

**OLGA WEISS, IWONA WEISS AND COLOR & CUT BEAUTY
SALON, INC.**

Docket No. PR 08-076

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In the Matter of the Petition of:	:
	:
OLGA WEISS, IWONA WEISS and COLOR & CUT BEAUTY SALON, INC.,	:
	:
Petitioners	:
	:
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law, dated April 4, 2008,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----X	

DOCKET NO. PR 08-076

RESOLUTION OF DECISION

APPEARANCES

Stephen D. Hans & Associates P.C., Nils C. Shillito of Counsel, for Petitioner.

Maria L. Colavito, Counsel, New York State Department of Labor, Benjamin A. Shaw of Counsel, for Respondent, Commissioner of Labor.

WITNESSES

Olga Weiss, Iwona Weiss, and Czeslaw Weiss for Petitioners; Ewa Cebula, Magdalena Cebula, and Vincent Hammond, Senior Labor Standards Investigator for Respondent.

WHEREAS:

A Petition for review in the above-named case was received by the Industrial Board of Appeals (Board) on June 3, 2008. Petitioners Olga Weiss, Iwona Weiss and Color & Cut Beauty Salon, Inc. (together, Petitioners) seek to vacate an Order to Comply with Article 19 of the Labor Law that the Respondent Commissioner of Labor (Commissioner) issued against Petitioners on April 4, 2008.

The Order directs Petitioners to pay to the Commissioner unpaid wages owed employee Ewa Cebulla (Claimant) in the amount of \$6,743.06, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of \$4,853.52, and a civil penalty in the amount of \$6,743.00, for a total amount due of \$18,339.58.

The Petition alleges that the wages, interest, and penalty were improperly assessed because the Claimant was never employed by Petitioners during the period of the claim. Alternatively, the Petition asserts that even if some or all of the wages were properly assessed, the civil penalty is nonetheless unreasonably high given the small size and brief period of operation of Petitioners' business; the low gravity of the violation; Petitioners' good faith in attempting to comply with the Labor Law regarding payment of wages and recordkeeping; and the absence of any prior violations by Petitioners.

Counsel for the Commissioner filed an Answer, denying its material allegations, and interposing as affirmative defenses that the Petition fails to establish that the Claimant was not employed by the Petitioners or that the wages, interest, and civil penalty were not properly assessed by the Order.

Upon notice to the parties, a hearing was held on July 7, 2009 before J. Christopher Meagher, Esq., Member of the Board and the Board's designated hearing officer in this case. Petitioners submitted evidence at the hearing, without objection from the Commissioner, supporting the additional claim that Petitioner Iwona Weiss was not properly named as an employer in the Order. After hearing the testimony of the Claimant, it was also acknowledged by the Commissioner that an error had been made in the calculation of wages owed and a recalculation would be submitted to reflect the Claimant's testimony. The Commissioner recalculated the wages to be \$4,018.50 and Petitioners agreed in their post-hearing brief that such amount is an accurate representation of the wages that would be due if the wage portion of the Order is upheld. Accordingly, both parties agreed in their post-hearing briefs that: (1) the issues include whether Petitioner Iwona Weiss was properly named as an employer in the Order, and; (2) the wages that would be due the Claimant if the Order is upheld should be modified to \$4,018.50.

Each party was afforded full opportunity at the hearing and in post-hearing briefs to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues. A Polish translator provided by the Board translated the proceedings for the benefit of any Polish speaking witnesses.

SUMMARY OF EVIDENCE

Petitioner Olga Weiss (Olga W.) is the owner of Petitioner Color & Cut Beauty Salon, Inc. (Salon), a beauty salon located at 186 Nassau Avenue, Brooklyn, New York that operated from April to October, 2003. Petitioner Iwona Weiss (Iwona W.) and her husband Czeslaw Weiss (Czeslaw W.) are Olga W.'s mother and father.

Testimony of Ewa Cebulla

Claimant testified that on March 24, 2004 she filed a claim against the Salon with the Department of Labor (DOL) for unpaid wages, including overtime wages, accrued during the period May 1, 2003 to October 4, 2003. The claim stated that Claimant had been employed by the Salon as an assistant manager and receptionist during the claim period at

the rate of \$250 per week and her last day of employment was October 4, 2003. The claim listed Olga W. as the owner of the Salon and Iwona W. as its manager.

