STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
SANFORD J. MOHEL and WALSH LIMOUSINE SERVICE, INC.,	:	
Petitioners,	:	DOCKET NO. PR 08-160
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6 of the Labor Law, both dated September 3, 2008,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Sanford J. Mohel, *pro se* for Petitioners.

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

WITNESSES

Sanford J. Mohel, for Petitioners.

Donna Griffiths, Herold Siering and Richard Gutkind, for Respondent.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on November 3, 2008. An Amended Petition was filed on December 10, 2008 and the Answer was filed on January 20, 2009. Upon notice to the parties a hearing was held on September 3, 2009 in Garden City, New York, before Anne P. Stevason, Chairperson of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to make closing statements.

The Commissioner of Labor (Commissioner) issued the orders under review on September 3, 2008. They direct compliance with Article 6 of the Labor Law. The first Order (Wage Order) directs the Petitioners Sanford Mohel (Mohel) and Walsh Limousine Service, Inc. (collectively Petitioner) to pay the Commissioner for wages due and owing to Herold J. Siering (Siering), Richard E. Gutkind (Gutkind) and Daniel Koppelman (Koppelman) (collectively Claimants) in the total amount of $6,817.45, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $2,159.22, and assesses a civil penalty in the amount of $1,705.00, for a total amount due of $10,681.67.

The second Order (Supplement Order) directs the Petitioner to pay to the Commissioner for expenses due and owing Siering and Gutkind in the total amount of $1,238.63, with interest continuing thereon at the rate of 16% calculated to the date of the Supplement Order in the amount of $386.10, and assesses a civil penalty in the amount of $310.00 for a total amount due of $1,934.73.

The Petition and Amended Petition allege that Gutkind and Siering, "employee[s] of Walsh Limousine Service, Inc.," were paid the "wages" in question. The Answer alleges that Siering, Gutkind and Koppelman each filed a claim against Petitioners and Petitioners failed to produce any records proving that they were properly paid.

The hearing was originally set for June 10, 2009 but was postponed on Petitioner's request for health reasons. Thereafter, the case was rescheduled for September 3, 2009. On August 30, 2009 Petitioner faxed a request to again adjourn the hearing due to the unavailability of his accountant/representative. Respondent objected to this request noting that the hearing had already been postponed pursuant to Petitioner's earlier request, the accountant no longer represented Petitioner, and the Claimants had arranged their schedules so that they could be at the September 3 hearing. By letter dated August 31, 2009, the Board denied Petitioner's request for an adjournment.

In his opening statement, Petitioner argued that the Claimants were independent contractors and not employees. The Commissioner objected to the consideration of this issue on the grounds that it was not raised in the Petition and was therefore waived pursuant to Labor Law § 101. The hearing officer allowed the parties to litigate the issue of the Claimants' employee status but reserved decision on the amendment of the Petition.

At hearing, after Petitioner rested, Respondent made a motion for a decision affirming Koppelman's claim on the grounds that neither the Petition nor Amended Petition raised any claim concerning Koppelman and Mohel failed to submit any evidence concerning Koppelman's claim at hearing. In response, Petitioner stated that he could not submit any information since he had moved and had been trying to get payroll records from his payroll service but had not gotten them yet and could not otherwise find them. Respondent's motion to affirm the Order with regard to Koppelman's claim was granted at hearing, subject to Board approval.

SUMMARY OF EVIDENCE

Mohel testified that he owns a limousine business that hires drivers who have Class E Chauffeur's licenses to work as independent contractors. The drivers drive Petitioner's cars, but they are free to accept or reject assignments. The drivers are usually paid 30% of the amount that each customer is billed for a trip. They are not paid on an hourly basis. Petitioner pays for car insurance, gas, tolls and car washes but does not pay any medical benefits, retirement benefits or home office expenses. There is no advertising on the cars and the drivers are not required to wear uniforms. The drivers are not told what route to take while driving. The drivers are paid sometimes weekly and sometimes bi-weekly. The driver submits a list of jobs completed, Mohel compares his list with the driver's list and then the driver is paid. There is no work schedule and Petitioner does not know ahead of time who will be available to drive. Drivers are assigned to different cars. Cars are kept at the Petitioner's place of business and only occasionally taken home. Drivers are not given training; and drivers are involved in resolving disputes with customers.

