STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
KRISTA SCHULTZ AND RKJ INTERESTS LLC,	
Petitioners,	
	DOCKET NO. PR 10-188
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, and an Order Under Article 19 of the Labor Law, both dated April 14, 2010,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Krista Schultz, petitioner *pro se,* for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin A. Shaw of counsel), for respondent.

WITNESSES

Krista Schultz and Robert Shultz, for petitioners.

Deborah Darling and Mary Coleman, Senior Labor Standards Investigator, for respondent.

WHEREAS:

On June 15, 2010, petitioners Krista Schultz and RKJ Interests, LLC filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued by the Commissioner of Labor (Commissioner) against petitioners on April 14, 2010. The Commissioner filed an answer on August 6, 2010.

Upon notice to the parties, a hearing was held on April 30, 2014 in Buffalo, New York before Board member and designated hearing officer J. Christopher Meagher, Esq. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (wage order) demands compliance with Article 6 of the Labor Law and payment of $2,268.00 in unpaid wages due and owing to claimant employee Deborah Darling for the period September 21, 2009 through October 8, 2009, interest continuing thereon at the rate of 16% in the amount of $186.91, and a civil penalty in the amount of $2,268.00, for a total amount due of $4,722.91.

The second order (penalty order) under Article 19 of the Labor Law assesses petitioners a civil penalty of $500.00 for failure to keep and/or furnish true and accurate payroll records during the period from September 21, 2009 through October 8, 2009.

The petition alleges that: (1) claimant was an "independent contractor," and; (2) petitioners paid claimant a total amount of $2,158.56 for her services and she "was paid all wages to which she was entitled."

SUMMARY OF EVIDENCE

Claimant's Testimony

Claimant Deborah Darling (claimant) filed a claim against petitioners with the Department of Labor (DOL) on November 3, 2009 stating that she was employed as an art director at the rate of $810.00 per week and was owed $2,268.00 in unpaid wages for the period September 21, 2009 through October 8, 2009. In support of her claim, claimant submitted a detailed written statement describing the history of the dispute.

Claimant testified that she was employed as an art director by an advertising company in Buffalo, New York named United Specialty Advertising, Inc. (USA) from 2005 to 2009. The company was owned and operated by Kenneth White (White). In January of 2009 USA merged with another advertising agency, Fusion Marketing Group International (Fusion), and the merged entity continued to serve the same clients. Claimant was employed as Fusion's art director under White's supervision from January through August of 2009 at a salary of $810.00 per week. Petitioner Krista Shultz (petitioner) was the accountant for both companies.

Near the end of August 2009, White advised claimant that her employment with Fusion was terminated because the company had gone out of business. He was now going into business with petitioner and her husband Robert Shultz, who operated a company named RKJ Interests LLC (RKJ). White advised claimant that RKJ would be the new advertising agency they would be working for, the accounts Fusion had serviced would be done by RKJ, and petitioner and her husband would be their new employer. White further informed her that she would continue to perform the same work on these accounts at the Sweet Home Road location where Fusion was located and that her workday, hours, and salary would remain the same. White gave no indication that her work would be on a per job basis or that she had to submit an invoice for her services. Claimant received her final paycheck from Fusion on August 31st for $1,620.00 representing her last two weeks of employment through August 21, 2009.

Claimant continued to work on the same accounts under White's supervision at the Sweet Home location from August 24, 2009 to October 8, 2009. In a spreadsheet of her hours and payments submitted to DOL, claimant stated that she worked Monday to Friday from

approximately 7:45 a.m. to 4:15 p.m. almost every day during this period. She received a money order from RKJ for $879.56, a cash payment from White of $150.00, and a check for $1,279.00 signed by petitioner. Claimant applied these payments to the wages owed for the first four weeks of her employment through September 18th.

