STATE OF NEW YORK
*INDUSTRIAL BOARD OF APPEALS*

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| In the Matter of the Petition of:<br><br>WILLIAM A. ETTER,<br><br>Petitioner,<br><br>To Review Under Section 101 of the Labor Law: an Order to Comply with Article 6 of the Labor Law dated July 30, 2009,<br><br>- against -<br><br>THE COMMISSIONER OF LABOR,<br><br>Respondent. | DOCKET NO. PR 09-258<br><br>RESOLUTION OF DECISION |

**APPEARANCES**

Joseph Carbone, Jr., Esq., for Petitioner.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry, of counsel), for respondent.

**WITNESSES**

William A. Etter, for Petitioner.

Hugo Desantana and Angel Medina, Labor Standards Investigator, for Respondent.

**WHEREAS:**

On September 14, 2009, William A. Etter (Petitioner) filed a Petition for review 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 (Board Rules) (12 NYCRR Part 66) seeking review of an Order to Comply (Order) that the Commissioner of Labor (Commissioner, Respondent or DOL) issued against him and Alternate Measures Contracting Corp. (Alternate) on July 30, 2009. The Order finds that Petitioner and Alternate failed to pay wages to Joseph W. Schmidt (Claimant) for the period August 12-September 29, 2006, and demands payment of $2,850.00 in wages, interest at the rate of

16%, calculated through the date of the Order in the amount of $2,195.88; and a 25% civil penalty in the amount of $713.00 for a total amount due as of the Order's date of $5,758.88.

The Petition alleged that Petitioner was not personally liable because he was an employee of Alternate and was neither a principal or owner; that Claimant was a subcontractor, who was paid on a weekly basis and is owed no money; and that Petitioner never received notice of any hearing; has not lived at an address used by the DOL since 2005; and neither received mail nor was any mail forwarded to him from that address since 2005. An answer to the Petition was filed on December 28, 2009.

Upon notice to the parties, a hearing was held on September 1, 2011 in White Plains, New York before Jean Grumet, Esq., Member of the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to make closing arguments. At the hearing, Petitioner's counsel stated that Petitioner declared personal bankruptcy in 2008 and his discharge in bankruptcy extends to and discharged any debt he might otherwise have owed.

## I. SUMMARY OF EVIDENCE

*Testimony of Petitioner William A. Etter*

Petitioner was Claimant's foreman on a home improvement job performed by Alternate, which is no longer in operation, in Syosset, New York from approximately March to August 2006, when the job was completed. Both Claimant and Hugo Desantana worked until completion of the Syosset job. Claimant, a carpenter who was paid a flat fee of $300.00 per week, did no work for Petitioner after completion of the job, but during the Syosset job, also worked with Petitioner on "another job that we just bounced on." Claimant's duties were limited to "[w]hatever was involved in doing the carpentry work," and did not include procuring materials.

Petitioner testified that while his memory is impaired because of a stroke, he worked as a foreman for Alternate, which was owned by Joseph Menna, for about two years beginning in 2004, after coming to know Menna while doing work at his house. Alternate did not exist before Petitioner's work at Menna's house; Menna "opened up a company, asked me if I would run it with him and I said yes." Petitioner has had no dealings with Alternate or Menna since August 2006.

Petitioner was not an owner of Alternate, but was foreman, "Everybody came to me." Petitioner distributed weekly paychecks to Alternate employees, and was on the job site every day while Menna was there three or four days a week. Petitioner, not Menna, gave instructions to employees, and Petitioner "made sure everything was done correctly." Petitioner represented himself as Alternate's vice president when he opened Alternate's checking account at Commerce Bank, which was used to pay Alternate's employees their wages.

According to a portion of Alternate's payroll journal which Petitioner testified he obtained from its payroll service Paychex Company (Paychex) and introduced in evidence, Claimant, one of seven "employee[s]" listed, was paid $300.00 in gross total earnings, with deductions for Social Security/Medicare, federal tax withholding and New York disability and unemployment insurance, for each of the seven weeks ending March 31, April 14 and 28, May 12 and 26, July 21, and August 4, 2006. The other employees listed, including Petitioner ("Bill Etter"), Desantana, and "Joe Menna," were also paid flat gross total earnings amounts: for Etter and Menna, $600.00 each week. Although the payroll journal pages include columns for "rate" and for regular and overtime hours, those columns are blank and only gross pay, required deductions and net pay are shown.

