STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: VASOS ANTONIOU, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, and an Order Under Article 19 of the Labor Law, both dated February 6, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-072 RESOLUTION OF DECISION

APPEARANCES

Vasos Antoniou, *pro se* Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor, Larissa C. Wasyl of Counsel, for Respondent.

WITNESSES

Vasos Antoniou; Ronald Fernhout; Patrice Fernhout; Miguel Zamora; Adelso Gonzalez; and Erin Gibbons, Labor Standards Investigator.

WHEREAS:

On April 2, 2009, Vasos Antoniou (Petitioner) filed a Petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Rules) (12 NYCRR Part 66), seeking review of two orders that the Commissioner of Labor (Commissioner or Respondent) issued against him on February 6, 2009. The order to comply with Article 6 of the Labor Law (Wage Order) finds that Petitioner failed to pay wages to two named Claimants, and demands payment of $8,347.81 in unpaid wages, interest at the rate of 16%, calculated to the date of

the order in the amount of $1,639.38, and a 200% civil penalty in the amount of $16,696.00 for a total amount due of $26,683.19. The order under Article 19 (Penalty Order) finds that the Petitioner failed to keep and/or furnish accurate payroll records for the period from October 8, 2007 through November 16, 2007, in violation of Labor Law § 661 and implementing regulations at 12 NYCRR 142-2.6, and demands payment of $500.00.

The Petition was amended on December 30, 2009 and alleges that Petitioner is not the Claimants' employer and that Claimants were employed by the homeowner of the house they were working on. The Amended Petition also challenges the interest and the imposition of civil penalties.

Upon notice to the parties, the Board held a hearing in Old Westbury, New York on February 23, 2010 before Board Member Jean Grumet, Esq., the designated hearing officer in this matter. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

At the close of Petitioner's case, the Commissioner made a motion for a directed verdict, which was denied by the hearing officer. The Board is not bound by the CPLR, and in this instance, where fairness requires consideration of the entire record and the Petitioner is *pro se*, we will not entertain such a motion.

SUMMARY OF EVIDENCE

Testimony of Petitioner Vasos Antoniou

Ronald Fernhout and Pat Fernhout hired Petitioner to do brick and foundation work on an addition to their home in September 2007, after they saw him working as a bricklayer at another location. Antoniou testified that he was merely one of three day workers whom Fernhout hired, and Fernhout was his and the Claimants' employer. Prior to 2005, he had been a general contractor, but was not a contractor during the period of the claim.

Antoniou was the first of the workers Fernhout hired, and began doing demolition work followed by bricklaying for the home extension. Then Fernhout requested that Antoniou find other workers so that the job would take less time. He called Claimant Miguel Zamora (Zamora), who later brought Claimant Adelso Gonzalez (Gonzalez). The Claimants negotiated their daily rate of pay directly with Fernhout, who paid the workers (including Antoniou) in cash on a weekly basis: Zamora was paid $120.00 per day, and Gonzalez was paid $100.00 per day. Antoniou did not testify as to his own daily rate of pay. Antoniou told the workers how to lay the bricks because he was the most experienced.

Antoniou relied on documents that Fernhout provided to the Department of Labor (DOL) during its investigation that were admitted into evidence. He had signed these documents in numerous places to confirm receipt of specified payments from Fernhout, but emphasized that he did not sign for other amounts on the same documents, such as the estimate of $42,500.00 and a payment of $6,600.00. Antoniou testified that he had "a fight with the owner and I left about the middle of November."

Petitioner admitted that he brought the Claimants to work at the Fernhouts' home; told the Claimants the jobs they were supposed to do; that they took orders from him; that he controlled the work the Claimants performed; and that he set their hours of work.

Testimony of Labor Standards Investigator Erin Gibbons

Labor Standards Investigator Erin Gibbons investigated this case. During the investigation, Antoniou told her that he was neither a contractor nor an employer of the Claimants. After interviewing Antoniou, Gibbons spoke to the homeowners, who told her that they hired Antoniou as a contractor, and he was responsible for paying the Claimants. Gibbons reviewed Fernhout's records, which demonstrated that the estimate for the house extension was $42,500.00, and a deposit of $6,600.00 had been paid. The records also demonstrated that the price for the driveway was an additional $12,500.00. Gibbons testified that her determination that Antoniou was a contractor and the Claimants' employer was based in part on two press releases from the website of the Nassau County Office of Consumer Affairs which the Fernhouts found on the internet and provided to DOL. [1] Gibbons also testified that she contacted the Department of State to determine whether Antoniou was licensed as a contractor, and found he did not have a license during the relevant period.

Gibbons recommended the maximum 200% penalty based on Antoniou's lack of cooperation and his behavior. DOL's Background Information - Imposition of Civil Penalty Sheet, in evidence, demonstrates the considerations Gibbons took into account in imposing the 200% penalty and states that the firm was in business for less than three years; the Petitioner was not cooperative and stated that the Claimants were not his employees; owed two employees a total of $8,347.81; furnished no records; and had no prior history of Labor Law violations.