Claimant testified that petitioner visited her at the Sweet Home office on Tuesday, October 6, 2009 and asked her to fill out and return a packet of documents so that she could get her on the company's regular payroll. Included were an employment application, I-9 employment eligibility verification form, W-4 tax withholding form, and a NYS IT-2104 tax withholding form. Clipped to the packet was a handwritten "sticky note" signed by petitioner stating "Debbie, please complete and return these forms so I can place you on ADP Payroll before November. Thank you! Krista." Claimant recognized petitioner's signature on the note from the check signed by her on October 1st. She marked the note as "RECV'D: 10.6.09," filled out and signed the forms, and returned them to petitioner later that day.

Claimant resigned her employment with RKJ on Thursday, October 8, 2009 following a workplace dispute with White. Claimant testified that she had a conversation with petitioner at the Sweet Home office later that day and explained the situation to her. Petitioner indicated that a check would be issued for any money owed back to the beginning of September and that she would be paid. No payment was received. After numerous calls to petitioner were to no avail, claimant filed her claim with DOL.

The claim listed 40 hours worked during the week ending September 25th, 40 hours the week ending October 2nd, and 32 hours the four days ending October 9th. Claimant testified that the hours stated were accurate and she was not paid any wages for the period of her claim. In a statement submitted to DOL, claimant detailed some of the projects she worked on during the claim period, including layout, design, proofs, printing, and mailing to clients of trade publication ads, brochures, calendars, and other projects.

DOL's Investigation

Senior Labor Standards Investigator Mary Coleman (Coleman) testified concerning DOL's investigation that resulted in the orders under review. Various documents and reports from the investigative file were submitted into evidence, including a "contact log" recorded by Coleman on a daily basis describing the investigation.

On November 16, 2009, DOL issued RKJ a collection letter advising it of the claim and requesting that petitioners remit payment or submit a statement why the amounts were not due, including "a copy of any payroll record, policy, contract, etc. to substantiate your position." Petitioner responded in a phone call and letter to Coleman, stating that claimant was never employed by RKJ but had done a few freelance projects for them for which she was fully paid. Petitioner added in her phone call that claimant had worked for Fusion at the Sweet Home location, Fusion had closed, and that RKJ had employed White and allowed him to work at the Sweet Home office. Coleman asked petitioner to send her the claimant's business certificate or a business card. Petitioner said she did not have them.

Claimant responded to petitioner's contentions in January 2010 and enclosed the written description of her work and spreadsheet of hours and payments. Based on this information,

Coleman issued petitioner a second collection notice on January 28, 2010 advising her that DOL would pursue the wage claim unless she could provide proof that claimant was an independent contractor. In a follow up phone call, petitioner reiterated that claimant was never an employee. Coleman advised her to obtain a statement from the person who the claimant had worked for.

On February 4, 2010, Coleman received a letter signed by White stating that claimant had worked on several freelance projects for him and one of Fusion's clients and was never an employee of RKJ. In a phone conversation on February 16, 2010, however, White told Coleman that he signed the letter because petitioner had written it, he was employed by her, and he had seen some other work on claimant's computer but wasn't sure whether she had done other freelance work or not. White added that claimant worked the hours she was claiming. In a letter to Coleman, claimant stated that she had never worked on other freelance jobs on work time or during her employment with petitioners.

By final notice dated February 26, 2010, Coleman advised petitioners that DOL was pursuing the claim and petitioners should remit payment or the case would be referred for an order to comply, entailing additional interest and penalties. Petitioners did not remit payment or submit further information. Based on petitioners' failure to submit sufficient evidence substantiating that claimant was an independent contractor, or payroll records establishing that she was paid the wages claimed, DOL issued the orders under review on April 14, 2010.

Petitioner's Testimony

Petitioner and her husband are both accountants. They operate a business called RKJ Interests LLC that performs financial services and operates a boutique located in Snyder, New York. Robert Shultz is the owner of the company and petitioner is the accountant.

Petitioner testified that she had been the comptroller at Fusion Marketing Group and a related entity, Showcase Marketing. Upon Fusion's closing RKJ decided to hire White as a salesperson, to take over some of Fusion's accounts, and to utilize claimant to work with White and complete existing art projects on these accounts:

> "Upon closing, Deborah was used to work on a couple projects with Kenneth White who was the salesperson at the time from Fusion and we were helping Ken take over some of the accounts and we actually hired Ken to work with us.
>
> "Deborah was his previous art director and was working on art projects, so there was some value in that for her completing projects that were in the works. She was paid for the projects that Ken approved that she worked on."

