

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
ROBERT H. MINKEL and MILLWORK	:
DISTRIBUTORS, INC.,	:
	:
Petitioners,	:
	:
To Review Under Section 101 of the Labor Law:	:
Two Orders to Comply with Article 6 of the Labor	:
Law, both dated October 1, 2008,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----X	

DOCKET NO. PR 08-158

RESOLUTION OF DECISION

APPEARANCES

Chiacchia & Fleming, LLP, Andrew P. Fleming of Counsel, for Petitioners.

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

WITNESSES

David R. Hollfelder and Robert H. Minkel for Petitioners; David R. Hollfelder, Harry D. Louth, and Andrew Cahill for Respondent.

WHEREAS:

A Petition for review in the above-named case was received by the Industrial Board of Appeals (Board) on October 27, 2008. Petitioners Robert H. Minkel and Millwork Distributors, Inc. (together, Petitioners) sought to vacate two Orders to Comply with Article 6 of the Labor Law that the Commissioner of Labor (Commissioner) issued against Petitioners on October 1, 2008.

The first Order (Wage Order) directs Petitioners to pay to the Commissioner \$9,972.36 in unpaid wages owed employees David R. Hollfelder and Harry D. Louth (together, Claimants), with interest continuing thereon at the rate of 16% to the date of the

Order in the amount of \$2,599.69, and a 25 % civil penalty in the amount of \$2,493.00, for a total amount due of \$15,065.05 The second Order (Wage Supplements Order) directs Petitioners to pay to the Commissioner \$425.60 in unpaid wage supplements owed Claimants, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of \$109.40, and a 25% civil penalty in the amount of \$106.00, for a total amount due of \$641.00.

The Petition challenged the Orders as unreasonable on various grounds, including that Petitioner Minkel was not the employer of the Claimants in this case. Counsel for the Commissioner filed a motion pursuant to Board Rules of Procedure and Practice (Rules) § 65.13(b), opposed by Petitioners' counsel, requesting that the Board direct Petitioners to file an Amended Petition. By decision dated December 23, 2008, the Board granted the Commissioner's motion and directed Petitioners to file an Amended Petition particularizing the grounds upon which Petitioners alleged that the Orders were invalid or unreasonable, including those upon which they asserted that Petitioner Minkel was not the Claimants' employer.

Petitioners thereafter filed an Amended Petition on January 27, 2009 particularizing their grounds for relief. Among other allegations, Petitioners alleged that "[Petitioner] Minkel, an individual, was never the employer of the employees in this case, nor did he have any contractual relationship with them." Petitioners further asserted that Claimants provided services only to Petitioner Millwork Distributors, Inc., as independent contractors, and any claim "against Mr. Minkel personally should be dismissed as he never personally had any work or business relationship with the persons involved and making claims."

Counsel for the Commissioner filed an Answer to the Amended Petition, denying its material allegations, and interposing as affirmative defenses that the Amended Petition contained insufficient and conclusory allegations and failed to establish that Petitioner Minkel was not properly named as an employer. As to the latter affirmative defense, the Commissioner cited legal authority and facts uncovered during the Department of Labor's (DOL) investigation of the case which was the basis for the Commissioner's finding that Petitioner Minkel was an employer under the Labor Law.

Upon notice to the parties, a hearing was held on June 5, 2009 before J. Christopher Meagher, Esq., Member of the Board and the Board's designated hearing officer in this case. At the outset of the hearing, Counsel for the Petitioners withdrew all other challenges to the Orders other than the assertion that Petitioner Minkel was not the Claimants' employer.

Counsel for the Commissioner moved to preclude proof on the question of Petitioner Minkel's status as an employer on the ground that the Amended Petition did not sufficiently raise the employer question, and argued that in light of Petitioners' withdrawal of all other issues, there were no outstanding issues for the Board's determination. The Hearing Officer denied the Commissioner's application and ruled that Petitioners had sufficiently pled the employer issue for the hearing to proceed. Accordingly, each party was afforded full opportunity at the hearing to present documentary evidence, to examine and cross-examine

witnesses, and to make statements relevant to the issue of whether Petitioner Minkel was properly named an employer in the Orders under review.

SUMMARY OF EVIDENCE

Petitioner Robert H. Minkel (Minkel) is the sole shareholder, owner, and Chief Executive Officer of Petitioner Millwork Distributors, Inc. (Millwork), a Hamburg, New York company that manufactured and sold interior door and trim packages for home construction. It is undisputed that Claimants were Millwork's employees during the time periods indicated in the Orders and that they earned the wages and expenses found due them.