Claimant testified that she had known the Weiss family for about ten years, as Iwona and Czeslaw W. were friends of Claimant's mother and stepfather. Claimant said her parents introduced her to Olga W. and that she and Olga W. went to the same school and became friends. Claimant submitted two photographs taken of the Weiss family attending a birthday party for her mother at Claimant's house in 2001 or 2002. In the first photo, Claimant identified Iwona W. sitting on a couch next to Claimant's stepfather, Richard Sadowski. In the second, Claimant identified Czeslaw W. sitting next to Mr. Sadowski. Claimant's mother and Olga W. are also in the photos.

Claimant testified that at a meeting held with her mother and Iwona W. in early May, 2003, Iwona W. hired her to work as a receptionist at the Salon on Thursdays, Fridays, and Saturdays from 10:00 AM to 8:00 PM at the rate of \$250 per week. After two weeks, Iwona W. increased Claimant's hours to six days per week but with no increase in pay. Claimant testified that she thereafter worked as a receptionist at the Salon from May, 2003 to October 4, 2003, when she quit after the Salon was sold.

Claimant testified that Olga W. was the owner of the Salon but was only there sporadically and was not involved in the operation of the business. The Salon was managed on a day to day basis by Iwona W., who was present when Claimant worked and directed her job duties. These duties included answering phones; scheduling appointments; receiving money from customers; logging in payments; providing manicures; filling out release forms for tanning clients; tracking clients on index cards; cleaning the work stations and tanning beds; distributing advertising fliers and job applications; translating for Polish speaking clients and employees; heating the tanning wax; and providing refreshments for customers. On occasion, Iwona W. asked Claimant to pick up the keys from her and open the Salon in the morning. Iwona W. also requested that Claimant not leave the Salon during the workday so that the other employees would not have to answer phones or go into the cash drawer. Claimant therefore took her meals and breaks in the Salon and did not leave the Salon other than to drop off towels to the laundry or pick up water and coffee for the customers,

Claimant identified seven other employees who worked at the Salon during her employ and described their specific job duties, which included hairstyling, manicures, pedicures, waxing, facials, and massages. The Salon opened at 9:00 or 10:00 AM and closed at 8:00 or 9:00 PM, depending on whether a hairstylist named Ella, who had lots of customers, had early or late appointments. Asked to describe what were the times of day that the Salon was busiest, Claimant stated, "In the beginning it was busy all day. Towards the end, when Ella got fired, a lot of customers did not come, and then we hired another girl and it picked up again, and then it went back down."

Claimant testified that Iwona W. paid her a \$250 check for her first week of work and lesser weekly cash payments thereafter until August, 2007, when Iwona W. stopped paying Claimant altogether. Claimant said she continued working without receiving her full

wages because the families were friends and Iwona W. promised that she would pay her what was owed once the Salon was sold.

On cross examination, Claimant stated that the Salon's bank told her she could request a copy of the \$250 salary check Iwona W. had paid her but that she did not take steps to do so. Claimant also said she kept a time sheet of her hours worked but was unable to retrieve it from storage and did not bring it to the hearing. Claimant acknowledged that she thought these documents would be important for this proceeding.

Testimony of Magdalena Cebulla

Magdalena Cebulla (Magdalena C.) is the Claimant's sister. She testified that she visited the Salon two to three times per week during the claim period and observed her sister answering the phone, cleaning tanning beds, cleaning up after haircuts, and providing manicures. Iwona W. was at the Salon on most of these occasions and Olga W. was frequently there. Magdalena C. said that it was her belief that Iwona W. was the owner of the Salon, not Olga W.

Testimony of Vincent Hammond

Senior Labor Standards Investigator Vincent Hammond (Hammond) testified concerning DOL's investigation of the claim.

The investigative file revealed that DOL served Petitioners a Notice of Violation and preliminary Recapitulation of \$6,743.06 in wages owed the Claimant on November 8, 2004. By letter dated November 16, 2004, an attorney disputed the claim on behalf of Petitioners and requested a District Meeting to discuss DOL's investigation because "the [C]laimant was never an employee of the business nor did either OLGA or IWANA employ her."

