § 148B. The Citation assessed a civil penalty of $2,500 for this violation.

(b) Citation No. 19-04-54246 was issued to the petitioners for failure to timely pay wages to two employees—$16,200 to Dr. Chawla, and $281.01 to Yari Jusino, an office worker (for 19 hours of work at $13 per hour unpaid plus the $24 check bounce fee Ms. Jusino had to pay)—from January 28, 2019 to April 24, 2019, in violation of M.G.L. c. 149, § 148. The Citation ordered the petitioners to pay restitution in the amount of $23,467.01, of which $6,986 had been paid directly to the employees, leaving a restitution balance due of $16,481.01 ($16,200 of unpaid wages owed to Dr. Chawla and $281.01 owed to Ms. Jusino). The citation also ordered the petitioners to pay a $5,800 civil penalty for the alleged violation.

(c) In total, the two citations demanded the payment by the petitioners of $16,481.01 in restitution, and $8,300 in civil penalties, for a grand total of $24,781.01.

(Alcantara Aff. at 2, para. 6; Division's Motion for Summary Decision: Exh. 3 (two citations issued by the Division to the petitioners, both dated Aug. 22, 2019.)

12 On December 2, 2019, the Fair Labor Division received a check from the petitioners for $281.01, representing full payment of the restitution owed to Ms, Jusino. On January 7, 2020, the Division received, from the petitioners, four money orders totaling $4,000 as partial payment of the restitution amount owed to Dr. Chawla. (Alcantara Aff. at

2, para. 8.)

13. With these payments, the restitution amount the petitioners owed Dr. Chawla was $12,200 as of March 31, 2020. (*See* Fair Labor Division's status report dated March 31, 2020.)

Discussion

1. Summary Decision—Ground Rules

Summary decision may be granted in adjudicatory appeals such as this one when there are no genuine or material facts to be adjudicated, and the outcome is compelled as a matter of law. *See* 801 C.M.R. § 1.01(7)(h); *Chamorro v. Fair Labor Div*., Docket No. LB-19-0045. Decision (Mar. 1. 2021); *Bd. of Registration in Medicine v. Grusd*, Docket No. RM-18-0445, Recommended Decision at 24-25 (Mass. Div. of Admin. Law App., May 19, 2020)*; Stanton v. Quincy Bd. of Retirement*, Docket No. CR-18-0121, Decision at 8-9 (Mass. Div. of Admin. Law App., Jun. 28, 2019); *Lilly v. Fair Labor Div. (Kirby Distributorship Appeals)*, Docket Nos. LB-10-505 *et al.*, Decision and Order on Motion for Summary Decision at 13-14 (Mass. Div. of Admin. Law App., Nov. 26, 2013)

The moving party must show both of these grounds for summary decision with competent evidence. If it makes this showing, the opposing party must show, with competent

evidence, that (a) there is a genuine, material factual dispute that precludes an issue's summary disposition; or (b) the undisputed material facts are other than as the moving party asserted them to be and, if true, would result in a different outcome than the moving party seeks; or (c) the applicable law compels summary decision in its favor, rather than in favor of the moving party. *Grusd*; Recommended Decision at 25.

In deciding a motion for summary decision, the DALA Administrative Magistrate is not confined to what the parties chose to file in support of, or in opposition to, the motion. The motion prompts a search of the record for a genuine, material factual issue. *Chamorro*; Decision at 18; *Castellani v. Fair Labor Div.*, Docket No. LB-10-533, Partial Summary Decision at 12 (Mass. Div. of Admin. Law App., Aug. 12, 2013). If one is found, and the issue cannot be decided strictly as a matter of law, DALA must hold a factfinding hearing in order to decide it. *See* 801 C.M.R. §1.01(7)(h), last sentence. Summary decision is granted appropriately, however, if a record search reveals no genuine, material factual issue. That may be the case if the non-moving party has not genuinely disputed any of the material facts despite having had an opportunity to do so throughout the appeal's prehearing history—for example, at the prehearing conference, at a subsequent status conference, or in response to an order directing the parties to identify which facts are disputed and which are undisputed. All of these opportunities were afforded here.

