

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SEVENTH REGION**

**DOWNRIVER URGENT CARE, P.L.L.C.  
and KELLY SERVICES, INC.<sup>1</sup>**

**Joint Employers<sup>2</sup>**

**and**

**Case 7-RC-23094**

**DISTRICT LODGE 60, INTERNATIONAL  
ASSOCIATION OF MACHINISTS AND  
AEROSPACE WORKERS, AFL-CIO<sup>3</sup>**

**Petitioner**

**APPEARANCES:**

Paul W. Coughenour, Attorney, of Detroit, MI, for Downriver Urgent Care, P.L.L.C.

William A. Moore, Attorney, of Detroit, MI, for Kelly Services, Inc.

Frank Forgiione and James Jencks, of Cincinnati, OH, for Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

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<sup>1</sup> The names of the Employers appear as amended at hearing. One document in the record, the contract between Downriver Urgent Care and Kelly Services, described infra, and the Employers' briefs use two words for Downriver. However, timesheets from Downriver Urgent Care that are in the record list it as one word. Further, I take official notice that documents filed with the State of Michigan by Downriver Urgent Care also cite it as one word.

<sup>2</sup> As discussed infra, I find that the two entities are joint employers.

<sup>3</sup> The name of the Petitioner appears as amended at hearing.

Upon the entire record in this proceeding,<sup>4</sup> the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.
2. The joint Employers are each engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employers.
4. A question affecting commerce exists concerning the representation of certain employees of the joint Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

## **Overview**

Downriver Urgent Care, P.L.L.C. (Downriver) is a single site medical facility providing urgent care on a walk-in or appointment basis. It has been in operation for about two and one half years. The facility employs three physicians, two of whom are owners, one office manager, Sharon Racklyeft<sup>5</sup>, four medical receptionists, four or five medical assistants, one lab receptionist, three or four medical billers, and one medical technologist.

The Petitioner seeks a unit of all full-time and regular part-time medical receptionists and medical assistants employed by Downriver at its facility located at 15830 Fort Street, Southgate, Michigan; but excluding all managerial employees, physicians, billing employees, and guards and supervisors as defined in the Act. The Petitioner does not seek to include the medical billers or the medical technologist in the unit because it asserts that those two classifications lack interchange and community of interest with the medical receptionists and medical assistants. The Petitioner argues that medical billers also should be excluded because they are confidential employees. Further, the Petitioner seeks to specifically exclude one of the medical billers, Lynn Dumas, because she is a supervisor within the meaning of Section 2(11) of the Act. The Petitioner also contends that Downriver is a single employer of the petitioned-for employees, and that Kelly Services, Inc. (Kelly Services) is not a joint employer and does not have

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<sup>4</sup> Downriver Urgent Care, P.L.L.C. and Kelly Services, Inc. filed briefs, which were carefully considered.

<sup>5</sup> The parties stipulated, and I find, that the three physicians and Racklyeft are supervisors within the meaning of Section 2(11) of the Act because they possess one or more of the enumerated supervisory indicia.

a timely contract with Downriver to supply the employees in the petitioned-for unit.

Downriver seeks to include the medical billers, including Lynn Dumas, the lab receptionist and the medical technologist in the petitioned-for unit. Downriver further notes that it entered into a contract, dated March 27, 2007, with Kelly Services to transition its employees to Kelly Services. It contends that since the contract was executed before the Petitioner filed its representation petition, the unit sought by the Petitioner is not appropriate because Downriver, the only employer named on the petition, no longer employs the employees in the petitioned-for unit.

Kelly Services' position is that the petition should be dismissed in its entirety as there is no appropriate unit as worded on the petition, since only Downriver is named as the employer of the petitioned-for unit. Kelly Services contends that the legal impact of the contract executed on March 27, 2007, one day before the representation petition was filed, makes Kelly Services the single employer of some, if not all, of the individuals in the petitioned-for unit.

I find that Downriver and Kelly Services are joint employers, based on their interrelationship of operations and overlapping supervision of employees. Further, I find, based on community of interest criteria, including similar or identical terms and conditions of employment and interchange among the employees, that the unit should include medical receptionists, medical assistants, the lab receptionist, medical billers and the medical technologist. As to the medical technologist, I find that he is a technical employee. I further find that he possesses a community of interest with the other employees to be included in the unit. In addition, he should be included because to exclude him would leave him as the only employee not in the unit and preclude him from the option of representation.

