



petitioner of \$1,000.00 for failing to keep and/or furnish true and accurate payroll records for each employee, and \$1,000.00 for failing to provide a wage statement with each payment of wages for the period from on or about August 28, 2005 to through August 28, 2011.

The *pro se* petition claims that the orders are unreasonable and invalid because the claimant and unnamed individuals listed on the order were not employees, and petitioner was not an employer. The DOL filed an Answer on July 18, 2012.

Upon notice to the parties, hearings were held on January 17, 2014 before then Board Chairperson Anne P. Stevason, and July 15, 2014 before Administrative Law Judge Jean Grumet, the Board's designated hearing officers, in New York, New York. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

## SUMMARY OF EVIDENCE

### *Petitioner's Evidence*

Leon is a newspaper distributor who buys newspapers from the New York Daily News, New York Post, New York Times, El Diario, and Newsday, which he resells to street hawkers, newsstands, and bakeries. Leon entered the newspaper distribution business in 2003 or 2004 as a driver. At that time, his supervisors suggested that he approach street vendors who were already selling batteries, gum, tacos, empanadas, bakery goods, or other products on Roosevelt Avenue from 74<sup>th</sup> to 111<sup>th</sup> Streets in Queens, New York to see if they would be willing to also sell newspapers. Leon proposed to the street vendors that if they could sell about 100 newspapers per day, equivalent to 25 cents per paper, he would leave them papers to sell and pay them \$25.00 per day, the "base average, whether you go over or under." Leon negotiated with each street vendor (hawker), and did not provide papers to those individuals who, because they could only sell 40 or 50 papers a day, "couldn't make the \$25."

Sometime later, Leon took over the company and the price of the newspapers increased. Leon told the hawkers that the former distributor was no longer going to provide the newspapers, and:

"if you want, I can buy the paper from the publication but they're not going to give me the same price. If you guys want, what I can do is sell you the paper at this price, sort of like a commission, and [you] would make...money based on how many papers [you] sell." Now, I went to every single one of them and I told them, if you want it I can sell it to you, tell me where you want to sell the paper, and everybody came to me and said, 'I want to sell it here, I want to sell it here.' So I got involved in that selling to everyone the paper on the street. They had their own milk crates."

Leon typically dropped off newspapers for hawkers between 5:30 a.m. and 6:30 a.m., whether the hawkers were present or not, and continued on his route to newsstands and bakeries. He picked up money hawkers had collected either later that day or the next. The hawkers kept

track of the number of papers they sold. According to petitioner, hawkers “can come when they want to” and “can bring people to work for them when they want to. I would just sell them the paper as long as they give me the money that they would purchase the paper for.” Once petitioner sold them the newspapers, hawkers were “free to do whatever they want with that paper.” According to Leon, “people come and tell me, Mr. Leon I want to work in that location” and he gives them the papers to sell. Petitioner testified that he negotiated different per-paper rates with each hawker; and that “[p]eople stayed there whenever they wanted, they came whenever they wanted. Some of them I just left the paper there they came and picked up the paper, so I had no control when they came and when they left, all I did was collect the money of the papers they sold.” According to Leon, his witness, Luis Robles, was typical of the hawkers he dealt with. Robles also sold batteries in addition to newspapers, and told Leon where he wanted to sell papers.

Leon testified that he did not make much money selling papers to the hawkers, but sold the papers to them because the Daily News and the Post “would give me something else on the side, which would be promotions that would be benefiting me” and selling to bakeries and newsstands was more profitable.

Leon testified that the claimant, Alberta Villa, was a substitute for another hawker who left to go to her country, and that it was common for people to come and go and use substitutes to sell their papers. Claimant stayed “a lot longer” than most of the substitutes. According to Leon, when he changed the pay structure from \$25.00 per day to a price per paper, “I said to her, Alberta . . . the lady before you, she was selling batteries so we made a deal with her.” Leon told claimant that while they had so far kept the same pay structure he negotiated with that hawker, for whom claimant had substituted, “I said, look, the papers went up, so we have to now negotiate in this way, you know, the papers are going to be x-amount of cents” with claimant buying them for that price if she wished for resale to customers. Leon told her that it was her choice whether to continue, and that five or six people already left because they were only selling 50 or 60 copies per day. Claimant decided to stay and every morning, Leon would drop the papers off for her at her location. Leon testified that he hardly saw the claimant, and often on the next day, she would leave the money for the previous day’s papers with somebody else for Leon to pick up. After awhile, Leon noticed money missing every week from the claimant. Because petitioner felt sorry for claimant, who had a young daughter, he finally told claimant that he would send his wife to help her count the money and the papers.

