



payment to the Commissioner for wages due and owing to one named employee in the amount of \$2,456.25, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$1,694.74, and assesses a civil penalty in the amount of \$615.00, for a total amount due of \$4,765.99.

### SUMMARY OF EVIDENCE

The Petitioner, William Rand Fosdick, is a construction contractor doing business as Ellison-Rand Construction. The Order under review in this proceeding concerns work performed by the Complainant from October 22, 2001 to December 28, 2001 on a bathroom renovation contract entered between the Petitioner and Diane Benton (the Benton project).

There is no dispute that the Petitioner employed the Complainant as a carpenter from July 1, 2001 to September 30, 2001. There is likewise no dispute that on September 30, 2001, the Petitioner informed the Complainant that he was terminating his employment for economic reasons.

From July 1, 2001 to September 30, 2001, the Complainant worked for the Petitioner on the Benton project and at one other job site. During that time period the Complainant's rate of pay was \$15.00 an hour. He received weekly paychecks with statutory deductions subtracted from his gross wages. The Petitioner was normally on-site working with and supervising the Complainant during this time period.

On September 30, 2001, the Petitioner terminated the Complainant's employment because the Petitioner was no longer able to afford to keep the Complainant on the payroll. However, at around the same time, the Petitioner was unable to complete the Benton project and offered the Complainant the opportunity to take it over since Diane Benton is the Complainant's mother-in-law. The Petitioner testified that at that point he was going to default on the project if the Complainant could not finish it.

The Petitioner and the Complainant agreed that the Petitioner would complete certain work on the Benton project as a "subcontract." This agreement was not made in writing. The Petitioner testified that the subcontract was for the Complainant to finish all of the remaining work on the Benton project. Although the Petitioner was unclear as to exactly what work he had not finished, he believed that the Complainant was supposed to do sheetrocking, framing, installation of plumbing fixtures, flooring, and ceiling installation. The Petitioner also could not recall the payment terms of the subcontract.

The Complainant, on the other hand, testified that under the terms of the subcontract he was to be paid \$1,800.00 to install the plumbing fixtures, the ceiling and the floor. The Complainant testified that the additional work, which is the subject of the Order under review in this proceeding, was to be paid at an hourly rate of \$15.00 an hour and was done at the Petitioner's request and with his consent because the Petitioner was unable to complete the sheetrocking, taping and painting work that was supposed to be done prior to the Complainant beginning work on the subcontract. The Complainant testified that it was agreed that he was to submit an invoice to the Petitioner in order to get paid for the additional work.

The materials and supplies used on the Benton project were purchased on the Petitioner's accounts at various local vendors. The Complainant testified that the Petitioner instructed him to purchase materials and supplies for use on the Benton project on the Petitioner's accounts. The Petitioner did not recall whether he authorized the Complainant to purchase supplies on his accounts, and testified that he believed Diane Benton was supposed to pay for the materials and supplies on the project. Nonetheless, the Petitioner did pay the invoices he received for the materials and supplies that were charged to his accounts for the Benton project.

The Complainant worked on the Benton project from October 22, 2001 to December 28, 2001. There is no dispute that during that time period the Complainant worked unsupervised and that the Petitioner was only present on one occasion at the job site to show the Complainant how to wire a switch.

The Complainant completed work on the Benton project on December 28, 2001, and submitted two invoices to the Petitioner for sheetrocking and painting work done from October 22, 2001 to December 28, 2001. The combined invoices were for 163 hours of work at \$15.00 an hour. The Petitioner does not dispute the amount claimed in the invoices and admits that he never paid the Complainant the amounts due and owing. The Complainant did not submit any invoice to the Petitioner for the subcontract work which was at least partially paid directly to the Complainant by Diane Benton.

Because the Petitioner failed after at least two requests to pay the Complainant the amounts invoiced, the Complainant filed a wage claim with DOL. DOL investigated the Complainant's claim and in the absence of any records or other defense presented by the Petitioner concluded that the Complainant was an employee of the Petitioner from October 22, 2001 to December 28, 2001 based on documents provided by the Complainant such as paystubs showing hours worked, week ending dates and withholdings; a 1099 tax form for 2001; the unpaid invoices for work performed; and an electrical inspection certificate for the Benton project under the Petitioner's license. Accordingly, DOL issued the Order under review seeking 163 hours of unpaid wages.

## GOVERNING LAW

### Standard of Review

In general, 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 shall presume that an order of the Commissioner is valid. Labor Law § 103(1) provides, in relevant part:

"Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter."

Pursuant to the Board's Rules of Procedure and Practice § 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.

#### The Commissioner's Authority to Issue an Order to Comply and Assess Civil Penalties

If the Commissioner determines that an employer has violated Article 6 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing. Labor Law § 218 (1) provides, in pertinent part:

"If the commissioner determines that an employer has violated a provision of article six (payment of wages) . . . of this chapter, or a rule or regulation promulgated thereunder, the commissioner shall issue to the employer an order directing compliance therewith, which shall describe particularly the nature of the alleged violation."

Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty and interest based on the amount owing. The civil penalty is in addition to or concurrent with any other remedies or penalties provided under the Labor Law, based upon the amount determined to be due and owing. Labor Law § 218 provides, in pertinent part:

"1. In no case shall the order direct payment of an amount less than the total wages . . . found by the commissioner to be due, plus the appropriate civil penalty . . . . 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 . . . . the failure to comply with recordkeeping or other non-wage requirements.

....

4. The civil penalty provided for in this section shall be in addition to and may be imposed concurrently with any other remedy or penalty provided for in this chapter."

#### Payment of Wages

Article 6 of the New York Labor Law requires every employer to pay wages to manual workers on a weekly basis and not later than seven calendar days after the end of the week in which the wages are earned (Labor Law § 191[1] [a] [i]).

## FINDINGS AND CONCLUSIONS OF LAW

The Board having given due consideration to the pleadings, hearing testimony and documentary evidence, and all of the papers filed herein, makes the following findings of fact and law pursuant to the provision of Board Rule 65.39 (12 NYCRR 65.39).

At the outset, we find the Complainant's testimony credible that he performed sheetrocking, taping and painting work at the Petitioner's request on the Benton project after September 30, 2001, and that this work was beyond the scope of the subcontract for installation of plumbing fixtures, ceiling work and flooring. We further find the Complainant's testimony credible that such work was to be paid at an hourly rate. This testimony is supported by the invoices the Complainant sent to the Petitioner for plumbing, painting and taping at \$15.00 an hour. For the reasons set forth below, we find that the Complainant was an employee of the Petitioner for the sheetrocking, taping and painting work performed on the Benton project after September 30, 2001.

We do not consider here whether the Complainant was an employee of the Petitioner for the work that was performed on the subcontract for the installation of plumbing fixtures, flooring and installation of a ceiling because the Order under review covers only unpaid wages for the 163 hours worked by the Complainant sheetrocking, taping and painting on the Benton project from October 22, 2001 to December 28, 2001.

Definition of "employer" under Article 6 of the New York Labor Law

Under Article 6 of the New York Labor Law, "employer" is defined as "any person, corporation or association employing any individual in any occupation, trade, business or service" (Labor Law § 190[3]). "Employed" is defined as "permitted or suffered to work (Labor Law § 2[7])." The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 U.S.C. § 203[g]). This similarity of language is due to the fact that Congress adopted the definition of "employ" from state child labor laws to protect employees who might have been otherwise unprotected at common law (*see Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 and n.7 [1947]). Because the statutory language is identical, the New York Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*see e.g. Ansoumana v. Gristede's Operating Corp.*, 225 F.Supp.2d 184, 189 [S.D.N.Y. 2003]).

In determining whether an individual is an employee covered by the Labor Law or an independent contractor without wage and hour protections, "the ultimate concern is whether, as a matter of economic reality the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v. Superior Care Inc.*, 840 F.2d 1054, 1059 [2d Cir. 1988]). The factors to be considered in assessing such economic reality include (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss, (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 (*Id.* at 1058-1059). In applying these factors, we must be mindful that "the remedial nature of the statute . . . warrants an expansive interpretation of its provisions so that they will have the widest possible impact in the national economy"

(*Herman v. RSR Security Services, Ltd.*, 172 F.2d 132, 139 [2d Cir. 1999]). Indeed, the Supreme Court in discussing the broad definition of “employ” set forth in the FLSA has observed that “[a] broader or more comprehensive coverage of employees . . . would be difficult to frame” (*United States v. Rosenwasser*, 323 U.S. 360, 362 [1945]).

Factor 1: The degree of control exercised by the employer over the worker

There is no dispute that prior to September 30, 2001, the Petitioner employed the Complainant. It is also not disputed that during that time period, the Complainant worked for the Petitioner on the Benton project. Although the Petitioner argues that the Complainant’s work on the Benton project was as an independent contractor after September 30, 2001, we are not persuaded that the employment relationship changed with respect to work that was beyond the scope of the subcontract for installation of plumbing fixtures, flooring and trim work, and note that an employer’s characterization of its employee as an independent contractor is not controlling (see *Ansoumana v. Gristede’s Operating Corp.*, 225 F.Supp.2d 184, 190 [S.D.N.Y. 2003]).

The Petitioner contracted with Benton for the project without any input from the Complainant with respect to the cost of the contract or the work to be performed. Prior to September 30, 2001, the Petitioner paid the Complainant \$15.00 an hour for work performed on the Benton project and was on-site most days to supervise the work. There was credible testimony from the Complainant that the Petitioner agreed to pay him \$15.00 an hour for sheetrocking, taping and painting work performed on the Benton project after September 30, 2001.