### **Downriver's relationship with Kelly Services**

Office manager Sharon Racklyeft supervises all the employees. The three physicians also supervise the medical assistants. Racklyeft is responsible for setting the employees' schedules, determining their work assignments, issuing discipline, and hiring and firing. As office manager, Racklyeft has dealt with the persisting problem of having employees "call-off" before their shift and being left short-handed. Specifically, Downriver experienced about 10 call-offs in December 2006, during the busy holiday season. As a result, Racklyeft decided to call a temporary staffing agency to help alleviate the staffing shortage.

In early March 2007, Racklyeft telephoned Kelly Services and made an appointment for March 12, to discuss a temporary staffing arrangement. The meeting was held at Downriver. At the meeting for Downriver was Racklyeft, one of Downriver's owners, Dr. Abdul Hadi Sinan, and medical biller/assistant office manager Lynn Dumas. They met with two representatives from Kelly Services, Jackie Bassett, Farmington location branch manager, and Joyce Gibson, Taylor location branch manager. During the meeting, the parties discussed subsidizing the staff for call-offs and vacations scheduled for the upcoming summer. The representatives from Kelly Services informed Downriver that Kelly Services was capable of filling in for all of Downriver's employees. After the meeting, Gibson sent some literature to Racklyeft regarding the broad range of Kelly Services' services.

The next day, Bassett e-mailed some documents to Downriver, including a bill rate inclusion letter for the physicians to review, and some resumes of candidates for temporary employment at Downriver. Following the presentation by Kelly Services, Dr. Sinan indicated to Racklyeft that he thought using Kelly Services was a good idea and he wanted co-owner Dr. Mohamad Al-Jarrah to meet with them. A second meeting was arranged for March 27.

On March 27, Dr. Al-Jarrah met with Bassett at Downriver. They discussed staffing shortages from call-offs, difficulty in retaining employees, and the possibility of offering employee benefits. Bassett brought up the option to Dr. Al-Jarrah of transitioning Downriver's employees to Kelly Services because Kelly Services was able to offer a wide variety of benefits. Dr. Al-Jarrah was pleased with this proposal because it benefited his employees and alleviated some of the administrative burdens they currently faced with payroll and scheduling. After Bassett and Al-Jarrah met for about 20 minutes, Racklyeft was asked to join the meeting. The two explained to her that rather than simply meeting staffing vacancies, Kelly Services could take over all the employees; it could do all of the scheduling, the employees would be on Kelly Services' payroll, and Downriver would never be without staff. Bassett informed them that Kelly Services could offer holiday pay, vacation pay, medical and dental benefits, and a 401(k) plan. Racklyeft indicated that she was pleased with that idea because the employees were seeking better pay and benefits. Bassett explained that Kelly Services requires transitioned employees to take a competency test and a background test. She said all the employees would be tested for the job positions. If they pass the tests and want to work for Downriver, other than being outsourced to another facility, she would try her best to place them back at Downriver's facility. Bassett estimated that about 80 to 90 percent of employees pass the tests. Based on her discussions with Dr. Al-Jarrah and Bassett, Racklyeft had no doubt that all the Downriver employees would become Kelly Services employees.

By the end of the meeting, it was decided to transition the employees to Kelly Services. Bassett was going to work out the final figures, e-mail them back to the physicians, and if they agreed, she would be back to have them sign the contract, titled Kelly Healthcare Resources Agreement Addendum. It is an addendum to a standard service contract. Bassett also indicated that Kelly Services would immediately start sending resumes for Downriver's temporary need for employees to fill in shifts.

It also was decided that once Racklyeft returned from vacation on April 16, the transitioning process would begin. A full staff meeting of Downriver's employees would take place, at which the upcoming changes would be explained. Kelly Services then would come in and present all the options that Kelly Services has to offer, and tell employees about how it could benefit them, in terms of health insurance, dental and vision benefits. The employees also would be informed about Kelly Services' capability in administering their payroll, and offering them workers' compensation insurance and unemployment insurance.

It also was agreed that after the transition, Racklyeft will still supervise the employees. Kelly Services will not have its own on-site supervisor at Downriver, although it anticipates communicating with Racklyeft on an ongoing basis if there are any problems with the employees. For Racklyeft, her plans after the transition include helping Kelly Services develop work rules and job duties, although she does not anticipate that the job duties will change much after the transition. The hours of operation will remain the same. Kelly Services will be responsible for the employees' scheduling and payroll, fringe benefits, discipline, and hiring and firing. Racklyeft indicated that Kelly Services will pay the current employees a slightly higher wage rate than what they now earn with Downriver.

