STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: SAM HOFFMAN, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law and an Order to Comply with Article 19 of the Labor Law, both dated June 10, 2008, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 08-115 RESOLUTION OF DECISION

APPEARANCES

Shloime (Sam) Hoffman, *pro se,* Petitioner

Maria L. Colavito, Counsel to the NYS Department of Labor ("DOL"), Benjamin A. Shaw of Counsel, for Respondent.

WITNESSES

Shloime (Sam) Hoffman, for Petitioner; Jose Mendez, for Respondent.

WHEREAS:

An Amended Petition for review in the above-named case was filed with the Industrial Board of Appeals (Board) on August 1, 2008. Petitioner, Shloime (Sam) Hoffman (Petitioner or Hoffman), seeks to vacate an Order to Comply with Article 6 and an Order to Comply with Article19 of the Labor Law that the Commissioner of Labor (Commissioner) issued against Petitioner on June 10, 2008. The Orders were also issued against two other parties, EZ Pack Bags (EZ Pack) and Monte Banash (Banash), who have not filed appeals with the Board.

The first Order under Article 6 (Wage Order) directs Petitioner to pay to the Commissioner unpaid wages owed employee Michael W. Rampley (Claimant) in the amount of $612.50, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of $84.04, and a 100 % civil penalty in the amount of $613.00, for a total amount due

of $1,309.54 The second Order under Article 19 (Penalty Order) directs Petitioner to pay to the Commissioner $500.00 as a civil penalty for failure to keep and/or furnish payroll records required by the Labor Law.

The Petition challenges the Orders as unreasonable because Petitioner owned EZ Pack with Banash, who was the partner responsible for all administrative duties, including payment of employees. Petitioner claims that his own position in the company was in marketing and sales and that he was not involved in hiring, firing, or managing employees. Petitioner also asserts that the Orders are unreasonable because Banash locked Petitioner out of the company a year prior to the filing of the Petition and stole all its money. Petitioner claims that he has been denied full access to the business premises, records, and funds since that time.

The respondent Commissioner filed an Answer to the Petition, denying its material allegations, and interposing as affirmative defenses that the Petition contains insufficient and conclusory allegations and fails to establish that Petitioner was not properly named as an employer.

Upon notice to the parties, a hearing was held on May 27, 2009 before J. Christopher Meagher, Member of the Board and the Board's designated hearing officer in this case. Each party was afforded full opportunity at the hearing to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

SUMMARY OF EVIDENCE

Petitioner, Shloime (Sam) Hoffman, is an owner of EZ Pack, a Brooklyn, New York company that sold bags and packaging. Petitioner incorporated the company by filing a Certificate of Incorporation with the Department of State on May 13, 2005.

Labor Standards Investigator (LSI) Jose Mendez (Mendez) testified concerning the investigation of the claim by the Department of Labor (DOL) that resulted in the two Orders under review.

Mendez testified that the file revealed that on November 13, 2007 Claimant filed a claim against EZ Pack with DOL for $612.50 in unpaid wages for the period July 26, 2007 to August 2, 2007. The claim listed EZ Pack as the employer, the company's business address as 14B Whale Square, Brooklyn, New York 11217, and Hoffman and Banash as the co-owners and managers of the company who were the responsible persons of the firm. The claim stated that Claimant was employed by EZ Pack from June, 2007 to August 2, 2007 and quit because of unsafe conditions. The claim also stated that Claimant made a demand for payment of his wages on Hoffman and Banash that was refused by them for the reason, "Company isn't doing so well".

