STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
HUGO FERNANDEZ AND NEW TACOLANDIA, INC.,	:	
Petitioners,	:	DOCKET NO. PR 12-149
To review under Section 101 of the New York Labor Law: An Order to Comply with Article 19, and an Order under Articles 5 and 19 of the Labor Law, each dated August 2, 2012,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Hugo Fernandez, petitioner pro se and for New Tacolandia, Inc.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Marshall H. Day of counsel), for respondent.

WITNESSES

Hugo Fernandez and Hugo Robin Fernandez, for petitioners.

Cloty Ortiz, Supervising Labor Standards Investigator, for respondent.

WHEREAS:

The petition, originally filed with the Industrial Board of Appeals (Board) on September 26, 2012 and thrice amended, seeks review of two orders issued against petitioners Hugo Fernandez and New Tacolandia, Inc. (together, petitioners) by respondent Commissioner of Labor (Commissioner or DOL) on August 2, 2012. On May 1, 2013, the respondent filed an answer. Upon notice to the parties, a hearing was held in New York, New York on November 20, 2014 before Vilda Vera Mayuga, Chairperson of the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements to the issues and file legal briefs.

The first order (minimum wage order) finds that petitioners were employers as defined in New York Labor Law § 651 (6), having employed Josefina Hernandez (claimant) as a general worker from June 17, 2007 to January 11, 2009, and paid her a wage rate below the minimum prescribed in the law and applicable regulations. The order demands compliance with Article 19 of the New York Labor Law and the 12 NYCRR Part 137, and seeks payment to the Commissioner of underpaid wages due and owing the claimant in the amount of $27,228.00, $15,504.30 in interest, $6,807.00 in liquidated damages, and $27,228.00 in civil penalties, for a total due of $76,767.30.

The second order (penalty order) under Articles 5 and 19 of the Labor Law assesses petitioners a civil penalty of $1,000.00 each for one count of failure to keep and/or furnish true and accurate payroll records for the period from June 15, 2007 through April 2, 2010, one count of failure to provide complete wage statements to employees for the period from June 15, 2007 through April 2, 2010, and one count of failure to provide the 30-minute meal period to employees for the period from June 18, 2007 through January 11, 2009, for a total due of $3,000.00.

The petition asserts that petitioners did not employ the claimant.

SUMMARY OF EVIDENCE

The Wage Claim

On January 21, 2009, the claimant filed a claim with DOL for unpaid minimum wages for work as a "general worker" at "Taco landia" from June 15, 2007 to January 5, 2009 at a weekly pay rate of $280.00, and then $350.00, and tips in the amount of $50.00 per week. The claimant indicated that she worked 6 days a week for 12 hours a day with no meal period.

Testimony of Petitioner Hugo Fernandez

Fernandez testified that he was the president and primary cook of Tacolandia, a Mexican fast food eatery located at 77-04D Roosevelt Avenue, Jackson Heights, New York. He denied any knowledge of the claimant and testified that there were only three people who ever worked at Tacolandia, to wit, his son, his daughter and himself. He testified that when DOL visited the restaurant in April 2010, Tacolandia was no longer in business. He also testified that he had no knowledge of claimant, that she had not worked at Tacolandia, that it would have been impossible for her to start work each day at 7:30 a.m. because he and his children did not begin work before 9:00 or 9:30 a.m. or later, and that as Tacolandia was a very small establishment, there would not have been need or room for the labor of claimant.

He also testified that Tacolandia was a cash-only business and that he did not maintain or provide DOL with any time or payroll records, although he paid his son based upon Tacolandia's performance, generally "$300 to $400 to $500" per week, as determined exclusively by Fernandez. He testified that he did not know if his children were issued 1099s or W-2s for their work as he gave "it all to the accountant." He testified that he did not consider payroll records necessary, but testified that he was able to report to his accountant "monthly more or less" what he paid to his son and daughter.

Testimony of Hugo Robin Fernandez

Petitioners called Hugo Robin Fernandez, son of petitioner Fernandez, who testified that he had worked off and on for nearly 19 years at Tacolandia, a "family business" that served lunch and dinner and employed no one other than his father, his sister and himself. He testified that "paperwork-wise" he was the president, vice president, secretary and treasurer of the business and that "there was no necessity of payroll" or time sheets. He also testified that his father determined his rate of pay based on hours, paying him "about [$]500, sometime less or sometimes more." He testified that he did not receive a W-2 at year's end and, when asked what he did receive, he indicated that "it was cash-in-hand business for a while until we wanted or something more we talked about it many times."

Testimony of Supervising Labor Standards Investigator Cloty Ortiz

Cloty Ortiz testified that as a Supervising Labor Standards Investigator, she was responsible for ensuring that the investigations completed by her subordinates were conducted in accordance with DOL policies and procedures, and that the law had been properly applied. Regarding the claim at issue in this proceeding, Ortiz introduced the DOL investigatory file in the hearing record and testified that she had reviewed the file in preparation for the hearing. She testified that the claimant's claim was received in January 2009 and included the allegation of having worked more than 70 hours a week, from June 2007 to January 2009, at Tacolandia as a general worker, with petitioner Fernandez as her supervisor, making a wage of $350.00 and tips of $50.00 weekly. Ortiz also testified that after the claim was filed, DOL was unable to reach the claimant. Introduced in evidence, Ortiz confirmed that respondent had sent a letter to claimant on March 23, 2011 asking for her to contact the investigator assigned to investigate her claim to provide additional information. The letter to claimant explained that claimant must communicate with respondent by April 7, 2011 or respondent "will assume [claimant] is no longer interested in pursuing [her] claim and the case will be closed." Ortiz testified that claimant did not respond to the letter as requested but an investigator still conducted an initial visit to Tacolandia in April 2010. According to respondent's investigative file, the investigator conducting the filed visit was unable to interview any of the unspecified number of employees working there because they did not want to cooperate. Since petitioner Fernandez was not present during the visit, he was issued a Notice of Revisit that directed him to produce payroll and other records. There is nothing in the record to indicate that DOL conducted that revisit. Ortiz also testified that at no time did petitioners provide wage or time records to the respondent.