Kelly Services also will administer testing for the transitioned employees. If any transitioned employees pass the competency exam and background screening, but decide not to sign on as Kelly Services employees, they will not be able to remain working for Downriver. Once the transition is complete, employees working through Kelly Services at Downriver who desire more hours can be transferred to additional jobs through Kelly Services. After that, when Downriver adds additional permanent employees, Kelly Services will send it resumes of candidates from which Downriver can select employees.

Racklyeft and Bassett testified that the contract negotiated by Dr. Al-Jarrah and Bassett was e-mailed to Downriver and signed the same day of their meeting on March 27. The contract sets forth bill rates that Kelly Services will charge Downriver for each job classification. These bill rates include employee wages and the cost of benefits available to employees upon transitioning to Kelly

Services. The contract contains no effective dates or procedures for termination. The standard service agreement to which the signed contract is an addendum has not been provided to Downriver.

Since a representation petition was filed by the Petitioner on March 28, seeking to represent some of the classifications of employees set to be transitioned to Kelly Services, the initially proposed April 16 implementation date was not maintained. No new date for the transitioning process has been set by the parties because they are awaiting the outcome of this representation proceeding.

## **Classifications**

### ***Medical Receptionists***

Job duties of the four medical receptionists include greeting the patients as they enter the facility, obtaining copies of the patient's insurance cards and identification, checking eligibility on the insurance, preparing new patient charts, and pulling established patient charts. They also input the patient's demographic information into the computer system. They may obtain the vitals signs of the patient if the medical assistants are busy. Medical receptionists also are responsible for making sure that the physician has placed the diagnoses and codes on the router slip for the procedures that the physician has performed. In addition, medical receptionists have cleaning duties set forth in "extended job descriptions" which are specific to each of them; these include mopping and washing down the counters, lobby, waiting area and restrooms.

On March 31, a new medical receptionist, Manal Asbahi, began working at Downriver. Her position is new and was created in order to assist the recently hired medical technologist. She will work with the medical technologist, inputting the demographic information for his patients, and verifying their insurance. While her title may be lab receptionist, she essentially performs all the same functions of the other medical receptionists.

### ***Medical Assistants***

Job duties of the four or five medical assistants include escorting the patients into the examination room, obtaining their vital signs - which includes height, weight and temperature - assisting the physician in medical procedures, conducting laboratory tests, assisting with x-rays, and cleaning the offices and exam rooms. They work in the exam rooms with the patients about 60 percent of the day. Their remaining time is spent at the front desk serving as a medical receptionist, answering the phones and calling patients regarding lab results.

Medical assistants also are responsible for making sure that lab procedures have been circled on the router slip for insurance purposes.

Downriver does not require that the medical assistants be certified as medical assistants, although one currently is. Some medical assistants have specific additional duties, set forth in their “extended job descriptions.” For example, one medical assistant is responsible for compiling an error log for x-rays, noting errors such as over- or under-exposed x-rays. Another medical assistant compiles a similar error log for the lab.

### ***Medical Billers***

Job duties of the four medical billers include inputting codes circled by the physician into the computer system, and inputting the diagnoses to match the codes. They prepare the claims and/or statements for the patients for pre-collection and collection purposes. They also are responsible for paging the physicians regarding medical questions. Medical billers work the front desk occasionally when patient volume is high. Usually, the least senior or experienced medical biller fills in at the receptionist desk. Medical billers are responsible for cleaning their own office area.

The first step of the billing process is performed by the medical receptionists when they input the patient’s demographic information into the computer system. The medical receptionists compile all the router slips for the day, balance out the daily log with a deposit sheet, rubber band them together, and send them to the billing office so that the medical billers can input the coding. Once the coding is completed, medical biller Lynn Dumas performs the electronic transmission of the claims to the various insurance companies. Medical biller Pamela Keith handles the pre-collection and collection of past due amounts. Her title includes accounts receivable.

### ***Medical Technologist***

Job duties for the medical technologist include performing the blood draw on patients, processing the lab work in-house at Downriver’s lab, and ordering all the supplies for the lab. The position of medical technologist is new to Downriver. The new medical technologist, Abdulfatah Asbahi, began working for Downriver in late February or early March 2007, and at the time of the hearing was setting up the new lab. He has a certification for medical technologist. Only he is certified to process the lab work. Before Asbahi was hired, the medical assistants performed the blood draws, and sent them out to the laboratory at Oakwood Hospital.