On November 30, 2007, DOL issued EZ Pack a notice (i.e. initial "collection letter") notifying it that the Claimant had filed a wage claim against it, the details of the claim, and that if it agreed with the claim it should remit payment to the Commissioner within ten days. DOL further advised that if EZ Pack disagreed with the claim, it should respond in writing stating the basis of its dispute, and substantiate its reasons with payroll records, contracts, and

documentation demonstrating payment of the wages claimed. The Postal Service returned the notice as undeliverable and DOL resent the notice to 1319 58th Street, Brooklyn, New York 11219, an address for the company provided by the Postal Service. When this notice was also returned, a third notice was sent to 1125 59th Street, Suite #3f, Brooklyn, New York 11219. This latter address is that listed with the Department of State for service of process and, according to the Petition, Petitioner's personal residence. The third notice was not returned. DOL received no response to the notice.

Mendez testified that the file revealed that DOL then sent a second letter on March 20, 2008 addressed to each of the parties respectively -- Hoffman, Banash, and EZ Pack -- at the three separate addresses described above. The letter reiterated the details of the claim and requested that the parties remit payroll and time records demonstrating that Claimant was paid in full for all time worked, or payment of the unpaid wages claimed within ten days. DOL further advised that unless the parties responded they could be subject to criminal prosecution and further civil action, including issuance of an Order to Comply, together with interest and penalties. The letters were not returned. No response was received.

Based on the parties' failure to respond to DOL's investigation and to submit payroll records or documentation establishing that Claimant was paid the wages claimed, the Commissioner issued the Orders under review on June 10, 2008. Copies of the Orders were sent to the parties at the three separate addresses described above.

Mendez testified that he was not the investigator of the claim and that the 100% civil penalty assessed in the Wage Order was recommended by LSI Maura McCann. In support of the penalty determination, DOL submitted an investigative form titled "Background Information – Imposition Of Civil Penalty" containing various boxes checked relating to the size of the firm, good faith of the employer, gravity of the monetary violations, and records provided or not provided concerning non-wage violations. Under a section titled "Recommendations", the form recited the statutory language of Labor Law § 218 relating to civil penalties to support a 100% penalty recommended by LSI McCann. DOL did not submit the testimony of LSI McCann, however, or any other witness particularizing how such penalty was determined. Mendez testified that he was not familiar with the penalty determination or the weighing of factors in this case as to why a 100% penalty was assessed. DOL also did not submit testimony or documentary evidence supporting the Commissioner's determination in the Penalty Order to assess a $500 penalty for failure to maintain/furnish records.

Petitioner testified that he established EZ Pack in 2006 as its sole shareholder-owner. In 2007 Petitioner sold fifty per cent of the shares to Banash in exchange for a cash infusion of $250,000. Petitioner testified that he and Banash then made themselves employees and split operation of the company; Petitioner was in charge of marketing, sales, and customer relations, while Banash was in charge of operations. Banash's responsibilities involved manufacturing, financial matters, hiring and firing employees, employee salaries and payrolls, and dealing with legal issues. While Banash ran day-to-day financial matters, financial authority was shared by both partners since no company check could be negotiated without both of their signatures.

On direct examination, Petitioner testified that Banash hired and supervised Claimant and that Petitioner had no involvement with Claimant's employment. Petitioner stated that

any dispute over Claimant's wages was therefore his partner's responsibility and not his own. On cross-examination, however, Petitioner acknowledged that he was working on site during the short period of Claimant's employment and signed the Claimant's paychecks. Out of concern for Claimant's welfare, Petitioner spoke with Claimant and told him that because of his escalating disputes with Banash, the company was not doing well, "I wish I could sign a check for you if we owe you any money, and I don't know that we do", and that Claimant would be wise to resign. According to Petitioner, Claimant agreed to do so.

Petitioner further testified that the partner disputes escalated to the point that Banash locked him out of the business and stole all its money. Banash did so by changing the locks and access codes to the worksite and bank accounts so that Petitioner no longer had access to the business premises, records, or funds. Petitioner testified that he was forced to go to the police to gain access to the worksite and to Rabbinical Court and Civil Court to resolve the dispute. The Civil Court eventually released Petitioner to go into competition with EZ Pack. Petitioner did not provide any specific time frame for any of these events.[1]

Finally, Petitioner testified that the penalties assessed by the Commissioner are unfair because he was effectively "kicked out" of the business by his partner. Petitioner testified that, while the police may have gained him technical access to the worksite, he was nonetheless denied access to the company's mail, bank accounts, and records by Banash. Petitioner claims that he was thereby blocked from cooperating with DOL's investigation and could not have provided payroll records or paid the Claimant wages from the company's bank accounts. On cross-examination, Petitioner acknowledged that he received all paperwork from DOL that was sent to his residence, including the final Orders.