Mohel testified that the Claimants were paid in full. In support he introduced copies of checks paid to Claimants Siering and Gutkind. The checks issued to Siering ranged from December 29, 2006 to January 29, 2007 and totaled $3200.80. Four checks were introduced as evidence of payment to Gutkind. They were dated June 29, 2006; July 10, 2006; July 13, 2006 and July 18, 2006, respectively. The checks totaled $4000. Two of the checks were replacement checks for stop payments on earlier checks. Also introduced was a running total of monies owed to Gutkind from January 28, 2006 to July 18, 2006. Mohel could not remember exactly when Gutkind stopped working but said that it was sometime in July or August 2006. Mohel testified that Siering sued him in Small Claims Court and the suit was dismissed when Siering failed to appear at the hearing.

Labor Standards Investigator (LSI) Donna Griffiths (Griffiths) testified concerning the Department of Labor's (DOL) investigation. On July 19, 2006 Claimant Koppelman filed a claim for unpaid wages for the period of April 5, 2006 to June 11, 2006 in the amount of $1,009.50. Attached to Koppelman's claim and introduced at hearing were copies of three checks from Petitioner marked "NOT SUFFICIENT FUNDS." Also attached were three pay stubs that Payrolls by Paychex, Inc. issued to Koppelman. The stubs listed Walsh Limousine Service Inc. under "Employer Information" and listing earnings and withholdings. In response to a DOL letter requesting a response to Koppelman's claim, including payroll records, Petitioner sent in a Driver Summary and an Employee Earnings Record.

LSI Griffiths testified that she recommended the minimum civil penalty of 25% of the wages against Petitioner because, although he produced some information, he did not provide everything requested.

Siering testified that he worked for Petitioner from November 2006 to January 2007 and that he was to be paid 30% of the amount billed to the client. He has a Class E driver's license which he had prior to working for Petitioner. Siering was supposed to be paid twice a month but payment was frequently late. Siering filed a claim for wages and a separate claim for expenses. The wage claim listed all of the jobs that Siering completed but was not paid for. He claimed unpaid wages for December in the amount of $543.00, November $598.50 and January $135 for a total of $1,276.50. Siering testified that he had an agreement with

Petitioner whereby he would be paid $100 per week to do maintenance on the cars. Since Siering worked for Petitioner for 6 weeks, he claimed $600 for his maintenance work for a total of $1876.50 in unpaid wages.[1]

Siering admitted to filing a Small Claims Court action against Petitioner in 2006 which was dismissed when he did not appear for the hearing on February 26, 2007. Siering filed his claim with DOL after the Small Claims Court action was dismissed. The checks that Petitioner produced at hearing was payment for jobs other than the ones sought in his claim. Siering reviewed the Driver Summary which Petitioner introduced into evidence which indicated the jobs he was paid for and compared it to his own list of jobs. Siering gave Mohel a list of jobs he was not paid on several occasions after he was not paid properly on his first check.

Siering also testified that he was owed $611.24 in expenses for gas, parking, carwash and ice and drinks for the car, purchased according to Mohel's direction. The amount claimed for expenses also included a payment that Siering made to a third person for repairing one of Mohel's cars.

Claimant Gutkind testified that he filed a claim with DOL on September 12, 2006 for unpaid wages and expenses that Petitioner failed to pay him for work done in July and August 2006. In support of his claim, a Driver Summary prepared by Petitioner was introduced into evidence which listed all of the jobs that Gutkind did for July. He also produced copies of notebook pages listing all of the jobs he did for August. Also submitted were copies of receipts for expenses for the months of July and August and a $306.69 check stamped "unavailable funds" for "Expenses for May and June." Gutkind testified that he never received cash or a replacement check for the bounced check. Gutkind admitted receiving the checks that Petitioner introduced into evidence but testified that the checks did not reflect payment for jobs after July 11, 2006 and he is still owed $2,995.10[2] in wages and $627.39 in expenses.