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 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 met by a preponderance of evidence (State Administrative Procedure Act § 306 [1]). Thus, the burden is petitioners' to prove by a preponderance of the evidence that the orders incorrectly identified them as an employer of the claimant.

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 Article 19 of the Labor Law means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 651 [6]). The word "employed" means "suffered or permitted to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act defines "employ" to include "suffer or permit to work" (29 USC § 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 the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 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 set out the test used for determining employer status, explaining that:

> "[b]ecause the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the 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 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).

When applying this test, "no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive." (*Id.* [internal citations omitted]).

Regarding the *Herman* factors, petitioner Fernandez credibly testified that he did not know, let alone hire, supervise, pay or terminate the claimant. He testified that Tacolandia never had any employees beyond himself, his son and his daughter, which was corroborated by Hugo Robin Fernandez's credible testiomny that Tacolandia had no additional employees and that the

claimant had not worked at Tacolandia. We also credit Hugo Robin Fernandez's testimony that no wage or time records were kept in the 19 years he worked in his father's business, although creation and maintenance of such records had been contemplated and ultimately rejected.

Thus, while we credit Ortiz's testimony regarding her review of the investigative file and regarding petitioners' failure to maintain or furnish required records to DOL, we find nothing to support DOL's determination that petitioners were the claimant's "employer" under the Labor Law (*see*, *Petition of Leo Tsimmer*, PR 11-180 [February 27, 2014]; *Petition of Young Hee Oh*, PR 11-017 [May 22, 2014]. New York law requires that an employer maintain certain employment records, including payroll records, that set out, among other things, its employees' daily and weekly hours worked, wage rate, and gross and net wages paid (Labor Law § 661, 12 NYCRR 137-2.1). Employers are required to keep such records open to inspection by the Commissioner or a designated representative. In the absence of payroll records required by the Labor Law, while the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" found in employee statements or other evidence, it was insufficient to rely solely on the claim form and a site visit at which no employee or employer was interviewed. Absent other evidence, sole reliance on the claim form, and the information in the claim form being rebutted by the live testimony of petitioners' witnesses, is insufficient.

The claimant did not appear at the hearing and her reference to the petitioners on the claim form, on the facts before us with nothing more, cannot form the basis for a finding that they are liable for claimed unpaid minimum wages under the Labor Law. We find that on the entire record, the petitioners met their burden of proof; petitioner Fernandez credibly testified that he was not an employer of the claimant and Hugo Robin Fernandez offered creditable testimony confirming this. We also find that the Commissioner failed to rebut petitioners' testimony. Respondent's investigative file includes a letter sent to claimant requesting additional information because respondent needed more before proceeding with the investigation to the extent of warning claimant that case would be closed if she did not respond to the letter. There is nothing in the record to explain why respondent moved forward with the investigation despite not receiving the requested additional information from claimant. There is also nothing in the record to indicate that a second visit to petitioners' place of business took place to inspect the records requested in the notice of revisit. Accordingly, we find that the minimum wage order against petitioners as the employer was neither valid nor reasonable and petitioners are not liable for the unpaid minimum wages, liquidated damages, civil penalties and interest set forth therein. We therefore revoke the minimum wage order.

The Penalty Order Is Affirmed, as Modified

Respondent imposed a $3,000.00 civil penalty against petitioners for violating Labor Law §§ 162 and 661, as supplemented by 12 NYCRR 137-2.1 and 137-2.2, by failing to keep and/or furnish true and accurate payroll records for all employees, wage statements to the claimant, and for failing to provide an adequate meal period to claimant. As DOL's determination that the claimant was employed by petitioners was unreasonable and invalid, the $1,000.00 penalty for failure to furnish wage statements to the claimant and the $1,000.00 penalty for failing to provide an adequate meal period cannot stand and the penalty order must be modified to remove them.

Petitioner Fernandez and Hugo Robin Fernandez testified there were no time or wage records kept, that Tacolandia was a cash business, and that the idea of maintaining required time and wage records had been contemplated, but ultimately discarded by petitioners; thus, the remainder of the penalty order ($1,000.00) for failure to keep and/or furnish true and accurate payroll records for all employees can be affirmed. It is unclear if respondent conducted a revisit of the business to inspect the records requested and basis for this penalty, but as petitioners testified that they did not maintain any payroll records at any time, and as petitioners did not challenge and therefore waived objection to the penalties in the penalty order pursuant to Labor Law § 101, we find that the considerations and computations the Commissioner was required to make in connection with the remaining penalty assessed in the penalty order are valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is revoked; and

2. The penalty order, as modified above, is affirmed; and

3. The petition for review be, and the same hereby is, granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr 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.