STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: DONALD F. FARR, JR. (D/B/A DON FARR CONTRACTORS CO.), Petitioner, To review under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, dated November 18, 2005 -against- THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR-05-082 RESOLUTION OF DECISION

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on December 15, 2005. An amended petition was filed on January 24, 2006, seeking review of an Order to Comply with Labor Law, Article 6, (Order) that Respondent Commissioner of Labor (Commissioner) issued on November 18, 2005.

The Order finds that Petitioner failed to pay wages to employees in violation of Labor Law § 191.1, and directs that payment be made to the Commissioner for the period January 29, 2004 through February 26, 2004 for employee Steven E. Hill, and for the period February 25, 2004 through March 30, 2004 for employee Edward Fitzwater, in the total amount of $3,490.00, with continuing interest thereon at the rate of 16%, calculated to date of the Order in the amount of $921.73, and assesses a civil penalty in the amount of $875.00, for a total due of $5,286.73.

The amended petition asserts that the Order is based on "false time records" and that the Claimant Ed Fitzwater sought pay "for work not performed." Respondent Commissioner filed an

answer on March 3, 2006, denying the allegations of the petition and interposing as an affirmative defense that the petition contains conclusory allegations.

On notice to the parties, a hearing was scheduled for December 18, 2006. By amended notice to the parties, the hearing was adjourned to December 20, 2006, when it was held in Binghamton before Mark S. Perla, Esq., Member of the Board and designated Hearing Officer. Petitioner Donald F. Farr (d/b/a Farr Contractors Co.) (Petitioner or Farr) appeared *pro se*, and Benjamin T. Garry, Esq., represented the Commissioner. The parties were provided full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues. Petitioner was the sole witness in support of his petition. Department of Labor (DOL) Senior Investigator Susan Wood, Claimant Edward Fitzwater, and April Flick were witnesses for the Commissioner.

RECORD EVIDENCE

Fitzwater testified that he was hired by the Petitioner on March 5, 1996 and worked for him on and off for several years as an employee. Fitzwater denied that he was an independent contractor or that he had his own business during the period that he worked for the Petitioner, contrary to the Petitioner's claim that Fitzwater was hired as an independent contractor. Most recently, Fitzwater worked for the Petitioner from February 25, 2004 through March 30, 2004 at what Fitzwater testified to as an agreed rate of $15.00 an hour. His work was at two family homes in Millport, New York. The testimony of April Flick corroborated that Fitzwater worked at these sites.

Fitzwater did electrical work and plumbing, installed drop ceilings, and ran gas lines. He never received a formal paycheck from the Petitioner for his work, but admitted that he did get "$100 here or there," totaling, according to Fitzwater, about $300.00, which he testified that he deducted from his claim to the DOL.

The DOL claim form filed by Steven E. Hill, the second Claimant, indicates that Farr agreed to pay Hill $10.00 per hour and owes him $490 in wages. Attached to the claim form is a handwritten statement, apparently by Hill, noting that Farr "had us all keep track of own time so it was just writing on a piece of paper." The statement provides the names and telephone number of the owners of a house on which Hill performed work on Farr's behalf, presumably so that DOL could corroborate Hill's work. In response to a DOL letter to Farr, advising of Hill's claim, Farr conceded in writing that Hill did work for him, but asserted that the assigned work – building basement stairs and installing porch floor boards and railings – was done incorrectly and had to be re-done.

The Commissioner did not produce Hill at hearing. However, Fitzwater testified to seeing Hill on the job, although he could not verify Hill's exact days or hours, and stated that Hill quit because Farr did not pay him. Other than Fitzwater, no other of the Commissioner's witnesses testified from personal knowledge as to Hill's claim. Wood admitted that she had never personally spoken with Hill and could not otherwise verify his claim. The Petitioner noted a strenuous objection to the inability to confront Hill on his claim.

Petitioner testified that both Fitzwater and Hill were independent contractors, but that he did not have written contracts with either of them. Petitioner did not produce time or payment records or any documentary evidence at all. On cross examination, Petitioner admitted that he

had no payment records and said that he let his employees keep track of their own time. Although Petitioner repeatedly testified that he was rarely at the job sites due to a family member's death, he denied that Fitzwater and Hill worked as many hours as they claimed based on his opinion that the tasks that they performed should not have taken them the time that they claimed that it took and because he drove by the work sites "maybe twice a week" and did not see them.

Petitioner also testified that he had given Fitzwater $600.00 in cash, that the hourly rate he and Fitzwater had agreed to was not $15.00, but $8.00 "tops," and that Fitzwater performed substandard work. Petitioner conceded that Hill had worked for him, but variously testified that it was for "no more than two hours," three hours, and five hours. Later he said he would be willing to pay Hill for a whole day (8 hours), "just to be nice."