2. Summary Decision in These Appeals

a. Summary Decision in the Context of Failure to Pay Wages Timely and Misclassifying an Employee as an Independent Contractor

The Attorney General's Fair Labor Division is charged by statute with enforcing the Massachusetts Wage and Hour Laws, including the Wage Act, M.G.L. c. 149, § 148, and the Misclassification Law, M.G.L. c. 149, § 148B. The Division's enforcement mechanisms include issuing civil citations for intentional or unintentional Wage and Hour Law violations. See M.G.L. c. 149, § 27C(b). A citation may include an order to pay restitution to an employee who was not paid wages timely, and/or an order to pay a civil penalty, the amount of which must be based upon consideration of at least the penalty factors identified at M.G.L. c. 149, § 27C(b)(4).

A person aggrieved by a citation issued by the Fair Labor Division may appeal it to the Division of Administrative Appeals. M.G.L. c. 149, § 27C(b)(4). On appeal, DALA "may affirm or, if the aggrieved person demonstrates by a preponderance of evidence that the citation or order was erroneously issued, vacate or modify the citation or order." *Id*. The appealing party has the burden of proving that the citation challenged was "erroneously issued." *Id*.; *Mahmood v. Fair Labor Div*., Docket Nos. LB-18-0038, LB-18-0039, Decision at 23 (Mass. Div. of Admin. Law App., Nov. 25, 2019).

Id. M.G.L. c. 149, § 27C does not define "erroneously issued" or specify the evidence needed to show that an appealed citation was, or was not, issued erroneously; however, a citation may have been "erroneously issued" if it was based upon a mistake as to what the operative facts are, or a failure to determine or consider the operative facts. *Mahmood*; Decision at 23.

In an appeal challenging a citation issued for failure to pay wages timely, the "operative facts" include when the employee worked, the hours the employee worked, and whether the employee was timely paid any part of the wages he was owed or was not paid anything. *Id.*

In an appeal challenging a citation for misclassifying an employee as an independent contractor, the operative facts the appealing party needs to prove by a preponderance of the evidence are those identified by the three-part test for an independent contractor relationship set out at M.G.L. c. 149, § 148B(a). Section 148B(a) provides that:

> For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:—
>
> (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
>
> (2) the service is performed outside the usual course of the business of the employer; and,

> (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

If any one of these elements is not met, the individual in question is deemed to be an employee for purposes of the Wage and Hour Laws—even if the individual was not hired as an employee, and "regardless of the agreement" between the parties as to the individual's independent contractor status, or of the parties' expressed intention that he would work as an independent contractor. *See Somers v. Converged Access, Inc*., 454 Mass. 582, 593, 911 N.E.2d 739, 748 (2009).

The Division's motion for summary decision needed to show, with competent evidence, that Dr. Chawla's status as an employee for purposes of M.G.L. c. 149 was not genuinely disputed. The motion did so, and its key competent evidence on this point was the petitioner LLCs' filings with the Commonwealth's Secretary of State. The LLCs' articles of organization and most recent annual reports showed their business purposes to be, or to encompass, the provision of chiropractic care to patients. The undisputed nature of the work Dr. Chawla performed for them—services as a licensed chiropractor—during the time period in question was made clear during the prehearing and status conference in these appeals, and also by the service agreements under which Island Chiropractic, Inc. provided chiropractic services to Mass Chiropractic Center and Union Chiropractic Clinic. Those services were provided solely by Dr. Chawla, Island's sole officer and the only chiropractor it provided to

the petitioner LLCs from August 27, 2018 to April 22, 2019.

Because the Division's motion showed competently the absence of a genuine or material dispute as to these elements, it was the petitioners' burden to show that they were indeed genuinely disputed, and that as a matter of law Dr. Chawla was not an employee and was, instead, an independent contractor. Because they filed no response to the motion, the petitioners risked an adverse summary decision sustaining the misclassification citation, and the citation ordering payment of restitution to Dr. Chawla as an employee whose wages were not timely paid (as opposed to an independent contractor owed money under contract), and the civil penalties both citations ordered, unless (1) A search of the record revealed that none of the three independent contractor elements set out at M.G.L. c. 149, § 148B(a) was genuinely disputed; or (2) those elements were satisfied, entitling the petitioners to a summary decision establishing that Dr. Chawla was an independent contractor for the purpose of the Wage and Hour Laws during the time in question as a matter of law.

Neither circumstance presents here, however, and as a result I grant the Division's motion.

b. Employee Misclassification as Independent Contractor

The Fair Labor Division is entitled to a summary decision establishing that Dr. Chawla was an employee of the LLC petitioners during the time in question and that the petitioners

misclassified him as an independent contractor.

