

documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The order to comply with Article 6 (wage order) directs compliance with Article 6 of the Labor Law and payment to the Commissioner for unpaid wages due and owing to Fawzia Rahman (claimant) in the amount of \$843.00 for the time period from March 23, 2009 to April 24, 2009, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$208.05, and ~~assesses a civil penalty in the amount of \$843.00, for a total amount due of \$1,894.05.~~

The order under Article 19 (penalty order) assesses a \$500.00 civil penalty against petitioner for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from on or about March 23, 2009 to April 24, 2009.

The petition alleges that Enigma never received notice of respondent's investigation and that the wage and penalty orders were the first documents received from respondent; and that Enigma has never employed claimant although she might have been an employee of Victor Lui. At hearing, petitioner's counsel contended that there is no proof of service of the orders being appealed. We reject that argument as it was not raised in the petition and pursuant to Labor Law § 101 (2) it was waived.

SUMMARY OF EVIDENCE

Testimony of Claimant Fawzia Rahman

Fawzia Rahman testified that in March 2009 she was looking for a job when she met Victor Lui at a medical office. Lui introduced himself as a medical representative and, after reviewing Rahman's resume, gave Rahman the address of an office where Lui said Rahman could work as a phlebotomist. Shortly after their initial meeting, Rahman met Lui at the address provided where Narrows Therapy was located. Lui showed Rahman around including the equipment and tools she would use as the phlebotomist assigned to that location as well as the required paperwork to complete for the blood specimens Enigma would process, and the box where the specimens were to be placed for pick up. Rahman provided detailed testimony of the location of the office in the basement of a building, that it was a physical therapy office, the description of each room and their designated use, as well as the description of the building itself as a medical office with different doctors' offices in it. Lui gave Rahman his business card that identified him as a representative for Enigma and said Enigma was looking for phlebotomists to work at Narrows Therapy. When Lui interviewed Rahman, he took her resume, reviewed her social security card and phlebotomist certificate, and told her he would give it to Enigma to process. She did not fill out any forms because "Mr. Lui said he was going to do all the paperwork." When Rahman met Lui at Narrows Therapy, he told Rahman that Enigma would hire her and pay her cash.

Rahman testified that she worked between 9:00am and 5:00pm on days indicated by Lui and "people from the Enigma Lab," specifically someone by the name Richard who claimed was a manager in the lab. The medical offices in the Narrows Therapy building also called her and let

her know if any patients were going to Narrows Therapy for their blood to be drawn. Rahman testified that she drew blood from a number of individuals each week and that the number of people fluctuated, but that she had to complete paperwork that had Enigma's name on it for each person. Every afternoon, Rahman would take all specimens to the first floor of the building where there was a box with the name "Enigma Lab" where she would deposit the specimens. Rahman would check the next morning and the specimens were no longer there so she assumed they had been picked up the afternoon before as Lui told her would take place.

While working at Narrows Therapy, Rahman used her own lab coat since none was provided by Enigma. She also stated that there was no time clock or sign-in sheet. Instead, Lui asked Rahman to write down her hours in a plain piece of paper she could give to him at the end of each week for him to show his manager.

Rahman testified that she only worked at the Narrows Therapy location for four weeks because she was not being paid. Lui had told Rahman that she would be paid biweekly, but after not receiving payment for the first two weeks, she demanded pay and Lui told her that his manager was on vacation. After three weeks and again after four weeks, Rahman asked again and Lui again said his manager was on vacation but would pay her upon his return. Rahman insisted on receiving payment to which Lui responded that she could just leave the job. After also claiming her paycheck from Richard who told her he would pass along the message to his supervisor, Rahman decided to leave the job and filed a complaint with the Department of Labor (DOL).

Rahman identified her claim form filed with the DOL in May 2009 and testified that the times written on them as having worked are correct. Rahman testified that Lui told her she could take breaks when there were no patients and that her lunch break was 30 to 45 minutes long. Lui went by the office the first two weeks to check on Rahman and Lui gave her direction at all times. Rahman said she does not know who owns Enigma or any of its officers.

Testimony of Mark Abrazi

Mark Abrazi testified that he has been working as the managing director for Enigma Laboratory since 2000. As managing director, Abrazi handles all personnel matters for Enigma including interviewing applicants, reviewing their resumes, making hiring decisions and completing paperwork for new hires. Abrazi testified that new hires are typically given one month to prepare before working on their own and that no Enigma employee is ever paid in cash.

Abrazi said that to his knowledge Rahman was never hired by Enigma and that Enigma has no record of her. Abrazi also stated that Enigma has never had any relationship to Narrows Therapy and he had never heard of it. He also stated that Enigma does not do phlebotomy work, instead they just pick up blood and urine specimens from doctors' offices and do the analysis.