Claimant David R. Hollfelder (Hollfelder) testified that on July 16, 2007 he filed claims against Millwork with DOL for unpaid wages and wage supplements accrued during the period January 1, 2006 to February 19, 2007. The claims stated that Millwork had employed Hollfelder as an outside sales representative from February, 2004 to February 19, 2007. Hollfelder listed Minkel as the owner and responsible person of the firm, the person who had hired him, and the person from whom he had demanded payment.

Hollfelder testified that he began employment with Millwork on February 4, 2004, when he met with Minkel and agreed to his offer of employment. Minkel was President of the company at the time. A "Letter of Understanding" between Millwork and Hollfelder, prepared by Minkel, memorialized the agreement. The agreement set Hollfelder's salary at \$750 per week and commission rate at 1% on collected funds after twelve months.

Hollfelder testified that he initially reported to Minkel and two other shareholder owners of the company. Minkel supervised Millwork's day to day financial operations, while the other owners had roles in sales and production. It is undisputed that Minkel bought out the other shareholders and has run the company exclusively since 2005. After Minkel became sole owner, Hollfelder reported only to Minkel throughout the remainder of his employment. There was no other person in a supervisory capacity between Minkel and Hollfelder. Whenever Hollfelder had questions concerning any aspect of his job -- i.e., production issues over shipping product or sales issues on Hollfelder's accounts -- he went to Minkel for guidance and direction. Minkel also reviewed the sales estimates that Hollfelder prepared for jobs bid by the company. When Hollfelder resigned in February, 2007, he addressed his resignation to Minkel and addressed his written demand for unpaid wages, commissions, and expenses to Minkel as the owner. Hollfelder testified that there was no other responsible person to go to. The expenses claimed included a reimbursement check that had been dishonored and remained unpaid. Minkel responded by letter, disputing that the company owed certain monies, but stated in a separate written note to Claimant "I will pay all of your commissions."

Hollfelder testified that after becoming sole owner, Minkel disseminated an Employee Handbook to him and the other employees. Minkel reviewed the Handbook with Hollfelder and had him sign a receipt acknowledging that he had received a copy and read

its contents. The receipt stated that if there was any policy or provision in the Handbook that Hollfelder did not understand, he would seek clarification from "Bob Minkel."

The Handbook makes numerous references to Minkel's supervision of Millwork's employees. It provides, *inter alia*, that: (1) attendance of all employees is recorded daily by the "Company Owner"; (2) a record of employee absenteeism and lateness is kept by the "Company Owner"; (3) confidential employment records for each employee are maintained by the "Company Owner"; (4) arrangements for time off should be made with the "Company Owner" to permit scheduling of work assignments based on availability of personnel; (5) employment is at will unless written agreement otherwise is made with the "Company Owner"; (6) all incidents of employee misconduct should be referred immediately to "Bob Minkel"; (7) employees may be terminated immediately for misconduct, but the "Company Owner" may discuss the problem and issue a written warning to the employee for corrective action; (8) employees are encouraged to bring problems and complaints to the Company's attention, and in most cases they may be resolved by a full and frank discussion with "Bob Minkel"; (9) when an employee decides to leave for any reason, "Bob Minkel" would like the opportunity to discuss the resignation before final action is taken; (10) special check payment arrangements are to be made with the "Company Owner"; (11) complaints of improper wage deductions are to be reported to the "Company Owner"; (12) any questions concerning conflicts of interest and acceptance of gifts should be addressed to "Bob Minkel"; (13) outside employment must be approved by "Bob Minkel"; and (14) the "Company Owner" will assist full-time employees who wish to enroll in health and dental plans when they are first employed.

On direct examination by Petitioners' attorney, Hollfelder acknowledged various writings that refer to his employment by Millwork, and not Minkel personally. These included the 2004 Memo of Understanding, Hollfelder's resignation and demand letter for unpaid wages, an attorney's letter demanding payment of Hollfelder's unpaid wages, and Hollfelder's letters to DOL concerning his claim. Hollfelder also testified that Minkel never personally promised to pay him dental benefits; the company vehicle he drove was registered in Millwork's name; he never received a paycheck or expense reimbursement check from any entity other than Millwork; and his sales estimates were always on Millwork letterhead.

Claimant Harry D. Louth (Louth) testified that on July 13, 2007 he filed claims against Millwork with DOL for unpaid wages and wage supplements accrued during the period July 25, 2005 to July 27, 2007. The claims stated that Louth had been employed as a sales representative by Millwork from July, 2005 to June 25, 2007. Claimant listed Minkel as the owner and responsible person, the person who had hired him, and the person from whom he had demanded payment.