On August 2, 2005 DOL issued Petitioners and their attorney notice to attend a compliance conference on August 25, 2005 where the claim might be resolved. The notice further advised Petitioners to bring all payroll records for the Claimant for the period May 1, 2003 to October 1, 2003. The file revealed that Petitioners failed to appear at the conference. A report summarizing the conference stated that the hearing officer questioned the Claimant and the investigator as to the merits of the case and recommended that an Order to Comply be issued for \$6,743.06 in back wages, together with 16 % interest and a 100 % penalty.

Hammond testified that as a senior investigator he reviewed the case and prepared it for issuance of an Order to Comply. The file revealed that Petitioner did not submit any documentation to DOL during the course of its investigation regarding the hours worked or wages paid the Claimant. The wage calculations were based solely on the information provided by the Claimant. Based on DOL's investigation, on January 11, 2008 Hammond recommended that an Order to Comply be issued for \$6,743.06 in back wages, together with a 100 % per cent penalty.

In support of the penalty, Hammond filled out an investigative report titled "Background Information – Imposition of Civil Penalty" that provides information 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. As to "Good Faith of the Employer", the report stated that the employer was not generally cooperative as it "failed to provide payroll records and failed to appear at a scheduled Compliance Conference." Under the section titled "Recommendations", the report referenced the statutory language of Labor Law § 218 relating to civil penalties to support Hammond's recommendation of a 100% penalty. Hammond testified that the factors upon which the penalty was based were that a compliance conference was scheduled in August, 2005 at which the Claimant and Petitioners were asked to appear and give testimony. The Claimant did appear, and the Petitioners did not, and on the recommendation of the hearing officer at the conference, interest of 16% and a 100% penalty were assessed.

Based on DOL's investigation and Hammond's recommendation, the Commissioner issued Petitioners the Order under review on April 4, 2008.

Testimony of Olga Weiss

Olga W. testified that she was the sole owner and operator of the Salon. She was the only person responsible for opening and closing the Salon, answering phones, paying bills, and hiring, supervising, and paying the employees. Olga W. denied that Iwona W. was a supervisor or manager of the Salon and denied that the Claimant was an assistant manager, receptionist, or had ever been hired or employed in any capacity.

Olga W. testified that the Salon operated from approximately April to October, 2003 and provided only hairdressing and tanning services. The only employees were Olga W. and two or three hairdressers she hired. Olga W. testified that, while she intended to have a set schedule when the Salon opened, she could not maintain one once the business got running because few customers ever came in and the hairdressers often did not show up for work. Olga W. therefore opened the Salon for only a few hours two or three times a week, typically opening at 10:00 AM and closing between 12:00 and 2:00 PM because customers and employees did not come in. Olga W. said she did not remember the days of the week the Salon was open or the names of the hairdressers she hired, and did not know why the employees did not appear for work on time.

Olga W. testified that she sold the Salon in the fall of 2003 because it was not making any money and had never turned a profit. Petitioners submitted a quarterly New York State sales tax return for the period June 1, 2003 to August 31, 2003, signed by Olga W. as President, listing no gross sales and services for the quarter and no sales taxes due. Petitioners also submitted a twenty three page contract of sale for the Salon, dated October 10, 2005, signed by Olga W. and the purchaser for the purchase price of \$85,000. The price was allocated between \$30,000 for "equipment, contracts, rolling stock, inventory and other personal property" and \$55,000 for "goodwill and remaining assets." Olga W. testified that she did not remember when the Salon actually ceased operations; who set the purchase price for the sale; or if she was represented by an attorney in the transaction. She said she did not

know if anyone negotiated the sale or if she ever had a conversation with the purchaser regarding the sale.

Olga W. testified that the Salon was the first business she had ever owned or operated and she had no prior formal business training. She had not been assessed with violations for unpaid wages by DOL before this case. Olga W. testified that she did not maintain records showing the hours worked and pay received by the Salon's employees because they were not there that frequently and there was no money coming in. She said she was also unaware that she had to keep such records.