The petitioners clearly disagreed with the Fair Labor Division's assertion that Dr. Chawla was an employee, and did so based primarily on the service agreements that Island Chiropractic signed with Mass Chiropractic Center and Union Chiropractic Clinic, in particular section XI.A of the agreement stating that the relationship between Island and the LLC "is that of independent contractors, and neither shall be considered an agent or representative of the other for any purpose," and that [n]othing in the Agreement was to be "construed in a manner" that made Island an employee of the LLC. (Undisputed Material Fact 6(k).) The service agreements are not determinative as to Dr. Chawla's status, however. Per *Somers* and the plain language of the statute, Dr. Chawla is an employee for the purposes of the Wage and Hour Law unless all three elements of independent contractor status specified at M.G.L. c. 149, § 148B(a) are met. It is not genuinely disputed that two of these elements are not met here—freedom from control and direction in providing chiropractic services, and the performance of services outside the usual course of the petitioner LLCs' business. As a result, the Fair Labor Division is entitled to summary decision establishing that Dr. Chawla was not an independent contractor during the time period in question and was, instead, an employee of Massachusetts Chiropractic Center, LLC and Union Chiropractic Clinic, LLC.

i. Control and Direction in Performing Services

Dr. Chawla was not free from control and direction in the performance of services under the service agreements. Mr. Sapozhnikov asserted, during the prehearing conference, that Dr. Chawla selected which patients he would treat and where and when he would treat them, and then agreed to take over the care of any other patients at Massachusetts Chiropractic Center or Union Chiropractic Clinic. (*See* above at 5.)

Because the petitioners filed no response to the Division's summary decision or submitted any evidence on this point during the prehearing or status conferences or at any other time, the record is without evidence of this asserted absence of control over Dr. Chawla's chiropractic services. That said, the absence of such control is to be expected as to aspects of Dr. Chawla's chiropractic practice that are regulated under statute and the Board of Registration of Chiropractors' regulations. *See, e.g.*, M.G.L. c. 112, §§ 89-97, and in particular, M.G.L. c. 112, § 94A (chiropractic facilities and licensing); and 233 C.M.R. §§ 2.00 (individual chiropractor registration requirements), 3.00 (chiropractor continuing education requirements), and 4.00 (standards of practice and professional conduct for chiropractors).

As to other aspects of Dr. Chawla's practice, the service agreements show extensive control and direction by the LLCs while he provided chiropractic services to patients at

Massachusetts Chiropractic Center or Union Chiropractic Clinic. These included billing patients and third-party providers for chiropractic services that Dr. Chawla rendered, and following up with collection efforts. Dr. Chawla would have had to perform those tasks otherwise, as they are fundamental to a financially successful chiropractic practice. The service agreements transferred control and direction of these tasks from the chiropractor to the petitioner LLCs. The service agreements took over other responsibilities associated with a chiropractic practice as well. Among other things:

(1) The provision of chiropractic services at Massachusetts Chiropractic Center and Union Chiropractic Clinic had to conform to the policies and procedures specified in the LLCs' "Service Performance Standards;"

(2) The LLCs specified the minimum malpractice coverage Dr. Chawla had to provide (liability coverage limits of $500,000 per occurrence and $1 million aggregate per each one-year policy term);

(3) Island's performance of chiropractic services—meaning Dr. Chawla's performance of chiropractic services, as he was Island's sole officer and Island provided no other chiropractor to perform them during the time period in question—was subject to the LLC's oversight, for quality control purposes, among other things;

(4) The LLC alone had the authority to determine the charges for the chiropractic services that Island, and thus Dr, Chawla, rendered;

(5) The LLC alone controlled billing for Dr. Chawla's services and was alone responsible for obtaining payment for his services by third-party providers including Medicare and Medicaid, and Dr, Chawla was prohibited from seeking payment from any patient or third-party provider for any chiropractic services he rendered under the Service Agreement; and

(6) The LLCs were assigned all rights to bill and collect for all of the chiropractic services Dr. Chawla rendered under the agreement, and when the Service Agreement was terminated for any reason, the LLCs owned all such accounts receivable, leaving Island (and, thus, Dr. Chawla) with only the right to claim compensation due under the Agreement.

