STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
JOSEPH VENTURA AND WILLIAM TELL SERVICES, LLC (T/A WILLIAM TELL FINANCIAL SERVICES),	
Petitioners,	DOCKET NO. PR 12-157
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, and an Order Under Article 19 of the Labor Law, both dated August 17, 2012,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Smith Hoke, PLLC (Wayne A. Smith, Jr. of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Matthew Robinson-Loffler of counsel), for respondent.

WITNESSES

Joseph Ventura, for petitioners.

Michelle Amell and Lori Roberts, Senior Labor Standards Investigator, for respondent.

WHEREAS:

The petition was filed with the Industrial Board of Appeals (Board) on October 15, 2012, and seeks review of two orders issued against petitioners by the Commissioner of Labor (Commissioner or DOL) on August 17, 2012 (together, the orders). On November 26, 2012, the Commissioner filed an answer. Upon notice to the parties, a hearing was held in Albany, New York on February 11, 2014, before Wendell P. Russell, Jr., Counsel to 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 order to comply with Article 6 (wage order) finds that Joseph Ventura and William Tell Services, LLC (petitioners) were employers as defined in New York Labor Law § 190 (3), having employed Michelle Amell as a broker's assistant from August 26, 2007 to March 1, 2009 and failed to pay her wages earned or payable. The order seeks payment of $5,239.50 in unpaid wages, $2,905.41 in interest, and $2,619.75 in civil penalties, for a total due of $10,764.66.

The order under Article 19 (penalty order) assesses petitioners a civil penalty of $500.00 for one count of failure to keep and/or furnish true and accurate payroll records.

The petition asserts that petitioners did not employ Amell during the claim period.

SUMMARY OF EVIDENCE

The Wage Claim

On September 23, 2011, claimant submitted to DOL a claim for unpaid wages in the amount of $5,239.50 for work as a broker's assistant, with an annual rate of pay of $32,500, from August 26, 2007 to March 1, 2009. Attached to the claim was a letter to claimant from the US Department of Labor indicating that William Tell Financial Services had failed to pay her overtime compensation in the amount of $5,239.50

Testimony of Joseph Ventura

Joseph Ventura testified that he is President of William Tell Financial Services, LLC (William Tell), and that during the claim period, he was a self-employed contractor working as a financial services broker with 5 to 10 other brokers in the same office. William Tell had no employees according to Ventura as it was a "conduit," an administrative entity that serviced the brokers, providing office space, equipment, staff and supplies. Ventura testified that William Tell used a separate company, like The Capitol Group and Schlager and Schlager, to hire and pay needed support staff as requested by the brokers. Ventura testified that there was no contract or agreement "per person, but there might have been some type of an agreement with Schlager and Schlager or The Capitol Group."

Ventura testified that he did not interview or approve employees referred to William Tell by Schlager and Schlager or The Capitol Group; the process of bringing on a new employee consisted simply of "meet[ing] the person and then they would begin work." When asked on cross-examination about "workplace policies," Ventura testified that "Schlager and Schlager and The Capitol Group would provide . . . boilerplate manuals and dress codes and sexual harassment-type items" which "were customized and those people read those documents and they signed off on them[,]" as required by Schlager and Schlager.

Ventura testified that Amell, in 2008, was an employee of First Advantage Payroll, The Capitol Group and Schlager and Schlager Professional Business Solutions; each was "a company who provided Michelle Amell to us[.]" Amell did not provide, during regular business hours, any services to William Tell; as an employee of Schlager and Schlager and The Capitol Group, Amell might "gather statements together and put it [*sic*] into a presentation[,] type up an agenda for the meeting . . . for the brokers."

Ventura also testified that Amell was compensated as a "non-employee" for work she did for William Tell, whereby she undertook "special projects . . . at home," on her "own time." For this work, the brokers would tell Ventura what was needed and he would communicate this to Amell, along with the amount she would be paid for each project. Ventura testified that Amell was given this work because she was a "single mom" who could not "work extra hours [at the William Tell office]" and who wanted to "do self-employed work on the side." Ventura testified that there was no contract or agreement with Amell for the work she performed after hours; the "projects" Amell did for the brokers were not the "same type of work" she did during regular business hours as a broker's assistant and consisted of "miniscule" projects like "alphabetizing and things to that effect."

Testimony of DOL Senior Labor Standards Investigator Lori Roberts

Senior Labor Standards Investigator Lori Roberts testified that her job duties include investigating "claims of unpaid wages, unpaid wage supplements, from intake to conclusion" and that she was assigned to handle the Amell investigation. She testified that Amell's claim form was submitted to DOL accompanied by a letter from the US Department of Labor indicating that its investigation revealed an underpayment of wages by William Tell. Roberts also testified that Amell had submitted a copy of a W-2 issued to her by Schlager and Schlager, a copy of a W-2 issued to her by First Advantage and a copy of a 1099 issued to her by William Tell.

Roberts testified that after receiving the claim and speaking with Amell, DOL attempted to collect Amell's unpaid wages in the amount of $5,239.50; she explained that the amount sought was taken from the claim form and from the US DOL letter accompanying Amell's claim. DOL sent William Tell a collection letter, to which William Tell responded by claiming that Amell was not employed by William Tell, that "The Capitol Group was the employer" and that "[The Capitol Group was] an employee leasing company." Roberts testified that William Tell did not submit any documentation to substantiate its assertions, in spite of having been asked to do so by DOL. Roberts testified that DOL also attempted without success to contact The Capitol Group and Schlager and Schlager, but learned that neither was in business any longer. Roberts also testified that William Tell, while identifying The Capitol Group as "an employment leasing company," never stated that William Tell was the leasing agent.