## **Terms and conditions of employment**

### ***Working hours***

Downriver's hours of operation are from 10:00 a.m. to 10:00 p.m., seven days a week. All employees, including the physicians and office manager, swipe a computerized time card upon starting and completing their work day. The medical receptionists and medical assistants usually start their shift at around 9:00 a.m. The medical billers have shifts starting at 7:00 a.m., 8:00 a.m. and 8:30 a.m., and end their shift at about 4:00 p.m. From 7:00 a.m. to about 4:00 p.m., the office manager, one medical receptionist, one medical assistant, and four medical billers are scheduled in the facility. After 5:00 p.m., one medical receptionist, one medical assistant, and possibly one other transitional employee, who performs both receptionist and assistant functions from 12:00 p.m. to 8:00 p.m., is scheduled in the facility. One physician is on duty at any given time. The medical technologist is a full-time employee, but his regular working hours are not reflected in the record.

### ***Pay Rate***

Medical receptionists, medical assistants, medical billers and the medical technologist are all paid on an hourly basis. The wage rates for medical receptionists, medical assistants and medical billers range between \$9 and \$12 per hour. The specific wage rate for the medical technologist is unknown, although because of his certification, it is higher than the range of the other classifications<sup>6</sup>. All employees are evaluated for pay raises at the end of January and the end of July.

### ***Uniforms***

Medical receptionists and medical assistants wear scrubs on a daily basis. Most billers do not wear scrubs, unless they know they will be called up to work at the front desk for the majority of that day. One medical biller, who no longer works at Downriver, wore scrubs to the facility every day. One current medical biller wears scrubs to the facility on occasion. When medical billers are not wearing scrubs, they wear business attire. The record is silent on the uniform of the medical technologist.

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<sup>6</sup> The record includes a pay stub for Asbahi, wherein his gross pay for 40 hours worked was \$1000, which would make his hourly rate of pay \$25.



## **Functional integration and employee interchange**

Patients walk into the waiting room and go to the front desk window, which is where two medical receptionists' desks are located. The medical billers are in a separate office, about five feet from the front desk area. The office contains three desks and chairs. Usually only medical billers use the medical billing office. There are five examination rooms, which is where the medical assistants work during most of the day. They also may be in the discharge station, the x-ray room, and in the front desk area making phone calls.

The medical technologist has been stationed in the space formerly used for breath alcohol tests, vision tests, and pulmonary function tests. Those testing functions have been moved to exam room 5 in order to accommodate the new in-house blood lab. The hearing test booth remains in the same area as the blood lab.

There is another suite adjacent to the main facility joined by a door. It is designated Occupational Medicine, and Downriver's employees also work there. It is owned by Dr. Al-Jarrah and employs only Downriver's employees. The Occupational Medicine suite was recently added to Downriver's facility. Downriver wants to expand its operations to include providing drug screening, pre-employment physicals and services for work-related injuries to individual companies.

Medical receptionists, medical assistants and medical billers use the same fax machine and typewriter, and go to the same area to access patient charts. They all have access to the same patient and insurance information, and all are subject to the same federal HIPAA laws. There is one central phone system, which rings throughout the facility. Employees are not provided with e-mail accounts by Downriver. Medical biller Lynn Dumas uses a personal e-mail account she created for use solely at the facility. There is one kitchen/lunch room used by all the employees.

Medical receptionists, medical assistants and medical billers have many shared duties. They are all trained on the billing software by Racklyeft. They also handle the hospital billing for Dr. Al-Jarrah when he performs work for a hospital facility other than Downriver. They all help with the hospital billing because it can come in large bulk quantities. While the duty may fall more under that of medical assistants, all classifications have been trained and can conduct drug screening or alcohol testing. All classifications also can obtain patient vital signs, like weight, height and temperature.

Most employees hire in as a medical receptionist or medical assistant. Most of the medical billers were hired as medical receptionists. Medical receptionists spend about 90 percent of their time at the front desk. On a weekly basis, the medical assistants may spend 20 percent of their time at the front desk. From the start of their shift at 7:00 a.m. until 9:00 a.m., medical billers fill in for the medical receptionists answering phones. They do so from the billing office, not the front desk, because the clinic is not yet open. Medical billers fill in for the medical receptionists for call-offs and missed shifts, and may fill in during lunch breaks. On those occasions when a medical receptionist leaves work early because of sickness, approximately two to five times per month, a medical assistant or medical biller steps in. Medical receptionists may enter the billing area to ask the medical billers questions regarding insurance. When medical receptionists need to input demographic data into the computer, they perform those functions in the medical billers' office.

One medical assistant spends about 60 percent of her time performing medical assistant duties, and about 40 percent of her time performing medical receptionist duties. Two medical billers regularly perform the duties of a medical receptionist.