On cross-examination, Leon admitted that it was his decision to change the way the hawkers were paid, and he was the one who set the commission rate. The rate changed every time the price of the newspaper went up “[s]o, every time it would change I would change the rate and we both negotiated what the rate is going to be depending on what the price is for the paper.” Leon also testified that there was no written contract with the hawkers, and they gave him the money for the newspapers only after they were sold.

Luis Robles testified that he sold newspapers for petitioner on Roosevelt Avenue on Monday through Friday mornings from 2005 to 2011: initially, for \$25.00 per day “no matter how many newspapers I sold.” Robles generally worked 6:00 a.m. to 9:00 a.m. “but it was not obligatory;” sometimes he arrived later. Robles made his own schedule and could send substitutes on days he did not work. If he was going to be absent, he notified Leon ahead of time. Petitioner told Robles to sell at a particular place on Roosevelt Avenue, but “if I want to, I

can” sell at a different place. Although petitioner initially supplied a table on which to put the newspapers, Robles found it more comfortable to put them on milk crates that he obtained for free, and he soon began doing so. Independent of his work with petitioner, Robles also sold batteries, and could sell other items. Some time around 2009, petitioner stopped paying \$25.00 per day, switching to a “commission” system in which petitioner set a rate per newspaper sold – sometimes 25 cents, sometimes “15 cents, sometimes he pays 20 cents, sometimes he pays me 14 cents.” Robles recorded his sales of the newspapers “on a sheet of paper and I keep for myself what is mine and I give to him what is his.” Under the new system, Robles could earn more than \$25.00 per day “because I stay longer;” his earnings depended on papers sold, and he also had more clients and received more tips. Sometimes, when Robles did not sell all newspapers petitioner left with him, petitioner gave Robles the “leftover newspapers for free,” and “all earnings would be left for me and that’s why I would remain for additional hours because it was for my advantage.”

Jessica Padilla Leon (Ms. Leon), petitioner’s wife, testified that she felt sorry for claimant and her baby daughter, and told claimant to bring the baby to work when she did not have a baby sitter. Ms. Leon babysat claimant’s daughter, either in her car or in her home, while claimant sold papers, and bought them food, coffee, and some clothes. Ms. Leon denied signing a letter in the DOL investigative file that contained what purported to be Ms. Leon’s computer generated signature on letterhead of JR Distribution (which petitioner stated at the hearing is “a company that I have”), stating: “I want to inform you that Albertha Villa, work whit is, in ship for part-time, showing a payment for, One Hundred and twenty five dollars a week. For more information contact us to” and listed a phone number, which Ms. Leon denies was hers.

#### *Respondent’s Testimony*

Supervising Labor Standards Investigator (SLSI) Cloty Ortiz testified that on August 22, 2011, the claimant called her to inquire about the status of her claim, which was filed with the DOL on April 20, 2010. The claimant indicated that she was not being paid minimum wage for her regular hours. Ortiz told the claimant that DOL needed the employer’s address and proof of claimant’s employment. The following day, claimant came to the DOL’s office, spoke to Labor Standards Investigator Maria Elena Fazzio, and provided the letter on JR Distribution letterhead mentioned above (whose authenticity Ms. Leon denied). A note in the investigative file said the letter “was given to her by the supervisor to assist in her renewal of Medicaid.” After obtaining the employer’s address through a license plate search, Ortiz wrote to Ms. Leon stating that respondent was investigating JR Distribution’s alleged failure to pay minimum wages, and requesting payroll records for the period August 2005 through the present. Ortiz testified that in response, Leon telephoned to state that he, not his wife, was responsible for the business, which consisted of the distribution of newspapers, and did not have employees.