Olga W. testified that the Claimant was a friend who occasionally visited the Salon in the afternoons to "hang out" and then left with her when the Salon closed. She said she did not remember when or why their friendship ended. Olga W. denied that the Salon was open during the hours asserted by the Claimant.

On cross examination, Olga W. testified that she could not recall how much money she paid to open the Salon; how much rent the Salon paid; whether anyone received facials at the Salon; whether she used a ledger book to keep track of the wages she paid the employees; whether an accountant or an attorney prepared the Salon's tax return; whether anyone helped her negotiate the sale of the Salon; or how the \$85,000 purchase price was arrived at. She did not recall how much she borrowed from her mother to open the Salon or how much she repaid her when it was sold. Olga W. said that she did not bring any documentation to the hearing regarding her purchase of the Salon; the money she borrowed and repaid her mother; the work schedule of the Salon; the schedule the Salon was open; or the employment applications of the employees. Olga W. testified that the employees were paid in cash but were not provided pay stubs.

Olga W. testified that she did not know what "goodwill" in the contract of sale meant and did not remember how the allocation of \$55,000 of the \$85,000 purchase price to "goodwill and remaining assets" was arrived at. She also did not recall what was done to advertise the opening of the Salon. Asked when the business went bad, Olga W. testified that, "It was bad from the beginning, but I would say it got worse after a month or so."

Testimony of Iwona Weiss

Iwona W. testified that the Salon was owned by her daughter, Olga W., and was open for a few months between the spring and September or October. She could not recall exactly when the Salon began or ceased operations; whether it had a set schedule of operation; the days it was open; how many employees worked there; or the names of the hairdressers who were employed.

Iwona W. testified that she visited her daughter at the Salon but did not recall how often or how long she stayed. On these occasions, there was no one else working at the Salon other than her daughter and one or two hairdressers. Sometimes there were no hairdressers present at all, as the Salon was not a busy place. Iwona W. also said that she would sometimes call the Salon and that her daughter answered the phone.

Iwona W. testified that her daughter was the sole operator of the Salon and was solely responsible for opening and closing the business and overseeing the hairdressers. Iwona W. denied that she was ever employed by the Salon or was ever involved in its operation and denied that she ever paid the Salon's bills or hired, fired, or paid any of its employees.

Iwona W. testified that she saw the Claimant visit her daughter at the Salon and the two would then leave together. She believed they were friends but did not know how her daughter knew the Claimant.

On cross examination, Iwona W. was shown the picture where the Claimant identified her sitting next to Claimant's stepfather at a family birthday party at Claimant's house. Iwona W. said she was present in the photo but did not recognize any of the other persons or recall where the picture was taken. Iwona W. acknowledged that she lent her daughter money to start the Salon but did not recall the amount or how much she was repaid when the Salon was sold. She did not bring any documentation regarding the transaction to the hearing.

Testimony of Czeslaw Weiss

Czeslaw W. testified that the Salon was owned by his daughter, Olga W., and was open for a few months between April and the fall of 2003. He did not know whether the Salon had a set schedule of operation; the days it was open; or how many employees there were.

Czeslaw W. testified that he visited his daughter at the Salon two or three times a week during the time it was open but did not recall how long he stayed. On these occasions, he observed Olga W. sitting in a chair at the desk and there were no customers. Czeslaw W. said he did not recall whether there were any other employees working at the time or whether his wife, Iwona W., was also there.

Czeslaw W. testified that he knew that Olga W. opened and closed the Salon because she lived at home with her parents at the time and always carried the keys to the Salon with her. He said he did not think Olga W. would give them to anyone else because she was the person responsible for the business. Czeslaw W. testified that his wife lived with him at the time, was not working, and he knew that she was not employed by the Salon or involved in its operation.

Czeslaw W. testified that he knew the Claimant because he saw her walking together with his daughter on the street a few times. He described the relationship between his daughter and the Claimant as friends. He said he did not know if the Claimant was employed at the Salon because he did not see her there when he visited.

On cross examination, Czeslaw W. was shown both of the photographs where the Claimant had identified him and his wife sitting next to Claimant's stepfather, Richard Sadowski, at a birthday party for Claimant's mother at Claimant's house. Czeslaw W.

testified that he and his wife were present in the respective photos. He acknowledged that he knew Mr. Sadowski but that he could not recognize where the photos were taken.