Petitioner filed a Chapter 7 personal bankruptcy petition on February 8, 2008, prior to the issuance of the Order under review here, and on May 14, 2008 Petitioner was granted a discharge order by the U.S. Bankruptcy Court for the Eastern District of New York. The explanation provided by the Bankruptcy Court with the order discharging the debtor states that such an order "eliminates a debtor's legal obligation to pay a debt that is discharged. Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed."

*Testimony of Hugo Desantana*

Desantana worked for Alternate for about a year and a half beginning around August or September 2005, after being hired by Petitioner. Desantana took instruction from Petitioner, and considered both Petitioner and Menna, whom Desantana met during his second work week, to be "bosses." Petitioner would tell Desantana what to do, and if Alternate was doing work on two or more sites concurrently, which place to work as well. Menna's main role was looking for jobs for Alternate, or other off-site business. Petitioner, who was the first to arrive at the work site in the morning and was usually at the work site "from the beginning of the job to the end of the job every day," kept a daily log of employee hours, and wrote down employees' hours in their presence.[1]

Desantana met Claimant about a week into Alternate's work on a job in Syosset, when Petitioner "told us he was hiring some more people" because the job was unusually big. The job took longer than three months, the normal length for an Alternate job; when it was finished, Petitioner said he had no further jobs. Desantana continued checking with Petitioner for a few weeks, but by August 28, 2006, Desantana's sister's birthday, the Syosset job had been done for a couple of weeks and Desantana had returned to his father's business. Desantana had no knowledge of whether any workers were brought back after that time to make final changes or improvements to the Syosset home.

[1] These logs were never furnished to the DOL, nor were they submitted as evidence at the hearing. Petitioner's counsel stated in his closing statement that they no longer exist. Medina, a DOL investigator, testified that unlike the payroll journal excerpts submitted by Petitioner, which did not establish daily or weekly work hours, contemporaneous logs of employees' daily hours could be used to check the accuracy of a claim and determine the existence and amount of any underpayment.

*Testimony of Angel Medina and Evidence from the DOL file*

Labor Standards Investigator Angel Medina was assigned this file after the original investigator left the DOL's employment. The Claim for Unpaid Wages (Claim) which Claimant certified to be true on October 6, 2006 states that Petitioner, Alternate's "responsible person" and "superintendent, manager or foreman," hired Claimant on February 1, 2006 and Claimant worked until September 29, 2006. Claimant's latest agreed rate of pay was $150 per day. Claimant worked as a carpenter at residences in Nassau and Queens, and was paid in cash on Friday. According to the Claim, Claimant was not paid for work performed during five out of the six weeks (all but the one ending September 22) ending between August 18 and September 29, 2006; Claimant made a demand for payment on September 29, 2006 but Petitioner refused to pay stating, "I don't have the money." Claimant stated he worked 4 ½ unpaid days the week ending August 18, five the week ending August 25, three the week ending September 1, four the week ending September 15, and 2 ½ the week ending September 29, for a total owed, at $150 per day for 19 days, of $2850.

The Claim listed two addresses for Petitioner. One, in Ronkonkoma, New York, was identical to the address later listed for Petitioner in the May 14, 2008 Bankruptcy Court discharge order. The other, in Levittown, New York,[2] was the one where the September 9, 2009 Petition states Petitioner has not lived "for at least the last four years, nor have I received or been forwarded any mail from that address in the past four years." On November 15, 2006 the DOL wrote to Alternate at the Ronkonkoma address, advising it of the Claim and requesting that $2850 be remitted or a statement of the reasons Alternate disagreed with the Claim, together with any substantiating documents, be provided. No response was received.[3] On February 27, 2007 the DOL wrote to Petitioner at the Levittown address, repeating the request of the November 15th letter. Medina testified that the second letter is in the form used by the DOL if no response to an initial letter is received. No response to the second, February 27th letter was received.

The DOL's case contact log does not record that either letter was returned as undeliverable. It records that the Order was initially issued May 21, 2008 to the Levittown address but returned as undeliverable; that a subsequent issuance on June 24, 2008 "to address found on Accurint[4]" was also returned; that an October 28, 2008 "Accurint search shows William A. Etter as still residing at" the Levittown address; that on July 27, 2009 the DOL directed re-issuance of the Order to Petitioner at a "new address found per Accurint," in Sayville, New York; and that on September 3, 2009 an attorney for Alternate "states his client was in Florida and did not get initial order but will appeal the amended Order dated July 30, 2009."