Medical receptionists, medical assistants and medical billers all attend the same monthly staff meetings, which take place the first Saturday of every month. Racklyeft runs the staff meetings - the physicians are not present. If Racklyeft is on vacation, the staff meeting does not take place and is postponed until her return. All employees receive the same agenda that is passed out during the meeting, where discussion centers on employer policies and any problems or incidents that may have arisen since the last meeting.

All employees receive a paid lunch break. There is no set time or duration for lunch; it depends on the flow of patients. Medical receptionists and medical assistants do not take a lunch break every day, and if they do, it varies as to what time it is taken. Medical billers work more of a set schedule, and do take daily regular lunch breaks.

### **Bargaining History**

There is no bargaining history involving Downriver's employees.

## **Supervisory status of employee Lynn Dumas**

Lynn Dumas is classified as one of the medical billers. Her title is assistant manager/biller/checker/receptionist. As assistant manager, she assists Racklyeft in all the insurance duties, including insurance reports and review of overpayments from the insurance companies. She assists Racklyeft with duties for Dr. Al-Jarrah's other office at the hospital. She also assists in the credentialing process for Downriver. Credentialing is applying for an insurance that the employer does not have, setting up site reviews for the insurance company, and filling out the paperwork for the insurance company, including tax information and physicians' resumes. Dumas is responsible for completing the applications and communicates with the insurance companies regarding any additional information they may need.

Dumas does not have the authority to hire or fire. She does not sit in on employee reviews. She cannot suspend or discipline employees, or issue warnings. She cannot lay off or recall employees, give wage increases or bonuses. She cannot promote or reward employees, or grant time-off requests. With respect to employee evaluations, Dumas helps check for errors in demographics entry and data entry, and mathematically tallies the errors that were made. She gives the medical receptionists and medical assistants notes that they made the errors. There is conflicting testimony whether Dumas reviews the errors with the employees directly before handing them over to Racklyeft. Before any discipline is issued, Racklyeft checks over Dumas' tally, and the employee is given an opportunity to dispute the errors. Other employees, such as receptionist/biller Holbrook, receptionist Piazza and receptionist/biller Keith, also can check for errors and tally them. Dumas can telephone other employees to fill in for a call-off, without getting permission from Racklyeft. Racklyeft testified that on those occasions, Dumas just grabs the employee list and starts calling. There is no record evidence that Dumas can require employees to work overtime or come into work. Only physicians and Racklyeft have access to Downriver's financial information regarding payroll and earnings. Dumas does not have such access.

Dumas does not receive any benefits different than the other hourly employees. She dresses in business attire, like the other medical billers. Excluding the medical technologist, she earns the highest wage rate of the hourly employees.

James Jencks, Petitioner organizer, testified that when he and another Petitioner official went to Dumas' house during a campaign visit, she said she was surprised they were there, she was management. He asked if she could hire, fire, promote and demote. She said yes. Racklyeft testified that Dumas does not

possess any of that authority. Employee witnesses presented by the Petitioner testified either that she did not have that authority or they were not aware that she had that authority. Dumas did not testify.

## **Analysis**

The employees currently are employed by Downriver only. Performance on the contract between Downriver and Kelly Services has not yet begun. However, when the contract is implemented, those employees will transfer to the payroll of Kelly Services. Kelly Services argues that since all the employees will soon be Kelly Services employees and the Petitioner has not requested the inclusion of any Kelly Services employees, it has waived any bargaining obligation on the part of Kelly Services. Kelly Services' argument is without merit. While the Petitioner has argued that Downriver is the sole employer, it has done so on the basis of attacking the timing and validity of the contract between the two employers. Its failure to prevail on that argument does not preclude the direction of an election listing both Downriver and Kelly Services as employers. Since joint employer status is at issue in this proceeding, the omission by the petitioner of naming Kelly Services on the representation petition is not a procedural bar. *Aldworth Co.*, 338 NLRB 137, 139 (2002). There is no evidence that the Petitioner was aware of the contract between the two employers when it filed its petition the day after the contract was executed. Thus, it is necessary to examine the relationship between Downriver and Kelly Services.

### ***Joint Employer Status of Downriver and Kelly Services***

The Board finds that a joint employer relationship exists when two or more employers "co-determine those matters governing essential terms and conditions of employment." *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3<sup>rd</sup> Cir. 1982); *W.W. Grainger, Inc.*, 286 NLRB 94 (1987). The essential factor to be examined is whether one employer possesses sufficient control over the work of the employees of another employer. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). "There must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction." *Laerco Transportation*, 269 NLRB 324 (1984).