Ortiz testified that she sent two investigators, Maria Elizabeth Cueva and Maria Elena Fazzio, to walk down Roosevelt Avenue to try to corroborate claimant’s statement during the investigation that there were an additional eight to ten hawkers. The investigators “did encounter some individuals. They did not wish to cooperate.” The investigators found a woman who identified herself as Maria who was willing to talk to them but wished to remain anonymous. Because Maria was a Spanish speaker and the investigators were not fluent in Spanish, they called Ortiz, who spoke on the phone with Maria. Ortiz testified that Maria confirmed that hawkers “work a certain number of hours for a set amount of money. That eventually that

arrangement was changed to a commission basis per paper. That they had to report whether they were going to be absent or not and that basically the control of the whole relationship was with Mr. Leon.”

According to Ortiz, the DOL computed the minimum wage underpayment to claimant and nine other, unnamed workers based on the wage and hour information provided by the claimant, except in the case of “Maria,” referred to as “EE001” in the minimum wage order. Since Maria had said she had a rate and hours different from claimant’s, the DOL used that information to calculate her underpayment. Ortiz testified that the reason the DOL assumed there were nine unidentified hawkers in addition to claimant was that the information the DOL obtained indicated that anywhere from eight to eleven individuals worked under similar conditions. Ortiz testified that “because they did not feel comfortable coming forward or because we were not able to actually find them, we included them in the case using the information that we have been able to gather from Alberta Villa and Maria as to the hours and the arrangements they had at the time.”

Labor Standards Investigator Maria Elizabeth Cueva testified that on October 12, 2011 at 10:00 a.m., she and another DOL investigator, Maria Elena Fazio, did a patrol of Roosevelt Avenue to look for newspaper hawkers. She testified that she “happened to see some people. We inquired but some weren’t as cooperative and then we got to meet, you know, one lady.” Because the woman, who stated her name was “Maria,” but wished to remain anonymous, could only speak Spanish, Cueva telephoned Ortiz who interviewed Maria. When asked by the Hearing Officer how many newspaper hawkers Cueva observed, Cueva responded that they saw “other people” selling AA batteries and newspapers at “makeshift spots. Like they have like either milk cartons sitting there it’s not a fixed spot.”

#### *Respondent’s Documentary Evidence*

Claimant Alberta Villa’s claim states that beginning March 19, 2007 claimant worked Monday to Friday selling newspapers for “Roberto & Jessica” on Roosevelt Avenue in Corona, New York: at first for \$25.00 per day, and beginning July 1, 2009 for a “piece rate” of 10 cents per newspaper sold. The claim states that claimant sells 130 to 150 newspapers daily, working 5:30 or 5:40 a.m. to 11:00 a.m., and makes from \$13.00 to \$15.00 for 5 ½ hours. Prior to April 2009 she worked 5:30 a.m. to 10:00 a.m.

A December 15, 2011 Narrative Report prepared by SLSI Ortiz states that in a September 19, 2011 conversation with petitioner, Leon:

“referred to the hawkers as independent contractors. Allegedly, he bought newspapers from the companies at wholesale value, which he then sold to the hawkers, who would earn a commission. Hawkers were ‘cashed out’ at the end of the day. Although Mr. Leon indicated that he had no control over these individuals’ comings and goings, he admitted that he offered the hawkers a rate of pay, which they agreed upon.”

The Narrative Report further states that when Ortiz contacted claimant on September 20, 2011 seeking a rebuttal of petitioner’s claim that hawkers were independent contractors, claimant

“stated that the employer chose the hours of work. If Mrs. Villa was late, the employer’s wife would berate her. She was also instructed to call in to report absences or latenesses,” and claimant also stated that there were another 8 to 10 hawkers besides her. Claimant also told Ortiz that she was paid 13 cents per paper towards the end of her employment (which according to the Narrative Report was sometime in May 2011).

Ortiz’s Narrative Report further states that during the October 12, 2011 visit to Roosevelt Avenue by the investigators, “Maria” stated she worked five days per week from 6:00 a.m. to 10:00 a.m. and 12:30 p.m. to 4:30 p.m. at first for \$50.00 per day and since 2009 for 12 cents per newspaper, selling about 240 papers in the morning and 50 in the afternoon. “She is allowed to keep whatever money she makes from selling El Diario. According to ‘Maria,’ the employer has other hawkers stationed all over Roosevelt Avenue.”

