STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petitions of:

ALBERT F. SCHWEITZER (D/B/A EATS & TREATS), DOCKET NO. PR 10-237,

SEAN MILES (D/B/A/ EATS & TREATS), DOCKET NO. PR 10-239,

Petitioners,

To Review Under Section 101 of Labor Law: An Order to Comply with Article 6 and an Order under Article 19 of the Labor Law, both dated May 20, 2010, and

- against -

THE COMMISSIONER OF LABOR,

Respondent.

DOCKET NOS.
PR 10-237 & PR 10-239

RESOLUTION OF DECISION

APPEARANCES

Albert F. Schweitzer, petitioner *pro se*.

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

WITNESSES

Albert F. Schweitzer, for petitioner.
Mary Coleman, Supervising Labor Standards Investigator, for respondent.

WHEREAS:

On July 19, 2010, petitioner Albert F. Schweitzer (Schweitzer) filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued by the Commissioner of Labor (Commissioner) against petitioner and Sean Miles, D/B/A Eats & Treats on May 20, 2010. This petition was given docket number PR 10-237. On July 20, 2010, petitioner Sean Miles (Miles) filed a petition with the Board seeking review of the same two orders and this petition was given docket number PR 10-239. The Board consolidated both cases for hearing pursuant to Board Rule 65.24 (12 NYCRR § 65.24).

The first order (wage order) requires compliance with Article 6 and demands payment of $3,052.00 in unpaid wages due and owing claimant Paul Peet, Jr., together with interest continuing thereon at the rate of 16% to the date of the order in the amount of $512.00, and a civil penalty in the amount of $3,052.00, for a total amount due of $6,616.40. The second order (penalty order) requires compliance with Article 19 and demands payment of a civil penalty of $500.00 for failure to keep and/or furnish true and accurate payroll records for each employee for the period March 20, 2009 through May 2, 2009.

Respondent filed Answers to the petitions on November 17, 2010. Upon notice to the parties, the cases were consolidated for the purpose of hearing pursuant to Board Rule 65.44 and a consolidated hearing was held on August 14, 2013 in Buffalo, New York before J. Christopher Meagher, Esq., Member of the Board, and the Board's 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.

DEFAULT FOR PR 10-239

Petitioner Miles received the Notice of Video Hearing for August 14, 2013 and he participated in two pre-hearing telephone conferences held on June 10, 2013 and July 11, 2013. During the pre-hearing conferences the petitioners were advised what would take place at the hearing on August 14th, that hearings typically last from several hours to a full day or more, and that the parties should be prepared to be available for whatever amount of time it takes to complete the hearing. On the morning of August 14, 2013, the hearing was supposed to start at 10:00 a.m. and Miles arrived early accompanied by two of his children.

The court reporter was delayed and did not arrive until shortly after 11:00 a.m. Miles advised the Hearing Officer at approximately 10:40 a.m. that he was leaving the hearing and would not return because he could not wait any longer and he had personal business to attend to with his family. The Hearing Officer advised Miles that, while sympathetic to his personal circumstances, the case was noticed for hearing that morning, he should stay until the reporter arrived, and the process would then be expedited as much as possible. Petitioner was further advised that he risked dismissal of his appeal by default if he left the hearing.

According to the Hearing Transcript, despite the Hearing Officer's warning, Miles did leave the hearing and was not present when the hearing record commenced at approximately 11:11 a.m. His absence was noted for the record at 11:20 a.m.

Pursuant to Board Rule 65.24, "the failure of any party to appear shall be deemed a waiver of all rights except the rights to be served with a copy of the decision of the Board and to request Board review" pursuant to Rule 65.41, unless application for reinstatement is made within five days after the scheduled hearing.

Subsequent to the hearing, Miles has not provided the Board with any explanation for his absence from the hearing or any request for reinstatement pursuant to Board Rule 65.24. Accordingly, petitioner Miles' failure to appear at the hearing is deemed a waiver of all rights under Rule 65.24, except the rights to be served with a copy of the decision of the Board and to

request Board review pursuant to Board Rule 65.41, and his petition is otherwise dismissed.

SUMMARY OF EVIDENCE

The Wage Claim

On October 1, 2009, claimant Paul D. Peet, Jr. (Peet) filed a claim with the Department of Labor (DOL) stating that he was employed as a chef at a restaurant called Eats and Treats Café from March 20, 2009 to May 2, 2009 and was owed $3,052.00 in unpaid wages for the period of his claim. The claim form listed "Jaz Miles" as the owner of the business and the person who hired Peet and was his supervisor. The form noted that Peet had requested his unpaid wages from Miles "numerous times" and that his employer refused to pay his wages with the reason that it was "not a good time".

Petitioner Schweitzer is not referenced on Peet's claim form. Peet did not appear or testify at the Hearing.

Petitioner's evidence

Schweitzer testified that he was a friend of Sean Miles and that Miles goes by "Sean or Jazz." Miles had talked to Schweitzer about his interest in opening up some kind of restaurant together because he knew that Schweitzer had experience in the food service business. Miles had noticed a small shop for rent on Lovejoy Street in Buffalo that was the right size and urged Schweitzer to go in with him, as the two might work well together in the community. Schweitzer said he was not that interested in the proposal because he had "a lot of stuff going on" at the time. However, since Miles was his friend and he helped his friends if they needed it, Schweitzer agreed to put his name on the "partnership paperwork" and to help with construction, remodeling, and painting to get the business set up. He told Miles that he did not have any "time to run the place. I do not want to be involved in that way; you know."