Louth testified that Minkel hired him in 2005. He worked first as a driver and then became an outside sales representative. Louth had prior sales experience with another company, but when he moved into sales at Millwork, Minkel explained to him how the company's salesmen worked and how to canvass for new accounts. Louth testified that Minkel was his direct supervisor and there was no one else between himself and Minkel in a

supervisory capacity. Whenever Claimant had questions concerning his job duties or his paychecks, he went to Minkel.

Senior Labor Standards Investigator (SLSI) Andrew Cahill (Cahill) testified concerning DOL's investigation of Petitioners. Cahill testified that DOL's investigative file revealed that Petitioners initially disputed the claims on various grounds. Following dismissal of an involuntary bankruptcy petition filed against Millwork,¹ DOL held a Compliance Conference with Petitioners on August 29, 2008 to resolve the claims.² In a report summarizing the conference, DOL's investigator recommended that final Orders to Comply be issued against *both* Millwork and Minkel because: (1) Petitioners had refused settlement; and (2) the Claimants had indicated that Minkel was the owner, active in the day-to-day administration of the business, and was responsible for signing paychecks. DOL's investigative file in evidence shows that Claimants submitted to DOL Millwork's employee Handbook and other documents substantiating Minkel's day-to-day operation of the company and direction of Claimants' employment

Cahill testified that he approved the recommendation to name Minkel as an employer in the Orders, along with the corporate entity Millwork. In determining who is an employer in any investigation, he testified that DOL uses the definition "any person, corporation, or association employing anyone" and defines "employing" as "... anyone who is employed by an employer". Applying these criteria to the facts of the instant claims, Cahill approved the recommendation to name Minkel as an employer because: (1) both Claimants had indicated in their claims that Minkel was the person who had hired them, was responsible for the firm, and for payment; and (2) the Claimants identified Minkel as the individual who directed their work on a regular basis.

Based on DOL's investigation, the Compliance Conference report, and Cahill's approval of the recommendation to name Minkel as an employer, the Commissioner issued Petitioners the Orders under review on October 1, 2008.

Minkel testified on direct examination that from 1995 to 2005 he owned and ran Millwork with two other shareholders, each owning one third of the shares. In 2005, Minkel bought out the other shareholders and has run the company exclusively since that time. Minkel stated that the company is currently "dormant", however, and he is not currently employed.

Minkel testified that from the time he became sole owner he was Hollfelder's immediate supervisor. However, he never had any personal contract with either of the Claimants, and it was his understanding that the employer of all the company's employees, including himself, was Millwork. As examples of this understanding, Minkel stated that

¹ An involuntary petition for bankruptcy was filed against Millwork with the United States Bankruptcy Court for the Western District of New York in October, 2007. The petition was dismissed by the Court on February 7, 2008.

² Present at the conference were the two Claimants, Minkel, Petitioners' attorney, and SLSI Wilfredo Ruiz, who had conducted the investigation along with SLSI Mary Coleman.

employees did not receive a paycheck from anyone other than Millwork and that Millwork owned and insured the company vehicle that Hollfelder drove.

On cross examination, Minkel testified that the company Handbook, drafted after he became sole owner, governs the terms of employment of the company's employees. It was Minkel's expectation that the employees would be bound by it, including himself as owner. Minkel stated that the "Company Owner" referenced throughout the Handbook was himself; everything at the company ran according to the Handbook's terms; and no one else had authority to alter any of its provisions.

Minkel further testified that he was at the top of Millwork's supervisory structure, with no other supervisor between him and the Claimants. It was Minkel's responsibility to assure that paychecks were issued to the company's employees, and he set up the contract with a payroll service company to do so. Near the end of Louth's employment, however, the company paid Louth with a company check drawn from the company's checking account, not the payroll account. Minkel made the determination to issue the company check on this occasion and either he or his wife signed it. Finally, a company employee registered and insured the company vehicle that Hollfelder drove pursuant to Minkel's direction.

GOVERNING LAW

Standard of Review and Burden of Proof

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

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

It is therefore Petitioner Minkel's burden to prove by a preponderance of the evidence the allegations in the Amended Petition that the Orders improperly named him as an employer.

Definition of Employer under Article 6 of the Labor Law

"Employer" is defined in Article 6 of the Labor Law as including "any person, corporation, limited liability company or association employing any individual in any

occupation, industry, trade, business or service” (Labor Law § 190 [3]). “Employed includes permitted or suffered to work” (Labor Law § 2 [7]).