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”]; *Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

It is therefore Petitioners’ burden to prove by a preponderance of the evidence the allegations in the Petition that the Order improperly determined that Claimant was employed by Petitioners during the period of the claim, that Petitioner Iwona W. was improperly named as an employer, and that the interest and penalty were improperly assessed.

B. Definition of Employment Under the Labor Law

“Employed” is broadly defined in Article 1 of the New York Labor Law as including “permitted or suffered to work” (Labor Law § 2 [7]). The New York statute mirrors the federal Fair Labor Standards Act (FLSA) which also defines “employ” to include “suffer or permit to work.” (29 U.S.C. § 203 [g]).

C. 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]). 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 under the federal statute:

“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]).

D. Recordkeeping Requirements

Labor Law §§ 195(4) and 661 require employers to maintain payroll records. Section 661 requires employers to make such records available to the Commissioner:

“Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time”

The Commissioner’s regulations at 12 NYCRR § 142-2.6 also provide in relevant part:

- “(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) wage rate;
 - (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
 - (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.”

E. DOL’s Calculation of Wages in the Absence of Adequate Employer Records.

An employer’s failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint’s assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid (Labor Law § 196-a.; *Angello v Natl. Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]). As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989], “[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner’s calculations to the employer.”

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 680, 687-688 [1949], superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

“[W]here the employer’s records are inaccurate or inadequate....[t]he solution...is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result 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.”

Citing to *Anderson v Mt. Clemens*, the Appellate Division in *Mid-Hudson Pam Corp. v Hartnett*, *supra*, agreed:

“The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee.... Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here.”

F. 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

Claimant Was “Employed” During the Period of the Claim

We find that the record evidence establishes that Petitioners “employed” the Claimant during the period of the claim and therefore affirm the Order, as modified by the Commissioner’s recalculation.

The Labor Law broadly defines “employed” as including “permitted or suffered to work” (Labor Law § 2 [7]). We find the Claimant’s testimony that she was hired by Iwona W. and performed “work” as a receptionist under her direction and control at the Salon during the period of the claim credible and corroborated by other evidence in the record (*Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 331-37 [SDNY 2005] [employee testimony concerning wages and hours credited where credible and corroborated by other evidence]).

Claimant testified that Iwona W. hired her to work as a receptionist at the Salon in early May, 2003 at the rate of \$250 per week; that the Salon was owned by Olga W. but was managed on a day to day basis by Iwona W.; and that Claimant performed receptionist and other duties at the Salon under Iwona W.’s direction and control from May to October, 2003. We credit Claimant’s testimony as it was credible, specific, and corroborated by other evidence in the record.

In contrast to Petitioners’ witnesses, Claimant was the only witness at the hearing to describe in detail the day to day operation of the Salon. She identified seven other employees who worked at the Salon during her employ and described their specific job duties, which included hairstyling, manicures, pedicures, waxing, facials, and massages. She described her own job duties, which included answering phones; scheduling appointments; receiving money from customers; logging in payments; providing manicures;

filling out release forms for tanning clients; tracking clients on index cards; cleaning the work stations and tanning beds; distributing advertising fliers and job applications; translating for Polish speaking clients and employees; heating the tanning wax; and providing refreshments for customers. She described the daily hours and business volume of the Salon, which was open and busy from 9:00 or 10:00 AM to 8:00 or 9:00 PM, depending on the appointment schedule and employment of one of the hairstylists who had a lot of customers. Claimant's testimony concerning the operation of the business and her employment at the Salon was specific and corroborated by the testimony of her sister, Magdalena C., who credibly testified that she regularly visited Claimant at the Salon and observed her answering the phone, cleaning tanning beds, cleaning up after haircuts, and providing manicures. According to Magdalena C., Iwona W. was at the Salon on most of these occasions.