On December 15, 2011, Ortiz wrote to petitioner and Ms. Leon stating that although petitioner described the hawkers as independent contractors, he admitted that he determined their rate of pay, and did not provide any evidence to counter the claimant’s allegations. Ortiz enclosed a recapitulation sheet indicating minimum wage underpayments and liquidated damages owed to ten workers and requesting appropriate payment. Ortiz testified that having received no response from petitioner, the DOL issued the wage and penalty orders.

## GOVERNING LAW

### Standard of Review and Burden of Proof

The Petitioner has the burden of proving by a preponderance of the evidence that the orders are invalid or unreasonable. State Administrative Procedure Act § 306 [1]; Labor Law §§ 101 and 103; 12 NYCRR § 65.30.

### Definition of “Employee” Under the Labor Law

Under Article 19 of the Labor Law, “employee” is defined as “any individual employed or permitted to work by an employer” (Labor Law § 651 [5]). “Employer” is defined as “any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as employer” (Labor Law § 651 [6]). “Employed” is defined as “permitted or suffered to work” (*Id.* § 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 nearly identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoummana v Gristede’s Operating Corp.*, 255 FSupp 2d 184, 189 [SDNY 2003]).

To determine whether an individual is an “employee” covered by the Labor Law, or an independent contractor excluded from its protections, “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” (*Brock v Superior Care Inc*, 840 F2d 1054, 1059 [2<sup>nd</sup> Cir 1988]). Factors to be considered in assessing such “economic reality” include: “(1) the degree of control exercised by the employer over the workers; (2) the workers’ 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

is an integral part of the employer's business" (*Id* at 1058-1059). "No one of these factors is dispositive; rather, the test is based on a totality of the circumstances" (*Id.* at 1059). Any relevant evidence may be considered and mechanical application of the test is to be avoided. (*Id.*) "The existence and degree of each factor is a question of fact while the legal conclusion to be drawn from those facts – whether workers are employees or independent contractors—is a question of law" (*Id.* at 1059).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule 65.39 [12 NYCRR § 65.39].

### The Minimum Wage Order Is Revoked

The principal issue in this case is whether it was reasonable and valid for respondent to conclude that the claimant and nine other unidentified newspaper hawkers were employees rather than independent contractors and were paid less than the minimum wage for the period August 28, 2005 to August 28, 2011. We note at the outset that neither the claimant, Maria, nor any of the unnamed individuals listed in the minimum wage order testified at hearing, and the DOL's case was based entirely on hearsay, while much of the petitioner's record evidence on the issue of independent contractor status is un rebutted or undisputed. We find that on the record presented in this case, the petitioner met his burden of showing that DOL's order was invalid and unreasonable.

There is little evidence that petitioner controlled the hawkers' work: Robles and petitioner testified without contradiction that hawkers were free to shift locations, use their own milk crates, and "do whatever they want with" the papers supplied for resale to readers. Robles testified his usual hours were "not obligatory," petitioner that hawkers "came whenever they wanted" and "stayed there whenever they wanted." Petitioner testified that he rarely even saw hawkers between dropping off papers and collecting payment – sometimes not even then. The hawkers found their own substitutes, and Leon testified that claimant herself was a substitute who stayed longer than most.

The hawkers clearly had an opportunity for profit. Petitioner testified that he originally recruited hawkers by asking those who were already selling batteries, gum, tacos, empanadas, baked goods and other products on Roosevelt Avenue if they would like to sell newspapers too. The hawkers were free to, and as Robles testified, did also independently sell other products. LSI Cueva corroborated that she also observed hawkers selling batteries when she patrolled Roosevelt Avenue.

With regard to the third factor, the degree of skill or initiative, while the job of a newspaper hawker is basically unskilled, the un rebutted evidence at hearing indicates that the hawkers in this case demonstrated independent initiative. Robles credibly testified that he made his own schedule, chose to work longer hours to sell more papers, could send substitutes on days he did not work, could choose where to sell his papers, and could sell other products.