Petitioner testified that claimant was paid as a "vendor" on a per job basis for these projects, was issued a 1099, and was fully paid for her services. As proof of payment she submitted copies of a money order issued claimant for $879.56 and a check for $1,279. Petitioner said the company did not need an art director at the time because it utilizes an outside vendor named 1006 Design for any design work it needs. The vendor is paid by check and issued a 1099 every year for the work performed. The work involved "exact repeat jobs" where an art director

is unnecessary because the design work is already done in prior orders. Petitioner added, "There might have been jobs from previous companies that were caught in the cross fire that were closed that were worked on."

Referring to the list of projects claimant worked on during the claim period, petitioner argued that calendar projects for Fusion's clients started earlier in the summer and would not have been paid for because they were not RKJ's jobs. A job involving a new logo and business card for RKJ may have been directed by White but was not approved by the company. A job for Showcase Marketing would not have been paid for as that company was going out of business.

On cross-examination, petitioner was asked to describe whom the company deemed an employee and whom it deemed a vendor or independent contractor. Petitioner testified that an "employee" was someone the company interviewed, liked, and believed would represent the company correctly. White was hired as an employee in September 2009 to "be doing sales for the company and continuing on servicing current clients." The employee is paid on "payroll via ADP" and works at its storefront where the boutique is located. Petitioner is currently running the business herself along with her husband and son. Normally they hire college students in the summer and retirees to work in the boutique, who ring sales, do gift wrapping, and plan events.

Petitioner testified that a "vendor" is someone whom RKJ uses only once or twice and who invoices the company for their services. The company utilizes vendors like Office Max or 1006 Design for any custom design work needed by clients of its boutique, such as an invitation. RKJ issues the vendor a check and a 1099 at the end of the year. The vendor submits a job quote for their work, which tells them how much they will be paid.

Petitioner was asked if she had job quotes and invoices submitted by claimant for the work she had performed. She replied that claimant submitted them to White, who would have put them in "job jackets" and "job folders." White was terminated on or about the middle of February 2010 after the company discovered misconduct he had committed. He absconded with the jackets and files when he left. Asked whether she had made an effort to subpoena this information as part of her case, petitioner said she had not.

Responding to claimant's testimony concerning the employment forms and "sticky note," petitioner denied that she had given her any forms and claimed that the employment application submitted by claimant is a Paychex form, while the company uses ADP forms. Petitioner submitted a copy of White's employment application as an example. Petitioner said that she had written the sticky note but that it went with a 401(k) plan document she had once distributed to claimant and other employees of Fusion and Showcase "letting them know that 401(k)'s were starting in November."

Finally, petitioner said she had a conversation with claimant on her last day and told her that if any additional monies were owed they would be taken care of and that she needed to talk with White about it.

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 commissioner under the provisions of this chapter" (Labor Law § 101 [1]). It also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 103 [1]). 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]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner shall "state ... in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). The Board's Rules provide that "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR § 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306 [1]).

Definition of "Employee" Under Article 6 of the Labor Law

An "employer" is defined in Article 6 of the Labor Law as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" is defined as "permitted or suffered to work" (Labor Law § 2 [7]). The Federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). Because the statutory language is identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoumana v Gristede's Operating Corp.*, 255 FSupp2d 184, 189 [SDNY 2003]).

Several factors are relevant in determining whether an individual is an employee under the Labor Law, or an independent contractor outside its wage and hour protections, and are known as the "economic reality test." They include (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss and their investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship, and; (5) the extent to which the work is an integral part of the employer's business (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2nd Cir 1988]). No one factor is dispositive; rather, the test is based on the totality of circumstances. "The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Id.* at 1059; *Matter of Tomasz Wojtowicz*, PR 10-102 at pp. 7-9 [June 12, 2013]).