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines “employ” to include “suffer or permit to work” (29 U.S.C. § 203 [g]). It is well settled that “the test for determining whether an entity or person is an ‘employer’ under the New York Labor Law is the same as the test . . . for analyzing employer status under the Fair Labor Standards Act” (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

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

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

When applying the test “[n]o 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]).

FINDINGS

Petitioner Is an “Employer” Under the Labor Law

We find that the record evidence amply demonstrates that Petitioner Minkel was an “employer” under the “economic reality” test and affirm the Orders below. We confirm our interim decision directing Petitioners to file an amended petition and the Hearing Officer’s ruling denying the Commissioner’s application to preclude evidence on the issue of whether Minkel was Claimants’ employer.

Petitioners argue that since both Claimants’ contracts of “employment” were with the corporate entity Millwork, and not Minkel personally, the Commissioner is precluded from holding Minkel responsible as an “employer” for non-payment of wages and wage supplements. Petitioners note that all employees were paid from the company payroll and not by Minkel personally. They point to the numerous writings referencing the Claimants’

employment with Millwork as evidence that the Claimants themselves always recognized the company as their employer, and not its owner. Because all terms and conditions of employment were between the Claimants and the corporate entity Millwork, and not with Minkel, Petitioners argue that Minkel should not be deemed an employer in this case.

Petitioners' claim that employment by the corporate entity Millwork precludes employment by Minkel as an individual misconstrues the Labor Law. Article 6 of the Labor Law is broadly written to include not only corporations as defined "employer[s]" under the statute, but also "any person ...employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]) (emphasis added). The act of "employ[ing]" is also broadly written to mean "suffer[ed] or permit[ted] to work" (Labor Law § 2[7]).

Further, 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 F3d 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 Minkel possessed sufficient authority over the Claimants' employment under this test, with no one factor dispositive, he was an employer under the Labor Law (*Herman v RSR Sec. Servs. Ltd.* at 172 F.3d at 139).

It is undisputed that Minkel hired both Claimants and possessed the power to terminate their employment at will. Indeed, the numerous Handbook references to Minkel's authority to hire and alter an employment at will, to discipline and terminate, and even to be noticed of an employee's decision to resign establish that the power to hire and fire resided in him.

Minkel and the Claimants testified that Minkel supervised the Claimants' employment as salespersons on a day-to-day basis. The Handbook further reserved in Minkel the authority to resolve any and all questions with his employees as the company owner, and the testimony shows that Claimants routinely went to Minkel to do so. The Handbook also reserved to Minkel control over Claimants' hours, time and attendance, work schedules, and terms and conditions of employment. Simply put, Minkel directed the Claimants' employment in every respect.

The record also demonstrates that Minkel possessed the power to determine the Claimants' rate and method of payment. It is undisputed that Minkel hired both Claimants and set Hollfelder's salary and commission rate in his initial contract of hire. Minkel testified that it was his responsibility to assure that paychecks were issued to the company's employees and that he hired a payroll service company to do so. On one occasion, however, Minkel made the determination to reimburse one of the Claimants by company check instead. The Handbook also advises employees to report complaints of improper wage

deductions to the "Company Owner". Both Claimants testified that they went to Minkel if they had such payment questions. At the end of their employment, both Claimants made demands on Minkel as the owner and responsible person of the firm for their unpaid wages and supplements. In Hollfelder's case, Minkel disputed the monies owed but promised to pay Hollfelder's commissions.

Finally, the Handbook expressly provides that Petitioner Minkel, as "Company Owner", maintains attendance, absenteeism and lateness, and confidential employment records for all company employees.

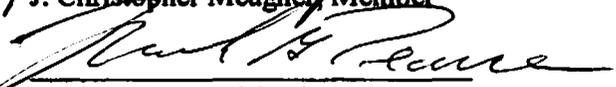
By virtue of the above, we find that as a matter of "economic reality" Petitioner Minkel controlled the employment of the Claimants and that the Commissioner correctly found that he was their employer.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

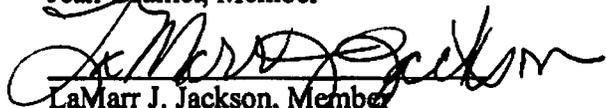
1. The two Orders to Comply with Articles 6 of the Labor Law, dated October 1, 2008, are affirmed in all respects, and;
2. The Petition and Amended Petition are denied.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Mark G. Pearce, Member


Jean Grumet, Member


LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York,
on January 27, 2010