STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ZENG CHAO PAN, Petitioner, 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 July 23, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO.PR 10-404 RESOLUTION OF DECISION

APPEARANCES

Zeng Chao Pan, petitioner *pro se*.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel) for respondent.

WITNESSES

Zeng Chao Pan, for the petitioner.

Sheng Liu, claimant, and Heather Buzzo, Senior Labor Standards Investigator, for respondent.

WHEREAS:

On December 20, 2010, petitioner Zeng Chao Pan (Pan) 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 Sheng Hui Travel and Tours, Inc. (Sheng Hui Travel) on July 23, 2010. An amended petition was filed on February 2, 2011. Sheng Hui Travel did not file a petition for review.

The first order (wage order) requires compliance with Article 6 and demands payment of $1,893.42 in unpaid wages due and owing claimant Sheng Liu, together with interest continuing thereon at the rate of 16% to the date of the order in the amount of $768.57, and a civil penalty in

the amount of $1,893.42, for a total amount due of $4,555.41. The second order (penalty order) requires compliance with Article 19 and demands payment of a civil penalty of $500 for failure to keep and/or furnish true and accurate payroll records for each employee for the period November 4, 2007 through January 9, 2008.

The amended petition claims that petitioner was not an owner, director, or shareholder of Sheng Hui Travel, did not hire the claimant, and was improperly named as an employer in the orders.

MOTION TO DISMISS

The Commissioner filed a Notice of Motion and Affirmation in Support of Motion to Dismiss on March 14, 2011. The Board held an evidentiary hearing before Associate Counsel Devin A. Rice on the motion on January 9, 2012.

Because service of the orders was defective, the motion to dismiss was denied and the petition was deemed timely filed. The respondent was ordered to file an answer by March 6, 2012, and respondent's answer to the petition was filed on February 15, 2012.

A hearing was held on March 29, 2013, in New York, New York, before Board member and designated Hearing Officer J. Christopher Meagher, Esq. 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 submit closing briefs.

SUMMARY OF EVIDENCE

The Wage Claim

On August 15, 2008, claimant Sheng Liu (Liu) filed a claim against Sheng Hui Travel with the Department of Labor (DOL), stating that he was employed by the company as a driver at the rate of $150 per day from November 4, 2007 to January 10, 2008 and was owed $1,893.42 in unpaid wages for the period of his claim. The claim form listed three individuals as responsible persons of the firm, including petitioner, and identified them as "owners" of the company.

Petitioner's evidence

Petitioner Zeng Chao Pan testified that he had no official connection with Sheng Hui Travel and was not an owner, shareholder, or employed by the company. He did not hire the claimant, did not supervise his employment, and did not pay him. During the time frame of the claim, Pan lived in Tennessee but was also a shareholder in another company at 3 Allen Street in New York's Chinatown and was acquainted with a Ms. Howe, who ran Sheng Hui Travel at 33 Allen Street.

Pan testified that after receiving the orders, he felt there had to be a mistake because he had no official business connection with Sheng Hui Travel and was not Liu's employer. Through an intermediary, petitioner met with the claimant and asked him to sign a statement requesting

that DOL withdraw the orders against him because of the misunderstanding. Claimant did so in a letter dated December 17, 2010: "This letter is hereby to inform you that I would like to drop the case against Mr. Zeng Cho Pan a/k/a Zeng Chao because I did not know that he is neither the employer nor a shareholder of Sheng Hui Travel & Tours, Inc." As part of the process of resolving the dispute, Pan also gave Liu $1,000. Pan then forwarded the letter to DOL with a request that it discontinue the case against him, explaining that he occasionally helped out at Sheng Hui Travel when he was in New York, but was not an owner or shareholder, and that "I talked to [the claimant] and explained to him that I was only a temporary helper and neither the owner nor a shareholder of the company and he is willing to drop the case against me."

Respondent's evidence

Claimant testified that Pan was "one of the bosses" at Sheng Hui Travel. When asked what proof he had for this statement, claimant replied that two of the three bosses told him that petitioner was "also the boss" and that he was "always in the office". Claimant acknowledged that he had no other basis to say that Pan was a boss other than what the two other individuals told him.