The existence and degree of each of these factors is a question of fact, and the legal conclusion to be drawn from these facts is a question of law (*Brock v Superior Care, Inc.* at 1059). In applying the factors, the reviewing court is to be mindful that "the remedial nature of the statute . . . warrants an expansive interpretation of its provisions so that they will have the widest possible impact in the national economy (citation omitted)" (*Herman v RSR Security Services, Ltd.*, 172 F3d 132, 139 [2d Cir 1999]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR § 65.39).

Claimant Was an Employee and not an Independent Contractor

We find that claimant was petitioners' employee and not an independent contractor as a "matter of economic reality" under the applicable five-part test.

Claimant testified that near the end of August 2009, White advised her that her employment as an art director with Fusion was terminated and he was going into business with petitioners, who were taking over Fusion's advertising accounts. Claimant would be employed by petitioners under his supervision performing the same duties on these accounts at the same location, hours, and salary. White gave no indication that her work would be on a per job basis or that she had to submit an invoice for her services. Claimant's last salary was $810.00 per week and her last paycheck was for the period ending August 21, 2009. Claimant performed art projects on these accounts under White's supervision at the Sweet Home office, Monday to Friday 8:45 a.m. to 4:45 p.m., from August 24 to October 8, 2009. Claimant's testimony was corroborated by a wage statement from Fusion, a spreadsheet of her hours, and a description of her work submitted to DOL. Additionally, claimant stated to DOL that she was solely employed by petitioners during the time period and was not engaged in any other business.

Petitioner testified and admitted during the investigation that when Fusion closed RKJ hired White as a salesperson to work at the Sweet Home location and to take over some of Fusion's accounts. Claimant was utilized to work "with" White on art projects on these accounts because there was "some value" to the company in completing projects that were "in the works." Petitioner did not dispute that claimant performed this work under White's supervision at the Sweet Home location and did not call or subpoena White as a witness to dispute the terms and conditions of her hiring. Petitioner admitted that she did not have any business certificate or business card from claimant and submitted no evidence showing that claimant operated her own business. Instead, petitioner simply characterized the nature of the relationship with claimant as that of a "vendor" who performed work on a per job basis and was issued a 1099 form at the end of the year. It is well settled that "an employer's self-serving label of workers as independent contractors is not controlling" (*Brock v Superior Care, Inc.*, 840 F2d at 1059).

When petitioner was asked if she had job quotes and invoices submitted by claimant for her work, which are submitted by all vendors whom RKJ contracts with, petitioner said they were submitted to White who would have placed them in "job jackets" and "job folders." Such evidence is critical to establishing contractor status, as independent contractors customarily set a fixed price for their work (*United States v Silk*, 331 US 704, 712 [1947]. According to petitioner, White absconded with the jackets and folders when he was terminated in the middle of February 2010. In a collection letter issued on November 16, 2009, however, DOL advised petitioners that if they disagreed with the claim they should submit a statement of their reasons and substantiate them with any payroll record, contract, or other documentation substantiating their position. Coleman issued petitioners a second notice on January 28, 2010 advising them that DOL would pursue the claim unless they submitted proof establishing that claimant was an independent contractor. At all such times the quotes, invoices, jackets, and files would have been under

petitioners' control before White left his employment. It is implausible that petitioners would not have produced this information to substantiate their position if it indeed existed.

Furthermore, petitioner testified that RKJ hires "employees" from time to time whom it likes and places on its "payroll via ADP." Claimant testified that petitioner visited her at the Sweet Home office on October 6, 2010 and asked her to return employment forms with an attached sticky note that requested them "so I can place you on ADP Payroll before November." The forms included a job application and tax withholding documents. Claimant dated the note as received on October 6th and returned the signed forms to petitioner later that day. Petitioner did not deny that she had written the note but claimed it had been attached to a 401(k) document she once distributed to claimant and other Fusion employees "letting them know that 401(k)'s were starting in November." We find this explanation implausible, as the note nowhere makes reference to 401(k) plans.[1] Given the timing and circumstances of the event, the evidence supports the reasonable inference we draw that claimant was in fact deemed an "employee" whom the company hired and was putting on its payroll.