Petitioners argue that Claimant's credibility was undermined because she failed to produce other former employees to corroborate her testimony that she was employed and failed to produce a \$250 check she was paid or the time sheet of hours she kept. The Board has previously held that an employee's testimony may establish an employment relationship where credible and corroborated by other evidence in the record (*Matter of Petition of Steve H. Sabba and Taxpro Financial Network Inc.*, PR 08-079 at pp. 10-13 [March 24, 2010]). In the absence of contemporaneous payroll records for a petitioner's employees, the Commissioner's determination of wages owed based solely on employee statements also constitutes the "best available evidence" and may be deemed valid and reasonable (*Mid-Hudson Pam Corp v Hartnett*, *supra* at 821). Petitioners' arguments that Claimant's testimony should not be credited because she did not produce other employee witnesses or documentary proof of her wages and hours is insufficient to satisfy Petitioners' burden of proof to negate the Commissioner's finding.

We do not credit the testimony of Petitioners' witnesses asserting that Olga W. was sole operator of the Salon; denying that Iwona W. was its manager; and denying that Claimant was employed during the period of the claim. The testimony of Olga, Iwona, and Czeslaw W. was lacking in recollection, evasive, and not credible about relevant facts concerning the operation and sale of the Salon and Petitioners' relationship to the Claimant and her family. It was unsupported by contemporaneous payroll records showing who was employed during the claim period and who was not. Petitioners' proof was thereby insufficient to overcome the Claimant's specific and credible testimony that she was employed and worked under Iwona W.'s direction and control during the period of the claim.

Olga W. did not know or recall how much money she paid and how much she borrowed from her mother to open the Salon; how much the Salon paid in rent; whether she utilized an accountant or attorney to prepare the Salon's tax return; what was done to advertize the opening of the Salon; the days the Salon was open; the names of the hairdressers she hired; whether the Salon provided services like facials; and whether she kept track of employee wages in a ledger book. As to the sale, Olga W. did not know or recall when the Salon ceased operations; whether anyone helped her negotiate the sale; whether she was represented by an attorney; whether she had a conversation with the

purchaser regarding the sale; how the purchase price was arrived at; how much money she repaid her mother; how the purchase price was broken down; or the meaning of "goodwill" in the contract of sale. She did not produce documentation regarding her purchase of the Salon; the money she borrowed and repaid her mother; the work schedule of the Salon; or the schedule the Salon was open.

Similarly, neither Iwona nor Czeslaw W. could provide relevant information about the day to day operation of the Salon, such as the days it was open, its schedule of operation, or the number or names of its employees. Iwona W. likewise said she did not recall how much money she lent her daughter to open the Salon or how much she was repaid when it was sold. She did not provide any documentation regarding the loan or its satisfaction.

We do not find it credible that Olga W. -- if she was sole operator of the Salon -- could fail to recall relevant facts concerning its schedule, services, and employees; the purchase price of the business; how much rent the Salon paid; whether accountants or attorneys were used in preparing the tax return or transacting the sale; who negotiated the sale; or any information about how the sale price was arrived at or broken down. We do not credit Olga and Iwona W.'s lack of recollection regarding the loan between the parties, a loan or investment to start the business that the parties would be unlikely to forget. Similarly, we do not find the witnesses' testimony that the Salon had few customers, employees, and sporadic hours from the beginning credible. We credit Claimant's testimony concerning the number of employees and volume of business of the Salon. Petitioners' assertions negating the business are belied by the contract of sale which allocated the majority of the \$85,000 purchase price, i.e. \$55,000, not to fixed assets but to "goodwill and other assets". Last, the testimony of Iwona and Czeslaw W. as to their relationship with Claimant and her family was disingenuous. The photographs submitted by the Claimant clearly show the witnesses present at an intimate family gathering at Claimant's house. Yet Iwona W. said she did not recognize anyone else in the pictures and did not know how her daughter knew the Claimant. Both witnesses claimed that they did not recognize where the photos were taken.

The lack of recall and candor of Petitioners' witnesses concerning the operation and finances of the Salon and their relationship with the Claimant and her family renders their testimony concerning Petitioners' operation of the Salon and employment of the Claimant not credible.