Liu testified that Pan "seldom gave me orders. Normally he stayed in the office." When asked to describe the kind of orders Pan gave him, claimant could only provide one example, "...one time this company was renting a truck or bus to another company and he instruct me to drive that vehicle to the other destination." When asked whether Pan verbally told him to do so, Liu explained that it was by phone and he knew it was petitioner because he recognized his voice. Liu added that he was never paid by Pan and that: "... All the money I got is from the company."

Senior Labor Standards Investigator Heather Buzzo (Buzzo) testified regarding DOL's investigation of the claim. Buzzo noted that the claim was reviewed for accuracy, collection letters were sent, and orders were then issued. Aside from the claim form, no evidence was submitted explaining the basis for DOL's determination that Pan was Liu's employer.

Rebuttal

On rebuttal, petitioner denied that he had ever given the claimant an order to drive a bus or truck to any destination.

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 (NYCRR 65.39).

Motion To Dismiss

The Board adopts the decision of counsel dated February 3, 2012 denying the motion to dismiss and finding that the petition was timely.

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 there is little evidence to support any of the *Herman* factors for employer status. Pan credibly testified that he was not an owner or shareholder of the company; did not hire, supervise, or pay the claimant; and was not his employer. The burden of going

forward thereby shifted to DOL to submit sufficient evidence establishing that Pan 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 Pan was an officer, director, or shareholder of Sheng Hui Travel. The only evidence that ties Pan to the company as one of the "bosses" is claimant's statement on the claim form that petitioner was an "owner" and his testimony on direct examination that he was one of the "bosses". However, claimant acknowledged that his testimony was based on hearsay from two other bosses at the company, who told him that petitioner was "also one of the bosses". When Liu was asked, "Do you have any other basis to say that he was a boss aside from what these two other people told you?" his answer was "No." We give no weight to this vague hearsay evidence and find it is outweighed by petitioner's direct testimony that he was not an owner of the business and did not hire, supervise, or pay the claimant. The only other evidence addressing the *Herman* factors was claimant's alleged recognition of Pan's voice in a single telephone call where Pan was alleged to have directed him to move a truck; a situation that was denied by petitioner. The Commissioner presented no other evidence that Pan had any power to hire or fire Liu, supervised or controlled his work schedule or conditions of employment, determined his rate and method of pay, or maintained his employment records. There is some evidence in the record from petitioner's letter to DOL that he occasionally helped out at the company when he was in New York. However, we find that evidence of a one-time directive to move a vehicle, a directive flatly denied by the petitioner, is simply insufficient to establish that petitioner had the requisite authority over claimant's employment, such that he may be deemed an employer under the statute.

While DOL argued in closing that petitioner would not have paid claimant the sum of $1,000 unless he was an employer, the transaction may also be viewed as a compromise business decision to resolve the orders issued against the petitioner, involving over $5,000 in wages, interest, and penalties. In the absence of direct and affirmative evidence that petitioner possessed the power to control claimant's employment, we do not find such evidence sufficient to prove that petitioner was an employer.

The wage order includes interest at the statutory rate of 16% ($768.57) and a 100% civil penalty ($1893.42). As the petitioner is not an employer in this case, the wages, interest and civil penalty are vacated as to petitioner.

Penalty Order

The penalty order assesses a $500.00 civil penalty against the petitioner 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 November 4, 2007 through January 9, 2008". Since we find the petitioner was not an employer under applicable law, the penalty order is also vacated as to the petitioner.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The wage order is revoked with respect to petitioner Zeng Chao Pan a/k/a Zeng Cho Pan a/k/a Zeng Cho a/ka/ Pan Zengchao; and

2. The penalty order is revoked with respect to petitioner Zeng Chao Pan a/k/a Zeng Cho Pan a/k/a Zeng Cho a/k/a Pan Zengchao; and

3. The petition of Zeng Chao Pan 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.