Schweitzer estimated that he performed maybe 40 hours of work getting the space fixed up to open and that he spent "a couple hundred bucks" on materials. Once the café opened, however, he was no longer involved in the business and performed no further services. Miles tried to get him to assist with the operation of the café but Schweitzer refused because he did not want to be further entangled. The café was small, sat possibly twelve people, and was never busy. The only people Schweitzer ever saw cooking at the establishment were Miles or his daughter. Schweitzer's name was not connected with any vendors or state agencies other than DOL: "Everything was in Mr. Miles' name as far as any of the vendors that supplied him food or beverages and utilities and all that stuff. They were all in his name; phone, rent; everything."

Schweitzer stated that he did not hire or fire any employees, schedule their work, pay them, decide their rate of pay, or maintain employment records for any employees at the business. "As far as I know, Mr. Miles took care of any record keeping or forms under anything. He dealt with the City as far as any of the inspections, Health Department as far as any inspections. He set up the phone system, the advertising, the menu; everything."

Schweitzer acknowledged that he had to sign paperwork for the bank account for the

business because Miles had opened a bank account at HSBC "... and the woman at HSBC at the time, their rules stated that both partners or any entity of any party or any entity like that, ... they all have to be on the paperwork. So reluctantly, I went down and put my name on the paperwork. I did not want to put my name on the bank. You know, that's financial stuff. That kind of stuff scares me; you know, but I figured, you know, to go forward." All further paperwork from the bank went to Miles. Schweitzer testified had no further contact with HSBC after signing the initial forms.

Respondent's evidence

Supervising Labor Standards Investigator Mary Coleman (Coleman) testified regarding DOL's investigation of the claim. Coleman noted that the claim was reviewed for accuracy and that she corrected the claimant's wage calculations to reflect overtime: "The Complainant said that his rate of pay was $12.00 an hour and he calculated his hours using a straight time rate. I calculated using $12.00 an hour for the first 40 and then $18.00 an hour after 40 hours in a week." Coleman noted that in reviewing this matter nothing indicated to her that this was not a legitimate claim and that the employee knew what he was speaking about relative to his employment. Coleman reviewed the collection letters that were sent, the contacts documented in the DOL's contact log, and the orders that were issued. She acknowledged that no field investigation was done on this matter and that "[e]verything was done by mail or telephone."

Rebuttal

On rebuttal, Schweitzer denied that he received the correspondence and order sent him by DOL at 1190 East Lovejoy Street in Buffalo. According to Schweitzer, the Lovejoy address was closed as of the date of the order and the building may have burned down. Schweitzer added that "...some of this stuff I did not receive, so I'm looking at it today for the first time."

STANDARD OF REVIEW

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).

Pursuant to the Board Rules of Procedure and Practice (Rules) 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 petitioners to prove by a preponderance of the evidence that the orders are not valid or reasonable (*see also* State Administrative Procedures Act § 306).

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).

Employer Status

The threshold issue to be determined is whether petitioner was an employer of the claimant within the meaning of the New York Labor Law.

Labor Law § 190 defines the term "employer" 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]). An "employee" is described in the statute as "any person employed for hire by an employer in any employment" (Labor Law § 190 [2]). Furthermore, to be "employed" means that a person is "permitted or suffered to work" (Labor Law § 2 [7]).

The Board has found individuals to be employers if they possess the requisite authority over employees (*see e.g. Matter of David Fenske [T/A] AMP Tech and Designs, Inc.*], PR 07-031 [December 14, 2011]; *Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 [January 27, 2010]). In *Herman v RSR Security Services, Ltd.*, 172 F3d 132, 139 [2d Cir 1999], the court articulated this test for determining employer status:

> "...the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' ... [T]he 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)."

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*Id*).

On the record before us as to Schweitzer, there is little evidence supporting any of the *Herman* factors necessary for employer status. Schweitzer credibly testified that he was a reluctant partner in the Eats and Treats Café and had no financial stake in the business aside from the minimal time and materials expended to get the location cleaned up and operational. Once the café was open, he refused to work in the business, performed no further services, and rarely visited it during the short period of time it was in operation. Schweitzer did not hire, supervise, pay the claimant, decide his rate of pay, and did not maintain employment records. Schweitzer added that he did not even know who the claimant was. The burden of going forward thereby shifted to DOL to submit sufficient evidence establishing that Schweitzer possessed the requisite authority over claimant's employment such that he may be deemed an individual employer under the statute. The evidence submitted fell short of the mark.

The Commissioner did not present any evidence establishing that Schweitzer played any operational role in the business. Coleman testified that a documentary review turned up Schweitzer's name but had no evidence of any connection between Schweitzer, the claimant, or the operation of the business. In the absence of direct and affirmative evidence that Schweitzer possessed the requisite power to control claimant's employment, we do not find any evidence sufficient to prove that petitioner was an employer.

The wage order includes interest at the statutory rate of 16% and a 100% civil penalty. As the petitioner Schweitzer is not an employer in this case, the wages, interest and civil penalty are vacated as to him.

Penalty Order

The penalty order assesses a $500.00 civil penalty against the petitioners for failing to keep and/or furnish true and accurate payroll records for each employee in violation of Labor Law § 661 and 12 NYCRR 142-2.6. The penalty order further states that the petitioner was "duly requested to provide payroll records for the period from on or about March 20, 2009 through May 2, 2009." Since we find that petitioner Schweitzer was not an employer under applicable law, the penalty order is also vacated as to him.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. As to the petition of Sean Miles, this proceeding be, and the same hereby is, dismissed in accordance with the Board's rules; and

2. The wage order is revoked with respect to petitioner Albert F. Schweitzer; and

3. The penalty order is revoked with respect to petitioner Albert F. Schweitzer; and

4. The petition of Albert F. Schweitzer be, and the same hereby 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
January 16, 2014.