We also reject Petitioners' assertion that Claimant was never employed because Petitioners failed to provide any contemporaneous payroll records for their employees during the period of the claim. Such records would be relevant circumstantial evidence of who was employed during the claim period and who was not. Olga W. said she did not maintain payroll records because the employees were not there that frequently, there was no money coming in, and she was unaware that she had to keep such records. We reject this explanation as self serving. In the absence of contemporaneous payroll records, none of Petitioners' witnesses could provide any evidence of who the Salon employed; how long it employed them; what the employees were paid; the hours worked by the employees; or even the hours that the business was open. In the absence of credible records or testimony

concerning their operation of the Salon, Petitioners have failed to meet their burden to establish that they did not employ the Claimant during the period of the claim.

We therefore credit Claimant's testimony that Iwona W. managed the business on a day to day basis and that Claimant was hired by Iwona W. and worked under her direction and control during the period of the claim. We find that Claimant was thereby "employed" by Petitioners under the Labor Law.

Petitioner Iwona W. Is an "Employer" Under the Labor Law

Given our finding above, the record evidence amply demonstrates that Iwona W. is an "employer" under the "economic reality" test.

It is well settled that an employee may have more than one employer, including individuals who as a matter of "economic reality" possess the power to control the employment of the workers in question (*Herman v RSR Sec. Servs. Ltd.*, 172 F.3d at 139 [citing "economic reality" test to find that individuals are employers under the FLSA]). The Board has repeatedly found individuals to be employers, along with a corporate or business entity, if they possess the requisite authority over employees (*Matter of Franbilt, Inc.*, PR 07-109 [July 30, 2008] [company shareholder owner an employer under "economic reality" test]; *Matter of Sam Hoffman*, PR 08-115 [November 17, 2009] [shareholder owner an employer when such authority exists, even if restricted, delegated, or exercised only occasionally]). If Petitioner Iwona W. possessed sufficient authority over the Claimant's employment under this test, with no one factor dispositive, she was an employer under the Labor Law (*Herman v RSR Sec. Servs. Ltd.* at 172 F.3d at 139).

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 (*Herman v RSR Sec. Servs. Ltd.*, *supra* at 139).

We find that in early May, 2003 Claimant was hired by Iwona W. to work as a receptionist at the Salon on Thursdays, Fridays, and Saturdays at the rate of \$250 per week. After two weeks, Iwona W. increased Claimant's hours to six days per week but without an increase in pay. Claimant thereafter performed receptionist and other duties under Iwona W.'s direction and control until October 4, 2003. During such period, Iwona W. exercised authority over Claimant's work schedule, including the days Claimant was to report to work and Claimant's meals and breaks during the workday. Iwona W. paid Claimant one paycheck of \$250 and lesser cash payments thereafter until August, 2003, when Iwona W. stopped paying Claimant altogether.

Iwona W. possessed the power to hire and fire the Claimant, to supervise and control the Claimant's work schedule and conditions of employment, and to determine the rate and method of payment for Claimant's work. While Petitioners did not maintain records of employment, Petitioners were required by law to maintain such records and as the Salon's

manager Iwona W. clearly had authority to do so. As a matter of “economic reality”, Iwona W. possessed the power to control the Claimant’s employment and is therefore an “employer” under the Labor Law.

The Order Is Modified to Reflect the Commissioner’s Recalculation of Wages Owed the Claimant

The parties agree that the Commissioner’s recalculation is an accurate representation of the wages due the Claimant if the Order is upheld. We therefore modify the wages to be paid the Claimant to \$4,018.50.

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.”

We therefore modify the Order to proportionally reduce the interest to be paid the Claimant on the amount of \$4,018.50 in wages owed.

Civil Penalty

Petitioners argue that the Commissioner’s assessment of a 100% civil penalty is excessive and unreasonable and should be substantially reduced because:(1) the Salon was a small business with few employees and was only open for a few months; (2) the violation deals with a single employee and a relatively small amount of money; (3) the Salon’s owner, Olga W., was a first time business owner with no prior business training and was unaware of her obligation to maintain payroll records, and; (4) this is Petitioners’ first violation of the Labor Law for failure to pay wages.