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[2] The Claim actually listed East Meadow rather than Levittown; the DOL contact log for the case, submitted in evidence by Medina, records that the DOL corrected the town name for the address given in February 2007.

[3] The DOL's contact log states that on January 2, 2007 the DOL called the employer, who stated that the Ronkonkoma address "is his girlfriend's address. Mail was not returned as undeliverable. He then gave me an address... in Brooklyn... stating to mail it to him there. Address is non deliverable." The log does not specify whom the DOL spoke with or at what number; Petitioner testified he did not recognize the Brooklyn address.

[4] Accurint is a Lexis/Nexis database.

A "Background Information – Imposition of Civil Penalty" form completed by the DOL's original investigator in March 2007 recommended a 25% civil penalty. With respect to the employer's good faith, one of the bases for assessment of a civil penalty, the form states that the employer was "[n]ot generally cooperative" in that it did not respond to the DOL's letters and did not supply deliverable mailing addresses.

## II. STANDARD OF REVIEW AND BURDEN OF PROOF

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in [the petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103). If the Board finds that the "order, or any part thereof, is invalid or unreasonable it shall revoke, amend or modify the same" (Labor Law § 101[3]).

Pursuant to Rule 65.30 of the Board's Rules of Procedure and Practice (Rules) (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 Petitioners to prove by a preponderance of the evidence that the Orders are invalid or unreasonable. (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30)

## III. FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to Board Rule 65.39 (12 NYCRR § 65.39). For the reasons stated below, we find that the Petitioner did not meet his burden of proving that the Order was invalid or unreasonable, and, if it were not for the bankruptcy discharge, we would affirm the Order in its entirety.

### A. Petitioner Was an Employer Under the Labor Law

"Employer" as used in Article 6 of the Labor Law "includes any person, corporation or association employing any individual in any occupation, industry, trade, business or service." (Labor Law § 190 [3]) Under Labor Law § 2 [6], the term "employer" is not limited to the owner of a business, but means "the person employing" a worker, "whether the owner, proprietor, agent, superintendent, foreman or other subordinate." "Employed" includes "permitted or suffered to work." (Labor Law § 2 [7])

Like the Labor Law, the federal Fair Labor Standards Act defines 'employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "employer" to include "any person acting directly or indirectly in the interest of the employer in relation to an employee" (§ 203 [d]). The "test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test... [used] for analyzing employer status under the Fair Labor Standards Act." *Chu Chung v. New Silver Palace*

*Rest., Inc.*, 272 FSupp 2d 314, 319 n6 [SDNY 2003]. The U.S. Court of Appeals for the Second Circuit has summarized this test, when the question is an individual's personal employer status and liability:

> "[T]he 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.'....
>
> "No one of the four factors standing alone is dispositive."

*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999] (citations omitted).

Applying these standards, the Board finds that the record evidence amply demonstrates that Petitioner was an employer within the meaning of the Labor Law and liable for wages earned by and owed to the Claimant. The Claim states that Petitioner hired, supervised and controlled Claimant. This statement was corroborated by Desantana's testimony that Petitioner hired, supervised and controlled him and others, and Petitioner's own testimony that he ran Alternate together with Menna, gave employees their instructions, was on the job site every day and "made sure everything was done correctly." Desantana testified that he worked overtime to "ma[ke] sure I kept my job. So like if I messed up... and I had to clean it up before Mr. Etter or Mr. Menna saw it, I would clean it up." Petitioner also maintained employment records, paid workers, kept track of their hours, represented himself as a corporate officer when he opened Alternate's checking account, and was evidently regarded as such by Paychex, since it supplied him a copy of the payroll journal. The Petition's claim that Petitioner was simply an employee and "not responsible for the running of the corporation" is undermined by this undisputed evidence, which supports the DOL's determination that Petitioner, in his individual capacity, possessed the requisite authority over Alternate workers to be found individually liable as an employer under the Labor Law.

B. Claimant Was an Employee Under the Labor Law

The Petition alleges that Claimant "was paid as a subcontractor." In determining whether an individual is an employee protected by the Labor Law or an independent contractor, "[t]he ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1059 [2d Cir 1988]). Factors to be considered include (1) the degree of control exercised by Claimant, (2) his opportunity for profit or loss, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to

which the work was an integral part of Alternate's business. No one factor is dispositive (*id.* at 1058-1059).