GOVERNING LAW

A. Standard of Review and Burden of Proof

The Labor Law provides that "any person...may petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter" (Labor Law 101 §[1]). It also provides that an order of the Commissioner "shall be presumed valid" (Labor Law §103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an Order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board's Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angelo v National Finance Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

[1] After the conclusion of the hearing, Petitioner proffered copies of a bank letter, police report, Rabbinical Court summons, and Civil Court order, all bearing dates in 2007-08 after the period of Claimant's employment and wage claim. The proposed exhibits were rejected by the Hearing Officer for lack of foundation, because they would deprive DOL of the opportunity to cross-examine Petitioner regarding their contents, and for Petitioner's failure to comply with the Board's pre-hearing notices to provide all documents he wished to submit at the hearing. Various purported corporate documents were rejected for the same reasons.

It is therefore Petitioner's burden in this case to prove by a preponderance of evidence the allegations in his Petition that he was not properly named as an employer in the Orders and that the penalties assessed are unreasonable because he was ousted from his business.

B. Definition of Employer under Article 6 of the Labor Law

"Employer" is defined in Article 6 of the Labor Law as "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 U.S.C. § 230 [g]). It is well settled that "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Restaurant, Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v. RSR Security Services Ltd.*, 172 F3d 132, 139 [2d Cir 1999], the Second Circuit Court of Appeals articulated the test used for determining employer status:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

When applying the test "no one of the four factors standing alone is dispositive. Instead, the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive" (*id.* [internal citations omitted]).

C. The Commissioner's Authority to Impose Civil Penalties for Wage and Records Violations

Labor Law § 218 provides, in relevant part:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions [of the Labor Law], rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount

found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation. In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

FINDINGS

Petitioner Is an "Employer" Under the Labor Law

We find that the record evidence amply demonstrates that Petitioner was an "employer" under the applicable "economic reality" test.

Employer status does not require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control of one's employees. "Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control 'do not diminish the significance of its existence'" (*Herman v RSR Security Services Ltd.*, 172 F3d at 139 [quoting *Donovan v Janitorial Services, Inc.*, 672 F2d 528, 531 [5th Cir 1982]); see also *Carter v Dutchess Community College*, 735 F2d 8, 11-12 [2d Cir 1984] (fact that control may be "qualified" is insufficient to place employment relationship outside statute); *Moon v Kwon*, 248 F Supp 2d 201, 237 [SDNY 2002] (fact that hotel manager may have "shared or delegated" control with other managers, or exercised control infrequently, is of no consequence).

Petitioner by his own admission was the founder, co- investor, and co-manager of the company that employed the Claimant from June, 2007 to August 2, 2007. The unpaid wage claim covered the last week of this time frame. During such time Petitioner admitted that he was at the worksite running the marketing side of the company, while his partner ran the operational side. While Petitioner may have "shared or delegated" aspects of the day to day supervision of Claimant's employment to his partner, such limitation does not diminish the "existence" of Petitioner's ultimate control over such employment as a co-owner and manager of the company. The existence of Petitioner's authority was evidenced in several ways. Petitioner acknowledged that he retained authority over payment of Claimant's wages by cosigning the Claimant's paychecks; took supervisory interest in Claimant's employment by counseling him to resign; and shared final responsibility for any unpaid wages by telling him that he wished he could give him a paycheck "if we owe you any money". Though Petitioner may have "exercised that authority only occasionally ... does not diminish the

significance of its existence" (*Donovan v Janitorial Services, Inc., supra* at 531 [while day to day management of company was in hands of its president, individual that financed its incorporation retained ultimate, if latent, authority over its affairs]).