Although after September 30, 2001, the Petitioner was no longer present on the job site and no longer supervised the Complainant’s work, an employer “does not need to look over his workers’ shoulder every day to exercise control” (*Superior Care*, 840 F.2d at 1060; *Herman v. RSR Services*, 172 F.3d 132 [2d Cir. 1999] [finding sufficient control exercised where the employer hired workers and on occasion supervised and controlled employee work schedules and the conditions of employment]). The fact that the Petitioner negotiated the original contract with Benton and unilaterally dictated the terms and conditions of the Complainant’s work on the project, including the amount of money he would be paid and the work to be performed indicates a sufficient level of control exercised by the Petitioner over the Complainant. Furthermore, there is evidence in the record that the Petitioner knew the Complainant to be capable of performing the work required at the Benton project without strict supervision.

Factor 2: The worker’s opportunity for profit or loss

The Complainant’s investment in the Benton project was negligible and limited only to any of his own tools and work clothes that he used on the project. The Petitioner’s investment on the other hand was substantial and included negotiating the terms and conditions of the contract with Benton, including the price and nature of the work, and the purchase of the supplies and materials necessary for the completion of the project. The record before the Board demonstrates that the Petitioner negotiated the contract with Benton without any input from the Complainant, and we find the Complainant’s testimony credible that the Petitioner directed him to charge materials and supplies for the project to the Petitioner’s accounts at various local

suppliers. Where the Complainant's only expenditures from which he obtained a return were on his own labor, he cannot be said to have the type of opportunity for profit or loss that exists for an independent contractor (*Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d, 1050-51 [5<sup>th</sup> Cir. 1987] [internal citations omitted]).

Additionally, there is no evidence to suggest that the Complainant was truly in business for himself at any time. He was not incorporated or otherwise registered with the Secretary of State as a business entity, he was not insured, and he was not a licensed contractor. The Petitioner on the other hand was an incorporated business entity presumably licensed and insured as evidenced by the fact that the electrical inspection which was completed during the time period that the Complainant was allegedly an independent contractor was performed under the Petitioner's license.

The source of both the Complainant's and the Petitioner's income for work performed on the Benton project was the contract between the Petitioner and Benton. We find that the Complainant was economically dependent on the terms of that contract and that the Complainant had no role in its formation. This is a clear indication of an employment relationship.

Factor 3: The degree of skill and independent initiative required to perform the work

While we do not doubt that the Complainant is a capable carpenter with some years of experience, his work on the Benton project before and after September 30, 2001 did not require any degree of independent initiative. As discussed above, there is no evidence before the Board that the Complainant was operating his own business. The record shows that the Petitioner and Diane Benton determined what work was to be done and the price for that work, and any initiative that the Complainant might have exercised was limited by the original contract. The Petitioner essentially explained to the Complainant what work needed to be done, and the Complainant did it. This is not the type of skill and independent initiative required of a bona fide independent contractor.

Factor 4: The permanence or duration of the working relationship

The Petitioner employed the Complainant for several months prior to the date of his termination on September 30, 2001, and then continued to employ him on the Benton project for work that was beyond the scope of the subcontract until the project was completed in December 2001. Although the duration of the working relationship was relatively short, the evidence suggests that the Petitioner only terminated the Complainant on September 30, 2001 because he could not afford to keep him on the payroll. Ultimately the employment relationship only ended because the Benton project was completed and the Petitioner no longer had any additional work for the Complainant.

Factor 5: The extent to which the work is an integral part of the employer's business

The Petitioner is a construction company. It is self evident that home renovation projects such as the Benton project are integral to a construction contractor's business. The work performed by the Complainant on the Benton project was essential to the completion of the contract between the Petitioner and Benton.

We find that based on the totality of the circumstances the Complainant was dependent on the Petitioner's business for the opportunity to render service (*see Superior Care*, 840 F.2d at 1059). Accordingly, an employment relationship existed between the Petitioner and the Complainant at least in so much as the sheetrocking, taping and painting work until the completion of the Benton project and the Petitioner is liable for the unpaid wages under Article 6 of the Labor Law.

#### CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Order additionally assessed a civil penalty, in the amount \$615.00. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Order is proper and reasonable in all respects

#### INTEREST

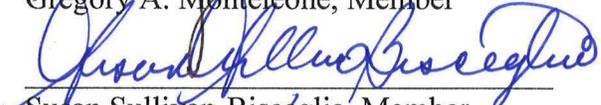
Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date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

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

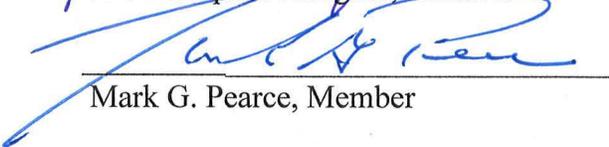
1. The Order to Comply with Article 19 of the Labor Law, dated April 21, 2006, under review herein, is affirmed; and
2. The Petition for Review be and the same hereby is, denied.

  
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Anne B. Stevason, Chairman

  
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Gregory A. Monteleone, Member

  
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Susan Sullivan-Bisceglia, Member

  
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J. Christopher Meagher, Member

  
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Mark G. Pearce, Member

Dated and signed in the Office of the  
Industrial Board of Appeals, at New  
York, New York, on February 27, 2008.

Filed in the Office of the Industrial  
Board of Appeals, at Albany, New  
York, on February 29, 2008.

DAR