No evidence supports the allegation that Claimant was a subcontractor. Petitioner neither testified nor submitted any other evidence that Claimant was not controlled by Alternate like any other employee, that he had any opportunity for profit or loss, or that he exercised any independent initiative. On the contrary, Petitioner assigned the work to be performed and maintained attendance records, and himself testified that Claimant's work was limited to carpentry and did not include procuring materials. The payroll journal pages submitted by Petitioner listed Claimant as an employee like other employees. Accordingly, an employment relationship existed between the Petitioner and the Claimant and the Petitioner is liable for any unpaid wages under Article 6 of the Labor Law.

C. Claimant Was Owed Wages

The Petition alleges that Claimant "is owed no monies for any work performed." At the hearing, Petitioner argued that the payroll journal he introduced showed Claimant paid through August 4, 2006; that Alternate's Syosset job, the last on which Claimant worked, was completed in August 2006; and that there could therefore be no unpaid wages for the period August 12-September 29, 2006 as reflected in the Claim and in the Order. However, Petitioner failed to supply records employers are required to keep which would have been necessary to establish such a position.

Labor Law § 195 and the New York Code of Rules and Regulations (NYCRR) require employers to keep payroll records. Specifically, Title 12 of the NYCRR, § 142-2.6, requires that employers establish, maintain and preserve for not less than six years weekly payroll records showing, among other things, each employee's name, address and social security number; wage rate; number of hours worked daily and weekly; and gross wages, deductions and net wages. 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 may credit a 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 required wages were paid. (Labor Law § 196-a; *Angello v. National Finance Corp.*, 1 AD3d 850 [3d Dept 2003]).

In the present case, Petitioner submitted pages from a payroll journal listing Claimant and other employees and indicating that Claimant was paid $300.00 gross wages for each of seven weeks ending between March 31 and August 4, 2006; that certain deductions were made; and that Claimant, in each of those weeks, was paid net wages of $267.41. Petitioner did not supply any canceled checks, nor the logs of employee work hours which, according to Desantana's undisputed testimony, Petitioner kept each day.[5] Although the payroll journal included columns for "rate" and for regular and overtime hours and such information was required to be kept by 12 NYCRR § 142-2.6, the columns were left blank and no other record of such information was submitted. Nor did Petitioner submit pages from the journal covering weeks other than those seven. There is no basis to

[5] As previously stated, Petitioner's counsel said in his closing statement that these logs no longer exist.

conclude, nor did Petitioner even testify, that the payroll journal pages he submitted were a complete record of all Alternate work beginning with the end of March.

Claimant submitted a specific, detailed and facially credible sworn Claim that he was owed wages at an agreed rate of $150 per day for varying numbers of days during five weeks ending between August 18 and September 29, 2006. The incomplete and inadequate payroll journal pages introduced by Petitioner do not negate the reasonableness of accepting Claimant's statement. Nor was the hearing testimony that the Syosset job was completed in August sufficient for this purpose. Petitioner testified that while his memory is impaired, his recollection is that the Syosset job was completed in August 2006, and was "like the last job" Alternate had. Desantana testified that the job was completed a couple of weeks before his sister's August 28th birthday, and that Petitioner had no further work for Desantana; Desantana also testified, however, that he worked for Alternate for about a year and a half beginning in August or September 2005, implying a much later ending date. In addition, Desantana testified he did not know whether any workers were brought back for final changes or improvements on the Syosset job, while Petitioner testified that Claimant worked on another job for Alternate concurrently with the one in Syosset.

We do not find such testimony sufficiently credible, definite and convincing to negate the DOL's acceptance of the Claim's specific statement that Claimant continued working through September 2006 and was unpaid for listed days. Rather, in the absence of the employer records which the statute required be kept, we are required by the statutory provisions and precedents discussed above to accept the best available evidence – including the Claim which Claimant certified as true – to estimate wages due.

D. The Petitioner's Bankruptcy Discharge Applies to the Claim for Wages but not for the Civil Penalty

Although the issue is not raised in the Petition, which was filed *pro se*, Petitioner's counsel stated at the hearing that Petitioner declared personal bankruptcy in 2008 and his discharge in bankruptcy extends to and discharged any debt he might otherwise have owed. We find that the Petitioner's discharge in bankruptcy invalidates the claim for wages but not for penalties.