We therefore credit claimant's testimony and DOL's evidence and find it establishes that petitioners hired the claimant, set the wages, hours, and location for her work, and directed and supervised the work that she performed. Such control is evidence of her status as an employee (*Brock v Superior Care, Inc.*, at 1060 [employer setting of wages, hours, and review of work performance are indicia of supervision and control consistent with employment]). Further, we find that claimant was solely dependent on the wages she earned from her employment and had no opportunity for profit or loss or investment in the business (*Brock v Mr. W. Fireworks, Inc.*, 814 F2d 1042, 1050-51 [5th Cir 1987], *cert. denied*, 484 US 924 [1987] [where employee's sole opportunity for return is from her own labor, she cannot be said to have opportunity for profit or loss that exists for an independent contractor]).

While claimant is no doubt an experienced art director, claimant's supervisor White determined what work needed to be done and controlled the terms and conditions for how it would be performed. White assigned the work and claimant did it. Such dependence on an employer to provide the opportunities for work does not reflect the skill and independent initiative of an independent contractor (*Brock v Superior Care*, 840 F2d at 1060 [where skilled nurses did not use technical skills in any independent way to obtain work opportunities, but instead depended on employer for job assignments that employer controlled the terms and conditions of, economic reality reflects employment]).

Petitioner argued that the company had no need to hire an art director because it used outside vendors for any design work it needed and some of the projects involved "exact repeat jobs" where a skilled person is unnecessary. The arguments are belied by petitioner's actions in hiring claimant as an employee and placing her on payroll. Petitioner also claimed that some projects done by claimant would not have been paid for because they were not approved or were not RKJ's responsibility. However, where claimant performed the work during the course of her employment, she was suffered and permitted to work and must be compensated for those hours (*Matter of Rumley*, PR 10-008 at p. 10 [November 20, 2013]).

---

[1] We do not credit petitioner's testimony that the company uses only ADP employment applications, as the application submitted into evidence does not contain any logo or other writing identifying it on its face as an ADP form.

As to the permanence and duration of the relationship, petitioners' actions in hiring claimant and placing her on payroll establish that their relationship was not intended to be short term, but rather continuous and long term. Finally, while petitioners may currently have no other employees and may outsource design projects needed for their boutique, in 2009 they hired a full-time employee to take over advertising accounts from another company and to continue servicing them. Claimant was hired to perform art and design work on these accounts and to assist him in doing so. Claimant's work was sufficiently integral to petitioner's business activity at the time to be evidence of her status as an employee, not an independent contractor.

Based on the totality of circumstances, we find that claimant was as "a matter of economic reality" dependent on petitioners' business to render service and that an employment relationship existed between claimant and petitioners. Petitioners are thereby liable for any wages owed her under the Labor Law.

The Wage Order Is Affirmed

The Labor Law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rate, and gross and net wages paid (Labor Law §§ 195 and 661, 12 NYCRR § 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative.

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dept. 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept. 2013]).

Petitioners did not submit evidence challenging the Commissioner's calculation of wages aside from showing that they issued claimant two payments in the total amount of $2,158.56. Crediting these payments to her hours worked from August 24, 2009 to October 8, 2009, she was not paid any wages for the period of her claim. We therefore affirm the wage order as valid and reasonable in all respects.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services 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 per centum per annum."

Petitioners did not challenge the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 [2] ("Any objections to the ... order not raised in such appeal shall be deemed waived"). We find that the computations made by the Commissioner in assessing interest in the order are valid and reasonable in all respects.

Civil Penalties

The petitioners did not submit evidence challenging the civil penalties assessed in the wage and penalty orders and the issue is thereby waived pursuant to Labor Law § 101 [2]. We find that the considerations and computations the Commissioner was required to make in connection with the imposition of the penalties assessed in the orders are valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is, otherwise dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
November 5, 2014.

Civil Penalties

The petitioners did not submit evidence challenging the civil penalties assessed in the wage and penalty orders and the issue is thereby waived pursuant to Labor Law § 101 [2]. We find that the considerations and computations the Commissioner was required to make in connection with the imposition of the penalties assessed in the orders are valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is, otherwise dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
in Rochester, New York, on
November 5, 2014.