With respect to the last two *Brock* factors, “the permanence or duration of the working relationship” and “the extent to which the work is an integral part of the employer’s business,” petitioner testified 1 that hawkers sometimes worked only briefly and decided not to continue, while Robles testified that he sold newspapers for several years. Leon testified that sales through hawkers made up just part of his business, which also included sales to newsstands and bakeries and promotional give-aways for which petitioner hired employees at \$10.00 per hour. Although the last two factors might weigh slightly toward a finding of employee status, we find that they clearly do not tip the balance and are far outweighed by the other factors. While respondent stressed that it was petitioner who decided to shift to the “commission” system, nothing in the record rebuts or disputes his testimony that the hawkers “all had different rates . . . . We negotiated different rates.” Villa’s claim states that she earned 10 cents per paper, and she subsequently told SLSI Ortiz that shortly before she left the job in May 2011, she earned 13 cents per paper. Maria, on the other hand, told Ortiz that she earned 12 cents per paper.

The claim filed with the DOL says nothing about petitioner’s control of claimant’s work and there was no testimony disputing petitioner’s contentions that the claimant and unnamed individuals were not employees. Ortiz’s Narrative Report states that when she contacted claimant, the latter “stated that the employer chose the hours of work,” she “was also instructed to call in to report absences or latenesses,” and Ms. Leon “would berate her” for lateness,<sup>1</sup> but Ortiz in her testimony provided no context or specifics. That is even more clearly true of Maria’s unsworn, anonymous telephone complaint. This hearsay is insufficient to serve as a valid and reasonable basis for finding employee status for claimant, Maria or the additional eight unnamed individuals and is insufficient to counter the petitioner’s evidence.

We find that the totality of the circumstances reveals that as a matter of economic reality, the newspaper hawkers in this case are independent contractors and not employees. We find that the orders are unreasonable and must be revoked as on the record before us there is insufficient evidence to support the DOL’s determination that the claimant and nine unnamed individuals were petitioner’s employees.

The Penalty Order Is Revoked

Having found that there was no valid and reasonable basis to find that the hawkers were employees, we necessarily also revoke the penalty order, which found that petitioner violated record-keeping provisions of the Labor Law that pertain to employees, not to independent contractors.

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<sup>1</sup> Ms. Leon’s testimony that she sometimes babysat claimant’s daughter suggests there may have been a personal relationship in addition to the relationship with claimant as an employee or contractor.

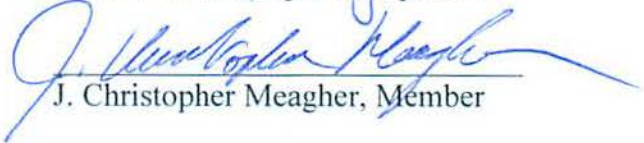


**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The wage order is revoked; and
2. The penalty order is revoked; and
3. The petition is granted.

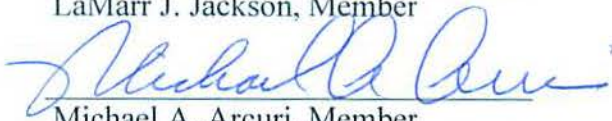


Vilda Vera Mayuga, Chairperson



J. Christopher Meagher, Member

LaMarr J. Jackson, Member



Michael A. Arcuri, Member



Frances P. Abriola, Member

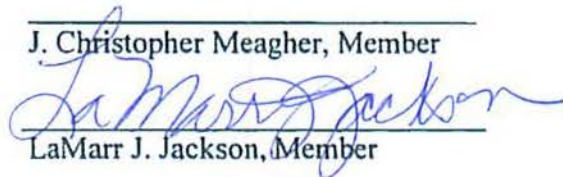
Dated and signed in the Office  
of the Industrial Board of Appeals  
at Albany, New York, on  
April 29, 2015.

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

1. The wage order is revoked; and
2. The penalty order is revoked; and
3. The petition is granted.

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Vilda Vera Mayuga, Chairperson

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J. Christopher Meagher, Member

  
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LaMarr J. Jackson, Member

Dated and signed by a Member  
of the Industrial Board of Appeals  
at Buffalo, New York, on  
April 29, 2015.

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Michael A. Arcuri, Member

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Frances P. Abriola, Member