Abrazi testified that Lui was hired by Enigma's director of sales, as a sales representative on a temporary basis for two months. Lui's responsibility was to go to doctors' offices and "solicit them in order to work with Enigma Laboratory." Lui was terminated after two months for not bringing in any clients. Lui was not authorized to hire anyone on behalf of Enigma, enter into contracts on behalf of Enigma, and never discussed Rahman with Enigma. Enigma uses time clocks for all its employees.

In cross-examination, Abrazi stated that his daughter, Bella Abrazi, and a Richard Abrazi are officers of the corporation. Abrazi also testified that his responsibilities at Enigma did not include payroll, but did include supervising all employees in the laboratory who handle the billing and laboratory work. According to Abrazi, he is the only one with authority at Enigma to hire and fire employees.

Abrazi testified that Enigma has 15 full time employees and about 15 part time employees, and Abrazi supervised them all. Since Enigma operates "24/7," Abrazi is present every day, but also has a night shift and day shift supervisor who are "mostly technical supervisors" without the power to hire or fire.

Abrazi did not recall the time period during which Lui worked at Enigma, but stated that Lui did not have a schedule since he was a sales representative who worked in the field. Abrazi testified that Lui would not have gone to a place like Narrows Therapy to request business for Enigma "because Narrows Therapy doesn't sound like a place where he was supposed to draw blood." Abrazi stated that Liu was supervised by the director of sales.

Abrazi said that Enigma employees at times brought him resumes of other people to review and consider and that he looks at hundreds of resumes every year. Abrazi insisted that he had not seen claimant's resume and that he would have remembered her because Enigma has two accounts with doctors of the same last name.

Testimony of Labor Standards Investigator Carla Valencia

Carla Valencia testified that she has been an investigator for respondent for eight years investigating claims for unpaid wages, unpaid overtime, and unpaid leave. Valencia stated that she did not investigate Rahman's claim, but that all investigators follow the same procedure for the same type of case. Valencia testified as to various documents entered into evidence and part of respondent's investigative file. She identified a letter sent by claimant which had Lui's business card attached and indicates Lui is a "marketing executive" for Enigma Laboratory at the same address Abrazi said Enigma is located. Valencia also identified the quarterly tax forms submitted by petitioner after the wage and penalty orders were issued by respondent, that show employees for the first two quarters of 2009 (1/1 – 6/30). These forms show Lui as being employed by Enigma during the first quarter of 2009, which includes part of the claim period. The forms also show Richard Abrazi as the only Richard employed by petitioner during the claim period. In cross examination, Valencia agreed that letters sent to Enigma requesting records, indicated a claim had been filed against Narrows Therapy.

SCOPE OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable. Any objections . . . not raised in the [petition] shall be deemed waived (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*Id.* § 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 (*Id.* § 101 [3]). Pursuant to Board Rules of Procedure and Practice 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 by a preponderance of the evidence that the orders are not valid or reasonable. (*See also* State Administrative Procedures Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

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” as used in Labor Law Articles 6 and 19 means “any person, corporation or association employing any individual in any occupation, industry, trade, business or service” (Labor Law § 190 [3]; *see also* Labor Law § 651[6]). “Employer” is also defined in Article 1 § 2 (6) of the Labor Law to include an “agent” which includes a “manager, . . . , supervisor or any other person employed acting in such capacity” (Labor Law § 2 [8-a]). “Employed” means “suffered or permitted to work” (Labor Law § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines “employ” to include “suffer or permit to work” (29 U.S.C. § 203 [g]), and 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 FLSA (*Matter of Yick Wing Chan v. N.Y. State Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]; *Bonito v. Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]; *Matter of Maria Lasso and Jaime M. Correa Sr. and Exceed Contracting Corp.*, PR-10-182 [Apr. 29, 2013], *aff’d sub nom. Matter of Exceed Contracting Corp. v. Indus. Bd. of Appeals*, 2015 NY App Div LEXIS 2219 [1st Dept Mar. 19, 2015]; *Chung v. New Silver Palace Rest., Inc.*, 272 FSupp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v. RSR Sec. Servs. Ltd.*, (172 F3d 132, 139 [2d Cir 1999]), the Second Circuit Court of Appeals explained the “economic reality test” used for determining employer status:

“[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” (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.*). Under the broad New York and FLSA definitions, more than one entity can be found to be a worker’s employer.