The explanation of its order provided by the Bankruptcy Court, which Petitioner furnished together with the order, states that such an order discharges a debtor from liability from "[m]ost, *but not all*, types of debts... exist[ing] on the date the bankruptcy case was filed" (emphasis supplied). Among the types of debts which are not discharged in a Chapter 7 bankruptcy case, pursuant to Bankruptcy Code Section 523 [a][7], 11 USC § 523 [a][7], is an individual's debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a government unit, and is not compensation for actual pecuniary loss." Such debts are non-dischargeable automatically, even if no objection to discharge is filed during a bankruptcy case.[6]

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[6] *See Kelly v. Robinson*, 479 U.S. 36, 43 and n. 4 [1986]. While *Kelly* was a criminal case, the same rule applies to civil orders imposing penalties. *See, e.g., Schaffer v. Louisiana State Bd. of Dentistry*, 515 F,3d 424, 432 [5th Cir. 1998]; *U.S. Dep't of Housing & Urban Dev. v. Cost Control Marketing & Sales Mgt. of Va.,*

The U.S. Bankruptcy Court for the Southern District of New York (Bankruptcy Court) has found monies listed in a DOL Order to Comply as for a civil penalty not dischargeable pursuant to Bankruptcy Code § 523 [a][7], while monies listed as for unpaid wages or interest were dischargeable. *In re Tanturri*, U.S. Bankruptcy Court, S.D.N.Y., Case No. 09-24093-rdd, Docket # 24 [Nov. 10, 2011].[7] As explained in the Bankruptcy Court's *Tanturri* decision, a DOL order requiring an employer to pay a fine, penalty or forfeiture due to the employer's violation of the Labor Law is not for pecuniary injury but to serve a regulatory purpose. The Bankruptcy Court found in *Tanturri*, however, that the portion of money stated to be owed towards workers' unpaid wages or interest on those wages, as distinguished from the portion of money stated to be owed for a civil penalty, is not deemed payable to and for the benefit of a government unit. For this reason, the Bankruptcy Court found that that portion of the order stated to be for a civil penalty, and only that portion, meets all the criteria for non-dischargeability set forth in § 523 [a][7]. While the Board is not an enforcement agency and can only affirm, revoke or modify a DOL order, which (unless revoked) the DOL can then enforce through further legal proceedings, the *Tanturri* ruling indicates that the Petitioner's obligation to pay the portion of the Order listed as for a civil penalty ($713.00) was non-dischargeable pursuant to Bankruptcy Code § 523 [a][7].

E. Petitioner Received Adequate Notice

The Petition states that Petitioner never received notice of any hearing, has not lived at the Levittown address since 2005, and neither received mail nor was any mail forwarded to him from that address since 2005. This, too, is an inadequate basis to find the Order invalid or unreasonable.

No earlier hearing was either conducted or required (*Matter of Fischer*, PR 06-099 [April 23, 2008] [due process and notice requirements are satisfied by an employer's right to appeal to the Board]). Given that Petitioner undisputedly received the Order and notice of the hearing, and that the DOL made repeated efforts to contact him earlier at two different addresses, one of which is also listed as Petitioner's in the Bankruptcy Court order he submitted into evidence, we do not find the Order invalid or unreasonable on this basis.

F. Petitioner Did Not Challenge the Penalty Imposed

The Petition did not challenge the 25% civil penalty imposed in the Order. As previously stated, Labor Law § 101 states that objections not raised in a petition shall be deemed waived.

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*Inc.*, 64 F.3d 920, 927-8 [4th Cir. 1995]; *In re Horras*, 443 B.R. 159 [8th Cir. BAP 2011]; *In re Jensen*, 395 B.R. 472, 481-2 [D.Colo. 2008]; *Kentucky v. Seals*, 161 B.R. 615, 620-21 [W.D. Va. 1993]; *In re Telsey*, 144 B.R. 563 [Bankr. S.D. Fla. 1992].

[7] Although the *Tanturri* ruling is not reported, it is available through the Bankruptcy Court's PACER website and the Board takes administrative notice of the ruling.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT**

1. That part of the Order pertaining to the civil penalties is affirmed; and

2. Otherwise, the Petition is granted.

Anne P. Stevason, Chairperson

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
February 6, 2013.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT**

1. That part of the Order pertaining to the civil penalties is affirmed; and

2. Otherwise, the Petition is granted.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
February 14, 2013