Testimony of Ronald Fernhout

Fernhout and his wife were looking for a contractor to do brickwork on their home. They met Antoniou doing brickwork at a home in College Point and invited him to come to their house to give them an estimate. The next day, Antoniou went to the Fernhout home and gave the Fernhouts a business card stating that he was a licensed contractor. Antoniou wrote $42,500.00, the amount of the estimate, on the back of the business card and stated that the garage would cost extra. Fernhout agreed to the price, and requested that Antoniou begin with chimney work. When Antoniou arrived to begin the work, he brought Claimant Zamora with him, and Zamora did most of the work. Claimant Gonzalez began working shortly thereafter. The Claimants sometimes worked ten hours per day. Antoniou controlled and directed Claimants' work. Fernhout had no idea of how Claimants were paid until they

[1] The press releases were admitted into evidence as part of the DOL's administrative file pursuant to State Administrative Procedure Act § 306(2), and not for proof of the matter asserted. § 306(2) states that "All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference." We have given no consideration to these unverified internet reports.

told him that Antoniou had stopped paying them, and that they needed money to pay their rent. Fernhout then told Antoniou: "You are not getting no money. The boys are getting it." On another occasion, in the presence of the police, Antoniou promised to pay the Claimants the following day, but did not, and he never returned to the Fernhout home. According to Fernhout's records, he paid the Claimants $600.00 on October 23, 2007, $800.00 on October 30, 2007, and $800.00 on November 1, 2007.

Testimony of Pat Fernhout

Pat Fernhout and her husband saw Antoniou working at another home and asked him to come to their house the next day to give them an estimate. He arrived and wrote down the price on his business card. Antoniou brought the Claimants with him to the house, and at different times brought other workers, including a worker who worked for only a week.

When Antoniou arrived in the morning, he ate breakfast with the Fernhouts while the workers were outside working. After breakfast, he told the workers what to do, stayed an hour or two, then disappeared, but returned at the end of the day. Pat Fernhout observed Antoniou pay the workers a few times.

Antoniou called the police because he wanted to take tools that he stored in the garage, along with scaffolding that he told the police also belonged to him and he wanted returned. The Fernhouts showed the police proof that they had purchased the scaffolding, and that Antoniou was trespassing on their property. The Claimants then told the police that Antoniou owed them money. A Spanish-speaking police officer translated for the Claimants. Antoniou promised the police that he would pay the Claimants what he owed them the following day, but never returned to the Fernhout house and never paid the Claimants.

Testimony of Claimant Zamora

Zamora had worked with Antoniou at Vinny Construction, and Antoniou told him, "I have a job, if you want to come to work with me, to help me, I will pay you well." Antoniou promised to pay Zamora more money than he was paid at Vinny Construction. Antoniou brought him to the Fernhouts' house. When they built the chimney, Antoniou paid him $120 per day and told him he would be paid $140.00 per day when they began work on the house. Antoniou told him what work he had to perform, gave him instructions on how to do the work, and determined his hours of work. Zamora considered Petitioner to be his boss. The machinery and equipment that he used, such as a grader, belonged to Antoniou. While the police were at the Fernhout home, Antoniou promised, in their presence, to pay the Claimants wages, but never did. The day the police came (November 18, 2007, according to Zamora's claim for unpaid wages) was the last time Antoniou ever appeared at the Fernhout house. Zamora worked on the Fernhouts' house for two months.

Testimony of Claimant Gonzalez

Gonzalez knew Antoniou from working with him at Vinny Construction. Zamora approached him and asked, 'You want to work with me for Mr. Antoniou?'" When

Gonzalez began work, Antoniou told him, "Let's work first one week to see how is your work, if you do good job. And after I will pay you $110 a day." Antoniou never paid him for his work. Gonzalez considered the Petitioner to be his boss. Antoniou told him what to do and how to do it, determined the hours of work, and provided the necessary equipment, which consisted of machines to cut bricks and machines to make cement and concrete.

STANDARD OF REVIEW AND BURDEN OF PROOF

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 reviews whether the Commissioner's order is valid and reasonable in light of the issues raised.

The Board is required to presume that an order of the Commissioner is valid. (Labor Law § 103 [1]). Pursuant to Rule 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 orders under review are not valid or reasonable.

FINDINGS AND CONCLUSIONS OF LAW

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

Petitioner is an employer within the meaning of the Labor Law Article 6.

Labor Law Article 6 defines "Employer" as "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" means "permitted or suffered to work" (Labor Law § 2 [7]). Under Labor Law §2(6) the term "employer" is not limited to the owners or proprietors of a business, but also includes agents, managers, supervisors, and other subordinates.

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" as "suffer or permit to work" (29 USC § 230 [g]). "The terms are expansively defined, with 'striking breadth,' in such a way as to stretch ... the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mut. Ins. Co., v Darden,* 503 U.S. 318, 326 (1992); *see also Ansoummana v Gristedes Operating Corp.*, 255 F Supp 184, 188 (SDNY 2003); *Zheng v Liberty Apparel Co., Inc.*, 355 F3d 61, 66 (2d Cir 2003): "This definition (of employer) is necessarily a broad one, in accordance with the remedial purpose of the FLSA."