THE GOVERNING LAW

1. Standard of Review.

The Board has jurisdiction to review an Order to Comply with Labor Law, Article 6, issued by the Commissioner upon the filing of a petition for review. Labor Law § 101. The Order is presumed valid, Labor Law § 103.1, and a petition for review must specify "in what respects [the Order] is claimed to be invalid or unreasonable. Labor Law § 101. The Board's Rules of Procedure and Practice (Rules) provide that "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it." Rules § 65.39. 12 New York Code of Rules and Regulations (NYCRR) 65.39. "Any objections . . . not raised in the [petition] shall be deemed waived." Labor Law § 101. Therefore, the burden is on the Petitioner to prove that the Order under review is unreasonable or invalid in the respects asserted in the petition.

2. Under Labor Law, Article 6, an Employer Has a Duty to Pay Wages Weekly to Employees Who Perform Manual Work.

Labor Law, Article 6, § 190.2 defines employee as "any person employed for hire by an employer in any employment." As used in Article 6, wages are "the earnings of an employee for labor or services rendered"; employer "includes any person [or] corporation employing any individual in any occupation, industry, trade, business or service"; and "[m]anual worker means a . . . workingman or laborer." Labor Law § 190.1, .3, .4.

Labor Law § 191.1 (a) (i) provides in relevant part that an employer "shall" pay wages to manual workers "weekly and not later than seven calendar days after the end of the week in which the wages are earned."

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 Memorial Hospital Medical Center*, 260 AD2d 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 NY3d 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 New York Minimum Wage Act, courts employ an "economics reality" test. *See e.g. Ansoumana v. Gristede's Operating Corp.*, 255 F Supp2d 184 (SDNY 2003); *Brock v. Superior Care, Inc.*, 840 F2d 1054 (2nd Cir 1988). The economic reality test considers 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 a 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 F Supp2d at 190.

FINDINGS

The Board, having considered the pleadings, the evidence, and the parties' arguments, makes the following findings, pursuant to the provisions of the Rules § 65.39. 12 NYCRR 65.39.

1. The Petitioner's Obligation to Pay Wages to the Claimants.

At hearing, Petitioner claimed that the Order was not reasonable because the Claimants were independent contractors and not his employees. Also at hearing, Petitioner asserted that if Claimants were employees, the Order unreasonably required that he pay wages for time worked that, according to Petitioner, Claimants either did not work, or if they did work, they worked an unreasonably long time to accomplish the tasks assigned to them, and their work was substandard. He also disputed the hourly rate that he agreed to pay each Claimant.

We find that Petitioner's testimony shows that he had the authority to control both the results of the Claimants' construction work and the means they used to achieve those results, but failed to exercise such control because of the distraction of personal concerns. Petitioner did not adduce any evidence on the specific *Bynog v Cipriani* factors that would tend to show that either Claimant was an independent contractor. On the contrary, he testified to paying each of them on

an hourly basis and suffered or permitted them to work, be present on their jobs, and be available for the Petitioner's direction. Accordingly, the Claimants were Petitioner's employees within the meaning of Labor Law § 190.2. Concomitantly, we find that the Petitioner was a private employer as defined by Labor Law § 190.3, doing business in the State of New York, and subject to the Commissioner's jurisdiction.

The Board notes that the recently issued Executive Order No. 17 establishing a task force on employee misclassification is predicated, in part, on findings that "an increasing number of employers . . . are improperly classifying individuals they hire as 'independent contractor,' even when those workers legally should be classified as 'employees'" and that such misclassification adversely impacts New York's citizens, business, and economy and, among other things, "gives employers who misclassify their employees an improper competitive advantage over law-abiding businesses." We find that Petitioner improperly classified Hill and Fitzwater as independent contractors.

We also find that the claims that Petitioner raised in the petition – that the Order is based on false records and that Claimant Fitzwater demands to be paid for work that he did not perform – embrace the balance of the claims that Petitioner raised at hearing and next address these.

Petitioner's burden was to prove that Claimants did not work the hours that they claimed and at the rates that they claimed. Labor Law § 195 requires an employer to establish and maintain payroll records showing, among other information, hours worked and gross and net wages.

An employer who fails to keep adequate records bears the burden of proving that the complaining employee did not work the hours that the employee claims to have worked and was not entitled to be paid at the rate that the employee claims. To find otherwise "would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act." *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687 (1946); *Doo Nam Yang v ACBL Corp.*, 427 F Supp2d 327, 332 (SDNY 2005).