The Commissioner argues that the percentage of civil penalty was reasonable because the Petitioners ran a small to medium sized business; failed to pay wages and minimum wages to the Claimant; failed to provide records regarding the operation of the Salon during the investigation; and requested a district meeting to present evidence for which they chose not to appear. At the hearing, Petitioners again failed to produce payroll records or provide credible evidence regarding the day to day operation of the Salon. The Commissioner argues that, at minimum, the circumstances are the same as they were at the time the penalty recommendation was made and the 100% civil penalty should be affirmed. Alternatively, the Commissioner asserts that the Petitioners have willfully failed to pay wages and have attempted to cover up such failure by asserting a scheme of ownership that defies credibility. The Commissioner urges that such conduct warrants an upward modification of the penalty to 200%.

We find that the considerations required to be made by the Commissioner in assessing the 100% civil penalty in the Order to be reasonable in all respects. We decline to consider the Commissioner's request to modify the penalty upwards, since the Petitioner was not properly given notice of such issue by the Order that is the subject of this appeal.

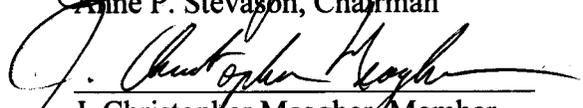
While this may be Petitioners' first violation of the statute, the Commissioner nonetheless reasonably determined that the size of the business and Petitioners' refusal to pay Claimant wages totaling over \$4,000 was a violation warranting the 100% penalty. Most important, DOL investigator Hammond credibly testified that the penalty was based on Petitioners' lack of cooperation in the investigation, demonstrated by its failure to provide any payroll records whatsoever during the investigation and its failure to appear at a compliance conference to resolve the case, a meeting that Petitioners had themselves requested. We find the Commissioner's determination to be a reasonable application of the penalty criteria of the statute. Indeed, Petitioners false assertions at the hearing concerning the operation of the Salon and Iwona W.'s role in managing the business and directing Claimant's employment illustrate Petitioners bad faith toward paying its employee the wages due her for the period in question.

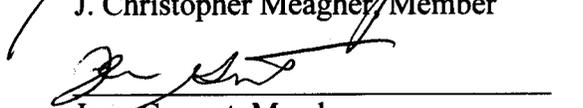
We therefore affirm the 100 % civil penalty assessed by the Commissioner and modify the Order to proportionally reduce such penalty to be paid on the amount of \$4,018.50 in wages owed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

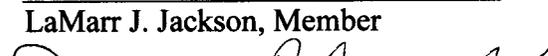
1. The Order is modified to reduce the amount of wages due and owing to \$4,018.50 and to reduce the interest and civil penalty on such amount proportionally, and in all other respects is affirmed; and
2. The Petition for review be and the same hereby is, denied


 Anne P. Stevason, Chairman


 J. Christopher Meagher, Member


 Jean Grumet, Member

Dated and signed in the Office
 of the Industrial Board of Appeals
 at New York, New York, on
 June 23, 2010.


 LaMarr J. Jackson, Member


 Jeffrey R. Cassidy, Member

We find that the considerations required to be made by the Commissioner in assessing the 100% civil penalty in the Order to be reasonable in all respects. We decline to consider the Commissioner's request to modify the penalty upwards, since the Petitioner was not properly given notice of such issue by the Order that is the subject of this appeal.

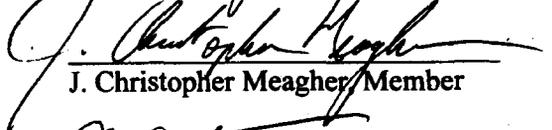
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We therefore affirm the 100 % civil penalty assessed by the Commissioner and modify the Order to proportionally reduce such penalty to be paid on the amount of \$4,018.50 in wages owed.

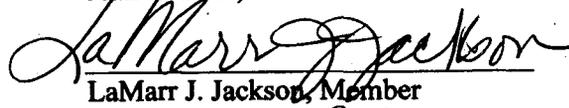
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

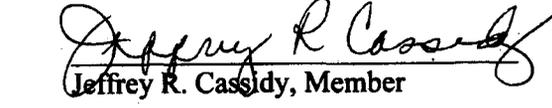
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2. The Petition for review be and the same hereby is, denied


Anne P. Stevason, Chairman


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Jean Crumet, Member


LaMarr J. Jackson, Member


Jeffrey R. Cassidy, Member

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