Once the employees from Downriver are transitioned to Kelly Services, the employees' job duties essentially will stay the same, and Downriver's office manager will work with Kelly Services in revising the existing work rules and policies. The hours of operation at Downriver will remain the same. Kelly Services will be responsible for testing the transitioned employees, setting the employees' wages, setting their schedules, administering payroll and fringe

benefits, and hiring and firing. The office manager at Downriver will remain the only on-site supervisor of the employees, besides the physicians. She will communicate with Kelly Services on an ongoing basis since there will be no Kelly Services supervisor on site. While Kelly Services apparently will issue discipline, it can only do so based on its contact with the office manager or the physicians. For both temporary and permanent employee assignments, Kelly Services will send resumes to Downriver for the latter to select the desired candidates.

The relationship between Downriver and Kelly Services extends beyond that of a mere staffing agency. In *Storall Mfg. Co.*, 275 NLRB 220 fn3, 238-239 (1985), the Board held that interviewing employees, checking work references, and preparing paychecks was insufficient to establish joint employer status of a supplier employer providing temporary employees. On the other hand, in *Continental Winding Co.*, 305 NLRB 122, 123 (1991), a case involving Kelly Services, the Board found a joint employer relationship where, even though one employer alone hired employees supplied to another and set and paid their wages, the other employer to which the employees were supplied exercised sole authority to assign, schedule, and supervise the workplace conditions, and the performance of work by the employees. There, the Board said, the supervision was more than “routine” and was not “insignificant.” In the instant case, since Racklyeft and the physicians are and will be the sole supervisors at the facility, it is evident that their supervision in the operation of the clinic will be more than merely routine and insignificant. In addition, they will select which employees Kelly Services sends to them on both a permanent and temporary basis.

In its brief, Downriver cites several cases in which joint employer status was not found. *National Metal Processing, Inc.*, 331 NLRB 866 (2000); *The Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993); *Flav-O-Rich, Inc.*, 309 NLRB 262 (1992); *TLI, Inc.*, 271 NLRB 798 (1984). In each of those cases, the supplier employer provided the supervision of the employees at issue, from on-site, direct and daily to less prevalent, and the user employer did not. That is not analogous to the situation here. In *Flav-O-Rich*, the user employer leased only one employee to do painting and general cleaning on a temporary basis.

Kelly Services argues in its brief that, under current Board law, the relationship between Downriver and Kelly Services equates to that of a multi-employer unit, which is only appropriate with the consent of the parties, citing *Oakwood Care Center*, 343 NLRB 659 (2004). However, Kelly Services’ reliance on that case is misplaced. In *Oakwood*, some of the petitioned-for employees worked for Oakwood, and other petitioned-for employees worked jointly for Oakwood and a supplier company, creating a multi-employer unit. In the instant case, all of the petitioned-for employees will be working jointly for

Downriver and Kelly Services. No employees will be working solely for Downriver.

Thus, I find that both Downriver and Kelly Services exercise control over substantial terms and conditions of employment of all the petitioned-for employees and are joint employers. *Windemuller Electric*, 306 NLRB 664 (1992); *Flatbush Manor Care Center*, 313 NLRB 591 (1993); *Brookdale Hospital Medical Center*, 313 NLRB 592 (1993).

### ***Substantial and Representative Complement of Employees***

For the first time in their briefs, both Downriver and Kelly Services argue that the imminent transition of employees to Kelly Services will create a situation whereby the petitioned-for unit is no longer a “substantial and representative” complement of employees who might be assigned to Downriver in the foreseeable future. They cite cases, *Premium Food, Inc. v. NLRB*, 709 F. 2d 623, 628 (9<sup>th</sup> Cir. 1983), *NLRB v. Pre-Engineered BLDG. Prods., Inc.*, 603 F.2d 134, 136 & fn. 1 (10<sup>th</sup> Cir. 1979), and *St. John of God Hospital*, 260 NLRB 905 (1982), involving expanding units. There is no record evidence that the size of the unit in this case will expand. As to the composition, representatives from both Downriver and Kelly Services anticipate that the administrative reorganization of employees will change the composition of employees little, if at all. Further, there is no evidence that Downriver’s current employees will decline the opportunity to sign on as Kelly Services employees, especially considering an increase in wages and the implementation of employee benefits.