Petitioner's effort to avoid responsibility for the Claimant's unpaid wages because of disputes with his partner are unavailing. Petitioner provided no specific time frame or corroboration for his lockout from the company and loss of operational control to Banash. By his own admission he was at the worksite and shared ultimate control over Claimant's employment during the time frame of the wage claim, as we find above. While subsequent events may be relevant to DOL's investigation of the claim, they do not exonerate Petitioner from responsibility as an "employer" for the claim itself.

The Board therefore rejects Petitioner's assertions in the Petition that he was improperly named as an employer in the Wage Order, and affirms the Commissioner's determination.

Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment". Banking Law § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

Imposition of Civil Penalties in the Wage and Penalty Orders

We find DOL's failure to adequately explain its application of the criteria that must be given "due consideration" under Labor Law § 218 in assessing Petitioner a 100% civil penalty in the Wage Order, and a $500 penalty in the Penalty Order, to be arbitrary and therefore unreasonable.

The Petition asserted that the Orders were unreasonable because Petitioner had been locked out of the company by his partner and denied full access to the business premises, records, and funds. At the hearing, Petitioner presented proof challenging the reasonableness of the penalties and DOL did not object to litigating these issues. Hoffman testified that the penalties were unfair because he was effectively "kicked out" of the company by his partner and was blocked from cooperating with DOL's investigation by providing records or paying the Claimant from the company's bank accounts.,

In the face of such evidence, the burden of going forward shifted to DOL to submit specific evidence explaining how the applicable factors that must be given "due consideration" were balanced to assess a 100% penalty for the wage violation, and a $500 penalty for the records violation, versus other penalties within the Commissioner's discretion (see *Atchison v Wichita Bd of Trade,* 412 US 800, 807 [1973] [simple and fundamental rule of administrative law requires agency to explain the grounds upon which it acted]). Absent such explanation, the Commissioner's determination assessing a penalty is arbitrary for failure to afford the due consideration required by the statute (*id.* at 806 [duty of reviewing court to

determine whether course followed by agency "is consistent with its mandate" from Congress]). DOL failed to satisfy such burden.

DOL failed to submit sufficient testimony from a witness particularizing how the applicable factors were weighed to assess the specific penalty in the Wage Order. Submission of the conclusory allegations in the "Background Information – Imposition of Civil Penalty" form is insufficient because it merely contains a series of boxes and pro forma language recommending penalty that recite the statutory criteria. The form does not particularize how such criteria were applied to Petitioner's specific circumstances. The testimony of investigator Mendez was also insufficient since he likewise did not adequately explain how the statutory factors were duly considered to arrive at the penalty. Mendez testified that the penalty was recommended by another investigator, who did not testify, and that he was unfamiliar with the penalty determination and the weighing of factors as to why a 100% penalty was assessed. The investigator's testimony simply establishing a foundation for submission of the penalty form does not satisfy the particularization required by the statute.

Similarly, DOL failed to submit any testimony or documentary proof supporting the determination in the Penalty Order to assess a $500 civil penalty for Petitioner's failure to keep and/or furnish payroll records required by the Labor Law. Labor Law § 218 requires the Commissioner to duly consider the same statutory factors for non-wage violations as for wage violations.

We therefore revoke the civil penalties assessed in both Orders for failure of the Commissioner to substantiate "due consideration" of the statutory criteria required by Labor Law § 218.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Orders to Comply with Articles 6 and 19 of the Labor Law, dated June 10, 2008, are modified to revoke the civil penalties imposed against Petitioner in each Order;

2. The two Orders are remanded to the Commissioner to enter amended Orders consistent with paragraph "1" above;

3. The two Orders are hereby affirmed in all other respects; and;

4. The Petition is otherwise denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
November 17, 2009.