DISCUSSION

Standard of Review and Burden of Proof

When a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in the [petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103 [1]). Pursuant to the Board's Rules of Procedure and Practice (Rules) 65.30 [12 NYCRR 65.30]: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable.

---

[1] Although the Order lists Siering's claim for wages as $2,011.50, it appears that earnings for January in the amount of $135 were mistakenly counted twice in totaling the claim.

[2] The Order demands $3,796.80 in unpaid wages.

Amending the Petition

Labor Law § 101 provides that a party may petition the Board for review of the reasonableness or validity of "any rule, regulation or order made by the commissioner under this chapter." It further provides: "Any objections to the rule, regulation or order not raised in the appeal shall be deemed waived."

The Petition does not contain any allegation that the Claimants are independent contractors. After Petitioner made his opening statement which indicated that he would be making that argument, Respondent objected based on Labor Law § 101 since this allegation was not made in the Petition. The hearing officer reserved decision on the order and allowed Petitioner to proceed with evidence concerning this allegation.

Board Rule 66.8 (12 NYCRR 66.8) provides that:

> "Amendment of pleadings to conform to proof may be obtained by any party, upon leave of the Board, at any time before conclusion of the hearing."

Petitioner was allowed to introduce evidence on the issue of independent contractor status subject to the approval of the Board. Given the facts that the Claimants were present and able to testify concerning the issue; and the Petitioner raised the issue to DOL earlier, as evidenced by the DOL records introduced at hearing; the Commissioner was not prejudiced by the fact that it was raised at hearing but not in the initial Petition. The Board grants Petitioner leave to amend his Petition to allege that the Claimants were independent contractors.

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rule 65.39 (12 NYCRR 65.39).

A. Claimants were employees, not an independent contractors.

Petitioner did not meet its burden to prove that the determination that they were employees under Labor Law article 6 was invalid or unreasonable (*see* Labor Law § 101; Board Rules 65.30, 12 NYCRR 65.30). The protections of Article 6 extend only to employees and "[a]lthough the definition of employee is broad, independent contractors are not included [citations omitted]." *Bhanti v Brookhaven Mem. Hosp. Med. Center,* 260 AD 2d 334, 335 (2d Dept 1999). Labor Law § 190.2 defines an employee as "any person employed for hire by an employer in any employment."

In *Bynog v Cipriani Group, Inc.*, 1 NY 3d 193, 198 (2003), the Court of Appeals held that the most significant factor in determining whether an individual is an employee or an independent contractor under Labor Law Article 6 is the right of control:

> "the critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results. Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed scheduled. [Internal citations omitted.]"

The determination of whether an individual is an independent contractor or an employee is a fact-based inquiry with the burden on the employer to prove that the individual who is performing service is exempt from the protections of New York and federal labor laws. In addition to the right to control, courts have considered other factors. Under the Fair Labor Standards Act and the New York Minimum Wage Act, courts employ an "economic reality" test. *See e.g. Ansoumana v Gristede's Operating Corp.*, 255 FSupp 2d 184 (SDNY 2003), *Brock v Superior Care, Inc.*, 840 F 2d 1054 (2nd Cir 1988). The economic reality test relies on five factors:

> "(1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss and their investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and (5) the extent to which the work is an integral part of the employer's business. . . . No one factor is dispositive; the 'ultimate concern' is 'whether, as matter of economic reality, the workers depend upon someone else's business to render service or are in business for themselves.' *Brock*, 840 F.2d at 1059."

Ansouna, 255 FSupp 2d at 190.

The Petitioner argues that the Claimants were independent contractors because they were not paid by the hour; had their own licenses; could accept or reject an assignment; were not on any schedule; the cars did not have advertising on them; Petitioner did not dictate the routes to be followed; and other than gas, parking, automobile insurance and car washes, Claimants paid their own expenses.