Applying this test to the record in the present case, we find that it was reasonable and valid to deem Enigma a statutory employer who in economic reality was responsible for Rahman’s wages. Rahman credibly testified that she was hired by Lui on behalf of Enigma. Lui gave Rahman a business card that identified him as an “executive” of the company and he

personally showed her the assigned work location and introduced her to others also working in the same place. Lui, as a representative of Enigma, interviewed Rahman and told her what her work hours would be and her rate of pay and method of payment. Lui oversaw Rahman's work at Narrows Therapy and was physically present during her first two weeks of work to make sure she had the necessary guidance before working on her own. All of this was done under the purview of Enigma. Contrary to petitioner's assertion that Lui might have employed claimant, but not for Enigma, there was at least one other Enigma representative aware of claimant's work on their behalf. Rahman credibly testified receiving calls from "Richard," who appears to be Richard Abrazi, officer of the corporation, in assigning claimant work. Further, petitioner's specimen box was at Narrows Therapy and petitioner did not submit any evidence to indicate that there was any other reason for a specimen's box to be at that location if Enigma had no business in that building. Claimant also credibly testified that she completed Enigma forms for each patient from whom she drew blood.

Even if petitioner was unaware of Rahman as an employee, it benefitted from her work. "An employer who has knowledge that an employee is working and who does not desire that work to be done has a duty to prevent its performance" (*Chao v Gotham Registry, Inc.*, 514 F3d 280, 288 [2d Cir 2008]).

"A presumption arises that an employer who is armed with knowledge has the power to prevent work it does not wish performed. Where that presumption holds, an employer who knows of an employee's work may be held to suffer or permit that work" (*Id.* at 290).

In *Gotham Registry* the court found that the employer was liable for the unpaid wages, even though it lacked some control over the employees' work hours. "[T]he law does not require Gotham to follow any particular course to forestall unwanted work, but instead to adopt all possible measures to achieve the desired result Gotham has not persuaded us that it made every effort to prevent the nurses' unauthorized overtime." (*Id.* at 291.) The petitioner in the instant matter, had at least two employees giving guidance and assigning work to claimant. Claimant's credible testimony pointed to both Lui and Richard as Enigma individuals with knowledge of her work, informing her when patients would come by for her to draw their blood and directing her to place the specimens in the Enigma box in the same building. By empowering Lui as its agent, petitioner permitted or suffered claimant to work and is therefore liable for the unpaid wages. (See also *Matter of Kenneth Ahrem*, PR 10-302 [March 20, 2013] and *Matter of Floral Park Community Church*, PR 07-014 [April 25, 2008]).

Petitioner argued that only Abrazi had the power to hire and fire and that, with the exception of two "technical" supervisors, Abrazi supervised everyone. However, Abrazi testified that Lui was hired by the director of sales and that it was the director of sales who supervised Lui. Even if the Board agreed with petitioner that Victor Lui was claimant's employer, it is also well established that an employee can have more than one employer (See *Matter of Robert Lovinger, Miriam Lovinger, and Edge Solutions*, PR 08-059 [March 24, 2010]).

Based on the record before us, we find that Enigma did not meet its burden to show that it was not claimant's employer. Accordingly, the wage order is affirmed.

Interest

Labor Law § 219 (1), as in effect at the time the wage order was issued, 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 banks 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.” We therefore affirm the interest imposed in the wage order.

Civil Penalty

The wage order imposes a 100% civil penalty against petitioner. Petitioner did not submit any evidence to counter the amount calculated by respondent as a civil penalty on the wage order. Consequently, we find that the considerations to be made by the Commissioner in connection with the imposition of the civil penalty in the wage order are reasonable and valid in all respects.

Penalty Order

The penalty order assesses a \$500.00 civil penalty against 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 March 23, 2009 through April 24, 2009.” Respondent admitted that all records request were for Narrows Therapy even if one of them was addressed to petitioner.

We find that petitioner could not have reasonably understood respondent’s request for records since they all indicated the claim was against Narrows Therapy; a business petitioner claims has no affiliation to it. Accordingly, the penalty order is revoked as to petitioner Enigma.

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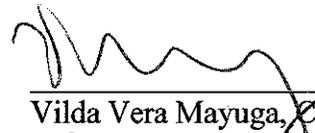
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

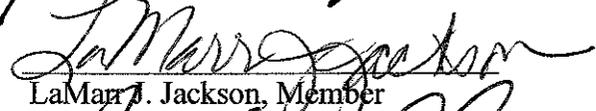
1. The wage order is affirmed; and
2. The penalty order is revoked; and
3. The petition be, and the same hereby is, granted in part and denied in part.



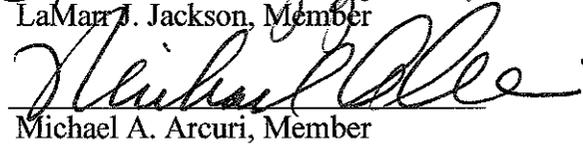
Vilda Vera Mayuga, Chairperson



J. Christopher Meagher, Member



LaMar J. Jackson, Member



Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 16, 2015.