(Undisputed Material Fact 6.)

ii. Service Performed Within Usual Course of Employer's Business

It is undisputed that the LLC petitioners, Island Chiropractic, and its sole officer, Dr. Chawla, were engaged in providing chiropractic services. The LLCs' Massachusetts filings with the Secretary of the Commonwealth make this clear as to them, and Island's filings with the Florida Department of State, Division of Corporations, makes this clear as to Island. (Undisputed Material Fact s 1, 2, 4 and 5.) It is therefore undisputed that Dr. Chawla's chiropractic services during the time period in question were performed within, not outside,

of the petitioner LLCs' usual course of business.

iii. Same occupation as that involved in service performed

This element of the test for individual contractor status is met. Clearly, Dr. Chawla was engaged customarily in an independent occupation, profession or business—providing chiropractic service to patients requiring them—as were the two LLC petitioners. However, the remaining elements of independent contractor status are neither present nor shown to be genuinely disputed.

c. Failure to Pay Wages Timely, and Restitution Owed

The amounts owed to each former employee were not disputed.

The petitioners made a partial payment of the restitution amount. The restitution amount claimed by the Division on behalf of Ms. Jusino ($281.01)was paid in full on December 2, 2019. (Undisputed Material Fact 12.) This payment is credited against the total amount of restitution the Division claimed in the citation.

The petitioners also made partial payments of the amount of restitution due to Dr. Chawla.

The original amount of restitution was $23,467.01, which included the amount due to Ms. Jusino. Subtracting restitution owed to Ms. Jusino, and paid, from the original restitution

amount of $23,467.01 reduced the restitution amount to $23,186. The citation for failure to make timely payment of wages shows a further reduction of the restitution amount—$6,986 the petitioners paid directly to Dr. Chawla. (Division's Motion for Summary Decision: Exh. 3; Citation No. 19-04-54246-002, dated Aug. 22, 2019.)

That left a restitution balance due of $16,200. During my discussion with the parties at the November 19, 2019 prehearing conference, the parties agreed that this was the amount Dr. Chawla was still owed. The issues I identified during the prehearing conference included, as to the citation for failure to pay wages timely: "Did the petitioners fail, without specific intent, to make timely payment of wages to . . . Sudeep Chawla, in the amount of $16,200, for treating chiropractic patients and related work from January 28, 2019 to April 24, 2019?" (*Order Following Prehearing Conference* at 5-6 (Nov. 20, 2019.)

There was an additional partial payment of the restitution owed to Dr. Chawla. On January 7, 2020, the Fair Labor Division received four money orders totaling $4,000 from the petitioners. (Undisputed Material Fact 10.) During the January 30, 2020 status conference, the Division acknowledged this partial payment, and noted its intention fo file a motion for summary decision on the remaining restitution amount of $12,200 and the civil penalties assessed by both citations, which totaled $8,300. (*Order Following Status Conference* at 3-4 (Jan. 31, 2020.) Its motion for summary decision, filed on February 12, 2020, acknowledges that the balance of restitution due to Dr. Chawla is $12,200. (Division's Motion for Summary

Dec. at 2 n. 1.)

There is no evidence in the record of any further payment of the remaining restitution amount.

Accordingly, it is undisputed that the total amount of restitution that remains unpaid and owing to Dr. Chawla is $12,200. Summary decision in the Division's favor on the citation issued to the petitioners for failure to pay wages timely will therefore sustain the citation with the restitution amount adjusted for partial payment to $12,200.

d. Penalty Amount

M.G.L. c. 149, § 27C(b)(2) directs that in determining the amount of any civil penalty it assesses for violations of the Wage and Hour Laws, including M.G.L. c. 149, § 148, the Attorney General "shall take into consideration" previous violations of those provisions by the employer, the intent by such employer to violate them, the number of employees affected by the present violation or violations, the monetary extent of the alleged violations, and (if the project in question was a public contract) the total monetary amount of the public contract or payroll involved. As explained in *Croteau v. Fair Labor Div.*, Docket Nos. LB-16-174, LB-16-175, Decision at 50 (Mass. Div. of Admin. Law App., Sept. 21, 2020):

> At a minimum, the factors listed by the statute must be considered. The statute does not state how any of them are to be considered or what weight they should be given. It also does not state that the penalty factors listed at M.G.L. c. 149,

> § 27C(b)(2) are exclusive. Other potentially-relevant factors could also be considered in determining the amount of a civil penalty.