However, the evidence also shows that the Petitioner owned the cars driven by the Claimants. Petitioner paid all expenses. Claimants drove jobs assigned to them by Petitioner. Their only investment was their time and service; they had no opportunity for profit and loss. Also, there was no evidence that Claimants were in business for themselves. Although Mohel testified that all drivers were independent contractors, Claimant Koppelman was on Petitioner's payroll and appropriate employee deductions were taken from his pay.

Finally, Petitioner was in business to provide limousine transportation, and the Claimants who drove the limousines were an integral part of that business.

B. Wages are Due to the Claimants.

An Employer's Obligation to Maintain Records

Labor Law § 195 as well as 12 NYCRR, § 142-2.6 require employers to keep employment records:

> "(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee:
> (1) name and address;
> (2) social security number;
> (3) the wage rate;
> (4) the number of hours worked daily and weekly, ...;
> (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
> (6) the amount of gross wages;
> (7) deductions from gross wages;
> (8) allowances, if any, claimed as part of the minimum wage;
> (9) net wages paid; and
> (10) student classification.
> " . . .
> "(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

Section 142-2.7 of Title 12 further provides:

> "Every employer . . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid, and to provide its employees with a wage statement every time an employees is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides, in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

In the absence of employer's payroll records, DOL may issue an order to comply based only on employee complaints. In the case of *Angello v. National Finance Corp.*, 1 A.D.3d 850, 768 N.Y.S.2d 66 (3d Dept. 2003), DOL issued an order to an employer to pay wages to a number of employees. The order was based on the employees' sworn claims filed with DOL. The employer had failed to keep required employment records. The employer filed a petition with the Board claiming that the claims and therefore, the order, were overstated. In its decision on the petition, the Board reduced some of the claims. The court, on appeal, held that the Board erred in reducing the wages since the employer failed to submit proof contradicting the claims. Given the burden of proof in Labor Law § 196-a and the burden of proof which falls on the Petitioner in a Board proceeding, 12 NYCRR 65.30, "the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees" (*Id.* at 854).

Here, not only did Petitioner fail to produce payroll records, but the Claimants affirmatively testified about wages due them and Petitioner failed to counter this testimony. However, based on the evidence, the wage order is modified to provide that $5,880.90 is due in unpaid wages: $1,876.30 is due to Claimant Siering; $2,995.10 is due to Claimant Gutkind and $1,009.50 is due to Claimant Koppelman. The Board affirms the ruling of the Hearing Officer that the Koppelman claim is affirmed based on Petitioner's failure to make any allegations regarding Koppelman in the Petition or in its case in chief.

C. Petitioner Owes Claimants Siering and Gutkind for Their Expenses.

Labor Law § 198-c (1) requires "any employer who is a party to an agreement to pay or provide benefits or wage supplements to employees . . . to provide such benefits or furnish such wage supplements within thirty days after such payments are required to be made. . . ." Under Labor Law § 198-c (2) benefits or wage supplements include reimbursement for expenses.

The Board finds that the expenses claimed by Siering and Gutkind are still due and owing. Although Mohel testified that Gutkind was paid in cash to replace an expense check that bounced, Gutkind denied receiving the cash. Mohel therefore failed to prove payment.

D. Civil Penalty affirmed.

The Commissioner assessed a 25% civil penalty in each of the Order. LSI Griffith testified that she recommended a 25% penalty based on Petitioner's failure to provide all records requested although he did provide some records. Accordingly, the civil penalty is affirmed.

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 section 14-A sets the "maximum rate of interest" at "sixteen percent per annum."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order to Comply is modified to provide that Petitioner owes $5,880.90 in unpaid wages plus interest of 16%; and

2. The Wage Order is further modified to provide that the civil penalty is 25% of $5,880.90 or $1,470.00; and

3. The Supplement Order to Comply is affirmed in full; and

4. The Petition for Review be, and the same hereby is, denied.

Anne P. Stevason, Chairman

J. Christopher, 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.