### ***Appropriate Unit***

Both Downriver and Kelly Services argue that the proposed bargaining unit is not appropriate pursuant to the holding in *Frito-Lay, Inc.* 177 NLRB 820 (1969). In *Frito-Lay*, an administrative restructuring of the employer shortly after the union’s certification rendered the certified unit inappropriate. Downriver and Kelly Services argue that Downriver soon will have no employees in the proposed unit, making the petitioned-for unit inappropriate. Based on my finding of joint employer status, that argument is without merit.

Downriver is a healthcare employer. As a result of its rulemaking procedures with respect to the healthcare industry, and in an effort to limit the proliferation of bargaining units in acute care hospitals, the Board adopted a rule in which it found the following eight separate units appropriate in acute care hospitals: 1. All registered nurses 2. All physicians 3. All professionals except

for registered nurses and physicians 4. All technical employees 5. All skilled maintenance employees 6. All business office clerical employees 7. All guards 8. All other nonprofessional employees. **Rulemaking**, 53 Fed. Reg. 33900, 248 NLRB 1515 et. seq. (1987). That rule was approved by the Supreme Court in **American Hospital Assn. v. NLRB**, 111 S. Ct. 1539 (1991).

Although the **Rulemaking** did not specifically extend to nonacute care facilities, the Board has since utilized its findings in formulating the rules, in conjunction with its traditional community of interest inquiry, to determine appropriate units for nonacute health care facilities. See **Park Manor Care Center, Inc.**, 305 NLRB 872 (1991). In **Park Manor**, the Board set forth a “pragmatic or empirical community of interests” approach for determining appropriate bargaining units in nonacute healthcare facilities. It considers community of interest factors, as well as those factors considered relevant by the Board in its rulemaking proceedings on collective bargaining units in the healthcare industry. **Id.** at 875 fn. 16. The Board indicated that the factors to be examined in making a unit determination include education and training, pay comparisons, distinct functions, common supervision, contact with other employees, and the relative size of the disputed employee group(s).

Here, a unit consisting solely of medical receptionists and medical assistants when they have a substantial community of interest with the medical billers is inappropriate. The medical receptionists, medical assistants and medical billers enjoy similar terms and conditions of employment, similar working hours, share several job duties, and are trained on similar functions. They all work in common areas of the facility. There is functional integration and interchange between them, as they fill in for each other during lunch breaks and call-offs.

With respect to the medical technologist, I find that he is a technical employee. See **National Health Laboratories, Inc.**, 239 NLRB 213 (1978). Separate technical units have been found to be appropriate in nonacute healthcare facilities. See **Faribault Clinic, Ltd.**, 308 NLRB 131 (1992). However, in that case, the unit of technical employees consisted of 35 employees; here, there is one. In its **Rulemaking**, the Board found that a unit of five employees or fewer constituted an “extraordinary circumstance” removing the case from strict application of the rule. **Rulemaking**, supra at 1588. Although the rule does not apply here, the considerations raised concerning small units are applicable to nonacute healthcare facilities: such small units would in many cases be impractically small. **Charter Hospital of Orlando South**, 313 NLRB 951, 952 (1994). If the medical technologist is excluded from this unit of 13 or 14 other employees, it would leave only one employee not in the unit. That could result in

undue proliferation of bargaining units. *Id.* Further, to exclude the medical technologist from the bargaining unit would leave him without the opportunity for representation since the Board has long held that it is contrary to Board policy to certify a single person unit. *Mt. St. Joseph's Home for Girls*, 229 NLRB 251, 251-252 (1977) and cases cited. Thus, I conclude that a unit limited to medical receptionists and medical assistants is not appropriate and that a unit including all employees is the smallest appropriate unit.<sup>7</sup>

### ***Supervisory Status of Dumas***

The primary supervisory indicia enumerated in Section 2(11) of the Act are read in the disjunctive, so that possession of any one of the 12 listed authorities can invest an individual with supervisory status. *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6<sup>th</sup> Cir. 1949), cert. denied 338 U.S. 899 (1949); *Allen Service Co.*, 314 NLRB 1060, 1061 (1994). The burden of proof rests with the party seeking to exclude the individual as a supervisor, in this case, the Petitioner. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 9 (Sept. 29, 2006); *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829, 829 (1999). The lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999). Also still viable is the Board's long recognition that purely conclusionary evidence is not sufficient to establish supervisory status. The Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip op. at 5 (Sept. 29, 2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusionary statements without specific explanation are not enough). Further, the Board is mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. *Azus Ranch Market*, 321 NLRB 811, 812 (1996).