M.G.L. c. 149, § 27C(b)(4) directs DALA to "vacate or modify" an appealed citation or order that was "erroneously issued." The challenged citation or order directing payment of a civil penalty must have been erroneously issued for DALA to vacate or modify it. If the citation or order was erroneously issued, DALA must, per the statute's directive, vacate it or modify it. *See Briggs v. Fair Labor Div.*, Docket Nos. LB-09-1022, LB-09-1029, Decision at 26 (Mass. Div. of Admin. Law App., Feb. 26, 2013), *reconsideration denied* (Mass. Div. of Admin. Law App., Jun. 24, 2013), *citing Majowicz v. Fair Labor Div.*, Docket No. LB-11-163, Decision at 9-10 n. 2 (Mass. Div. of Admin. Law App., Sept. 11, 2012).

Croteau explains what adjustments may be made to a civil penalty when the penalty amount is contested and the amount of restitution due for unpaid wages or overtime proves to be less than what the Fair Labor Division's citation alleged. That circumstance is not present here. The restitution amount owed as a result of this Decision is lower than what the citation in question specified, not for lack of supporting evidence but because it has been partially paid.

The Division's summary decision motion does not explain how the penalties assessed by the two citations were calculated. The affidavit supporting the motion does not furnish this information. The Division points out that both penalties ($2,500 for employee

misclassification and $5,800 for failure to pay wages timely) were below the maximum penalty that the Attorney General may impose for an employer's unintentional first violation—$7,500, per M.G.L. c. 149, § 27C(b)(2). It argues that both penalties "were fairly determined and reasonable, based on [the Division's] consideration of the applicable statutory factors, as required by G.L. c. 149, § 27C(b)(2) . . . ." The Division does not state what those factors were and how they were considered in determining the penalty amounts.

That the basis for the penalty calculations might have been better explained does not show that the Division's motion was insufficiently made and supported to show entitlement to summary decision on the penalty amounts. The petitioners' appeal did not claim specifically that the penalties were excessive , and their claim appeared to be that the penalties were unjustified altogether because Dr. Chawla was not an employee, a legal assertion on which the Division is granted summary decision here. To the extent they actually contested the penalty amounts, "the petitioners had the burden of proof with respect to the sufficiency of penalty factor consideration and the asserted unreasonableness of the penalty amount," and "[i]n the context of summary decision, they were required to show with competent evidence that these matters were the subject of a genuine, material factual dispute.' *Chamorro v. Fair Labor Div.*, Docket No. LB-19-0045, Decision at 29 (Mar. 1, 2021).

Because the petitioners did not respond to the motion for summary decision, they did not meet their evidentiary burden with respect to the penalty or the penalty amount, and as

a result, the record reveals no evidence that the Division's assertions are genuinely disputed. I note, nevertheless, that the $2,500 penalty assessed for the employee misclassification violation was not based upon a restitution amount; in fact, the citation for this violation demanded no restitution. While the citation for failure to pay wages timely asserted a restitution amount ($23,467.01, prior to adjustment based upon the petitioners partial payment of $6,986), there was no assertion or evidence that the penalty amount was assessed as a specific percentage of the restitution amount, whether before or after partial restitution payment was credited.

The restitution amount prior to credit for partial payment is the correct amount to consider because it was the amount of wages not paid when they were due, and while this amount was paid in part, that payment was still untimely. Mathematically, the $5,800 penalty assessed for failure to pay wages timely was 24.7 percent of the $23,467.01 restitution amount. This percentage places the penalty amount "within the lower range of penalties the Division has assessed for failure to timely pay wages where, as here, there were no prior violations, and the Division did not classify the violation it penalized as an intentional one." *Chamorro*; Decision at 29-30, *citing Croteau*; Decision at 61.

The penalties are sustained summarily, therefore,

Disposition

Fo the reasons stated above, I grant the Fair Labor Division's motion for summary decision and affirm the appealed citations, the penalties they each assess, and, as to the citation for failure to pay wages timely, the restitution amount. Because the restitution amount was partially paid, the balance of restitution due is $12,200. With the penalty amounts assessed by both citations ($8,300) added, the total amount due on both citations is $20,500. Payment of this amount is now due and payable as the citations direct.

This is a final decision. Each of the parties is hereby notified that any person aggrieved by this decision may, within 30 days of receiving notice of it, seek judicial review by filing an appeal with the Superior Court, pursuant to M.G.L. c. 30A, § 14.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/S/ Mark L. Silverstein

Mark L. Silverstein
Administrative Magistrate

Dated: March 24, 2021