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 FLSA *Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 (SDNY 2003). In analyzing this definition of employment, the Supreme Court has observed that "[a] broader or more comprehensive coverage of employees within the stated categories

would be difficult to frame" *United States v Rosenwasser*, 323 US 360, 362 1945.

The central inquiry in determining whether one qualifies as an employer under these expansive definitions 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." *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999). Factors to consider when examining the "economic reality" of a particular situation 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," though no single factor is dispositive. Instead the "economic reality" test encompasses the totality of the circumstances, no one of which is exclusive. "[E]conomic reality is determined based upon *all* the circumstances, [and] any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition" (*id.*).

We find that the Petitioner was an "employer" under the "economic reality" test and affirm the Orders as modified below.

It is undisputed that Petitioner supervised and controlled employee work schedules and conditions of employment. By his own admission, Antoniou brought the Claimants to work at the Fernhout house and on this basis we find that he hired them. He also told the Claimants the jobs they were supposed to do, gave them orders, controlled their work, and set their hours of employment. Petitioner's testimony, on cross-examination, regarding the control he exerted over the Claimant's working conditions corroborates the credible testimony of both Claimants, who additionally testified that they considered Petitioner to be their boss, and that they used his machinery and equipment, including a grading machine, cement mixer, and brick cutting equipment in the performance of their work. We also credit Claimants' testimony that Antoniou determined their method and rate of pay.

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

However, because the Claimants were paid a total of $2,200.00 in wages by Fernhout from October 23 to November 1, 2007, the Board modifies the Wage Order by reducing it by $2,200.00 to reflect these payments.

IMPOSITION OF CIVIL PENALTIES

The 200% Civil Penalty for failure to pay wages is modified

Upon a determination that an employer has violated Labor Law Article 6, the Commissioner 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. *See* Labor Law § 218 (1).

When the Commissioner issues an order directing compliance, she is authorized to assess a civil penalty based on the amount of wages found owing. Labor Law § 218 (1) provides:

> "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 these provisions, rules, or regulations, or to an employer whose violation has been found to be 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...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."

On direct testimony from DOL Senior Attorney Larissa C. Wasyl, LSI Gibbons explained the basis for her recommendation, of a 200% civil penalty:

> Q Who recommended a civil penalty on that?
> A It looks like I did.
> Q How much of a civil penalty?
> A The maximum.... 200 percent.
> Q What was the basis for you recommending the maximum penalty in this case?
> A The fact -- well, he was very aggressive. Very aggressive and didn't want – he didn't want to cooperate with our office at all....
> Q And based on that, did you use that.... You used that to determine the maximum penalty?
> A Correct. No cooperation at all.
> Q Is that standard procedure...?
> A I don't – usually we will discuss it but this went through to an IBA [hearing]. At that point it is whatever it decided.

Later in the hearing, Gibbons also testified that she recommended the penalty based on Antoniou's "cooperation and [his] behavior. [his] behavior was unacceptable," adding that she had a problem with Petitioner from the first time he came into her office, when "[he was] told to leave because [he was] yelling and that is inappropriate behavior in an office."

Since the DOL did not ground the imposition of a civil penalty in any claim that Petitioner had previously been found in violation of the Labor Law's provisions, we turn to consideration of whether it was valid and reasonable to treat the violation as "willful or egregious" within the meaning of § 218. The reasons given for the penalty by Gibbons – aggressiveness, lack of cooperation, "inappropriate behavior in an office" – all relate to

Antoniou's conduct and dealings with Gibbons during the DOL investigation and not to the underlying violation. We do not condone Antoniou's conduct and find it relevant to his good faith, one of the factors to be considered in determining the "appropriate" penalty in cases other than those involving repeat, willful or egregious violations, but not a valid and reasonable basis for a 200% penalty. We do, however, find that a 100% penalty is warranted based on the factors listed in § 218 including Antoniou's lack of good faith during the investigation, the gravity of a violation which included not paying two workers several weeks of wages amounting to several thousands of dollars, and his failure to comply with recordkeeping or other non-wage requirements.

The Civil Penalty for failure to maintain records is upheld

A $500.00 civil penalty was imposed on Petitioner for failure to keep and/or furnish payroll records pursuant to Labor Law § 661 of Article 19 and implementing regulations. Petitioner alleges that he was not required to maintain payroll records due to the fact that he was not an employer. However, as the Board finds that Antoniou is an employer and failed to maintain the required payroll records, the civil penalty for violating Article 19 is upheld.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 6 of the Labor Law, dated February 6, 2009 is reduced by $2,200.00, and the penalties and interest are reduced proportionally;

2. The civil penalty in the Order to Comply with Article 6 of the Labor Law is reduced to 100% of the wages due;

3. The Order under Article 19 of the Labor Law dated February 6, 2009 is affirmed; and

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

Anne P. Steyason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
April 27, 2011.