The record fails to establish that Dumas possesses any of the 12 indicia of supervisory status listed in Section 2(11) of the Act. The Petitioner contends that since Dumas tallies employees' errors for their evaluations, she has supervisory authority. However, the record revealed that such tallies are performed by other medical billers as well, and that the tallies are merely mathematical, and do not require the exercise of independent judgment. The record also does not demonstrate that Dumas exercises any supervisory authority with respect to calling employees to fill in for a call-off. There is no evidence that she can require employees to work overtime or come into work. Seeking volunteers to work

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<sup>7</sup> Petitioner contended during the hearing that medical billers also should be excluded on the basis of being confidential employees. However, the Petitioner failed to present any evidence to support this claim.



overtime does not constitute supervisory authority. *Youville Health Care Center, Inc.*, 326 NLRB 495, 496 (1998).

The Petitioner also relies on secondary indicia to contend that Dumas is a supervisor. However, while nonstatutory indicia can be used as background evidence on the question of supervisory status, such indicia is not itself dispositive of the issue in the absence of evidence indicating the existence of one of the primary or statutory indications of supervisory status. *Chrome Deposit Corp.*, 323, NLRB 961, 963 fn. 9 (1997); *Shen Automotive Dealership Group*, 321 NLRB 586, 594 (1996). Dumas holds the title of assistant manager/biller/checker/receptionist. However, a title or the holding out of an individual as a supervisor is not necessarily dispositive of supervisory status. *Carlisle Engineered Products, Inc.*, 330 NLRB 1359, 1360 (2000) (rank and file employees cannot be transformed into supervisors merely by being invested with that title); *Williamette Industries, Inc.*, 336 NLRB 743, 744 (2001). The proper consideration is whether the functions, duties and authority of an individual meet any of the criteria for supervisory status defined in Section 2(11) of the Act. *Waterbed World*, 286 NLRB 425, 426 (1987). As to Dumas holding herself out to be a supervisor during a campaign home visit, her representations regarding any supervisory authority lack factual record support. I give them no weight. See *North Miami Convalescent Home*, 224 NLRB 1271 fn. 4 (1976). Petitioner also points to Dumas' attendance at the March 12 meeting with other management officials and Kelly Services. However, attendance at one meeting with management does not establish her as a supervisor.

Thus, I conclude that the Petitioner has not sustained its burden that Dumas is a supervisor as defined in the Act.

## **Conclusion**

In view of the foregoing and the record as a whole, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:<sup>8</sup>

All full-time and regular part-time medical receptionists, medical assistants, lab receptionists, medical billers, and medical technologists employed by

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<sup>8</sup> A larger unit than petitioned-for was found appropriate herein. In addition, Kelly Services was found to be a joint employer with Downriver. The Petitioner stated on the record that if a unit other than the one petitioned for was found to be appropriate, it still wished to proceed with the election. In the event the Petitioner does not wish to proceed with the election, it may withdraw the petition without prejudice by notice to the undersigned within 14 days from the date of this Decision and Direction of Election.

Downriver Urgent Care, P.L.L.C. and Kelly Services, Inc. at Downriver's facility located at 15830 Fort Street, Southgate, Michigan; but excluding all managerial employees, physicians, and guards and supervisors as defined in the Act.<sup>9</sup>

Those eligible to vote shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 10th day of May 2007.

(SEAL)

“/s/[Stephen M. Glasser].”

/s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director  
National Labor Relations Board – Region 7  
Patrick V. McNamara Federal Building  
477 Michigan Avenue – Room 300  
Detroit, Michigan 48226

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<sup>9</sup> If prior to the directed election, Downriver and Kelly Services decide not to implement their contract, they should so advise the Region. In that event, Downriver will be the sole employer of the employees in the appropriate unit.

## DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **District Lodge 60, International Association of Machinists and Aerospace Workers, AFL-CIO**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### B. Employer(s) to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer(s) must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking

and the voting process, the names on the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **May 17, 2007**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, [www.nlr.gov](http://www.nlr.gov),<sup>10</sup> by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **2** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Posting of Election Notices**

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the

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<sup>10</sup> To file the list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. The user then completes a form with information such as the case name and number, attaches the document containing the request for review, and clicks the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, [www.nlr.gov](http://www.nlr.gov).

Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.69 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **May 24, 2007**. The request may be filed electronically through E-Gov on the Board's website, [www.nlr.gov](http://www.nlr.gov),<sup>11</sup> but may **not** be filed by facsimile.

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<sup>11</sup> Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.

To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. Then complete the E-Filing form, attach the document containing the request for review, and click the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, [www.nlr.gov](http://www.nlr.gov).