Having testified that he did not keep time records, but relied on Hill's and Fitzwater's own records of their time worked, Petitioner cannot now reject their records. Furthermore, Petitioner's opinion that Claimants took an unreasonably long time to perform their work in the face of his conceded reliance on their time records and his absence from their work sites and consequent lack of personal knowledge of their actual time worked is insufficient to meet his burden and shift the burden of going forward to the Commissioner to establish actual time worked.

Additionally, where their testimonies conflict, we credit Fitzwater's testimony over the Petitioner's, which is internally inconsistent, for example, referring to Fitzwater and Hill at times as independent contractors and at other times as employees. The Board finds that Fitzwater testified convincingly as to the hourly rate that Petitioner agreed to pay him, the work that he did at each work site, and the number of hours that he worked each day. We cannot credit Petitioner's testimony as to the time worked by Fitzwater and Hill when Petitioner repeatedly and emphatically testified that he was absent from their work sites and repeatedly changed his testimony as to the hours that Hill worked. Even if we were to credit Petitioner's testimony as to

the time it reasonably takes to perform certain construction/repair tasks that were assigned to Claimants, that they may have taken more time than reasonable to do their assigned work does not inexorably lead to the conclusion that they did not spend the time they claimed engaged in that work for Petitioner.

For the same reasons that we do not credit Petitioner's testimony as to the time that Claimants worked, we do not credit his testimony as to the hourly rates that he paid Fitzwater and Hill. Therefore, having failed to produce statutorily required records that show the Claimants' pay rates and in the absence of other evidence, the Petitioner has not met his burden to prove the hourly rate that he claims the Claimants agreed to.

As to Petitioner's claim regarding poor work quality, whether the Claimants' work was of high quality or substandard is not relevant to an assessment of the validity or reasonableness of the Commissioner's Order. Having employed the Claimants, the Petitioner must pay their wages for the time that he permitted them to work.

We are troubled by the paucity and quality of the evidence in support of Hill's claim -- there is little evidence that is based on personal knowledge and none based on DOL corroboration. Nonetheless, given Labor Law § 196-a which provides that it is the employer's burden to prove that a complaining employee was paid, when the employer has failed to keep required records, we find that Petitioner has failed to submit any credible proof which would contradict Hill's claim. "[T]he burden of disproving amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information. . . should not shift the burden to the employees." *Angello v. National Finance Corp.*, 1 AD3d 850, 852, 769 NYS2d 66, 68 (3d Dept 2003). Thus, under the particular facts presented here and the Petitioner's failure to meet his burden, we are constrained to sustain the Order's findings as to the wages owed Hill. Accordingly, we find that the Order is reasonable and valid as to the wages that Petitioner owes to both Hill and Fitzwater.

The Commissioner moved into evidence a letter, marked for identification as Respondent's exhibit 9, which was purportedly from an owner of one of the homes where Fitzwater performed work for the Petitioner during the at-issue time period in 2004. Fitzwater solicited the letter in September 2005 for the purpose of establishing, apparently in this review proceeding, that he had performed work at her home and that it was of good quality. The Petitioner objected to its admission into evidence, and the Hearing Officer reserved decision on its admission. The Board hereby denies the Commissioner's motion to receive Respondent's exhibit 9 into evidence and grants the Petitioner's objection. The letter is hearsay which, although normally admissible at a Board hearing, has very little probative value and denies the Petitioner the opportunity to cross-examine its author as to the contents, her reasons for writing it, or related circumstances. In addition, the letter is cumulative evidence as to Fitzwater's work at the home in question, which the Petitioner did not dispute, and is intended to establish a fact – the quality of Fitzwater's work – that is not relevant to the question of the validity or reasonableness of the Order.

2. The Order's Assessment of Civil Penalties Against Petitioner for Failure to Pay Wages.

The Order to Comply additionally assessed $875 in civil penalty. The Petitioner did not challenge the assessment or amount of the civil penalty. The Board finds no evidence that the Commissioner failed to make the required considerations and computations in connection with

the imposition of the civil penalty amount in the Order. *See* Labor Law § 218.1. Accordingly, the Order is reasonable and valid as to the civil penalties assessed.

3. The Order's Assessment of Interest Against Petitioner.

Labor Law § 219 provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to 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." Accordingly, the Order is reasonable and valid as to the interest assessed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 6 of the Labor Law issued by the Commissioner of Labor on November 18, 2005 against the Petitioner is affirmed in all respects; and

2. The Petition for review be, and the same hereby is, denied; and

3. All claims, motions, and objections not otherwise addressed in this Resolution of Decision are deemed denied as without merit.

Anne P. Stevason, Chairman

Mark S. Perla, Member *

Gregory A. Monteleone, Member

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Dated and Filed in the Office of the
Industrial Board of Appeals,
at Albany, New York,
on October 24, 2007.