Roberts also testified that she did not "verify" the amount of unpaid wages owed to Amell because it is "up to the employer or co-employer to provide [DOL] evidence to the contrary." She also testified that DOL followed its customary investigative process whereby, if an employer misclassifies an employee as an independent contractor, or cannot or will not substantiate its assertion that it is not a claimant's employer, DOL will "speak to the claimant and . . . rely on testimony from the claimant of what is due or what is claimed due."

Testimony of Michelle Amell

Amell testified that she was first interviewed at William Tell's office by the supervisor of broker's assistants and the office manager. Ventura himself then interviewed her and she was then hired as an office assistant in July 2006 at a pay rate of $9.00 an hour. In the interview with Ventura, he informed her of her start date, her hours of work and her duties, and that, at hiring, she was given William Tell policies and procedures, which she reviewed, initialed and returned

to the office manager, as she was instructed to do. Included were office policies for arrival and departure times, sick leave, vacation leave, meal and smoking breaks, telephone use, email use, "personal" conversations, inappropriate language and a dress code.

Amell testified that she did not complete "any paperwork" for the companies that had issued her W-2s. She thought The Capitol Group and Schlager and Schlager were "payroll companies" because shortly after she started to work for petitioners, she noticed that her paychecks were not issued by William Tell and the office manager told her that the company issuing her paycheck was a "payroll company." She testified that she understood Ventura to be her supervisor and when, in July 2006, she had requested proof of employment needed for a loan, she had been given a letter, dated July 14, 2006, on William Tell letterhead and signed by its assistant office manager. The letter confirmed she was a full-time employee of William Tell.

Amell also testified that shortly after she was hired, she became a broker's assistant; as such, her day-to-day duties consisted of preparing for client appointments, getting accounts ready, opening new accounts and speaking to clients. She worked mainly for Ventura, the "head broker," and would sometimes do "small work" for other brokers "here and there." By 2008, she was making some $16.00 an hour, working more than 40 hours a week in petitioners' office.

Amell testified that she had no agreement with William Tell or Ventura to work after hours, was "absolutely not" working outside of her normal work day and had not gotten any "additional money" or done any additional work beyond regular business hours. Amell denied ever working from home, with the possible exception of checking email "once or twice," and testified that she had received a 1099 from William Tell for 2008 because she had gone to Ventura seeking an increase in pay and he had suggested "instead of put[ting] all [her] earnings in [her] W-2, that he would cut part of [her] pay as a 1099 so [she] could just get that money. And then at the end of the year [she]'d have to pay whatever taxes on it." Amell testified that the wages reported in the 1099 otherwise would have been reported in her W-2. She also testified that the pay reflected in the 1099 had come from a William Tell account, in the form of handwritten checks, while the pay reflected in her 2008 W-2s came by direct deposit from "those payroll companies" Schlager and Schlager and The Capitol Group.

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]).

Board 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]). The burden is petitioners' to prove by a preponderance of the evidence that the orders incorrectly identified them as an employer.

Definition of "Employer" under Article 6 of the Labor Law

"Employer" is defined in Article 6 of the Labor Law as "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also Matter of Yick Wing Chan v New York Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

Like the New York Labor Law, the federal Fair Labor Standards Act defines "employ" to include "suffer or permit to work" (29 U.S.C. § 230 [g]), and it is well settled that "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) (*see also Matter of Chan v Industrial Bd of Appeals*, 120 AD3d 1120 [1st Dept 2014]), the Second Circuit Court of Appeals set out the test 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 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).

When applying the economic reality 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]).

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).

Petitioners Were Employers

For the reasons set forth below, we find that petitioners were claimant's employers during the claim period.

Amell signed a DOL claim form on September 23, 2011, for unpaid wages in the amount of $5,239.50 for work as a broker's assistant for the period of August 26, 2007 to March 1, 2009. She submitted her claim to DOL at the suggestion of the US Department of Labor, which concluded, after a Fair Labor Standards Act investigation that included a wage-and-hour audit of William Tell, that petitioners had failed to pay Amell $5,239.50 in wages for the period of August 26, 2007 to March 1, 2009, petitioners having improperly used compensatory time in lieu of paying overtime. In its September 14, 2011 letter informing her of the underpayment, the US Department of Labor referred Amell to DOL, and Amell's claim for unpaid wages was received by the DOL in its Labor Standards office of the Albany Central Office on September 27, 2011.

Various facts support the Commissioner's finding that claimant was employed by petitioners. We credit the detailed testimony of Amell and DOL Senior Labor Standards Investigator Roberts, which established that Ventura hired Amell to work as an administrative assistant and later a broker's assistant and fired her for refusing to sign a non-compete agreement, established her method (paychecks from employee leasing companies and from William Tell) and rate of pay (from approximately $9.00 to $16.00 per hour), set her hours and place of work and set workplace rules for garb, hair, arrival and departure, cell phone usage, etc. Roberts also testified to the US Department of Labor audit finding that William Tell had underpaid Amell. Claimant's and Robert's testimony clearly supports the conclusion that DOL's determination was valid and reasonable.

Ventura's vague testimony comparing Amell's duties during the regular work day as a broker's assistant with her "miniscule" projects for brokers during her off hours revealed a difference without a credible distinction. He testified that Amell's "special" projects were completed, of Amell's own volition and initiative, outside of her normal work hours, and that this work was compensated so that she might "earn extra money in the hours that she was home because she was a single mom." He could not recall any contract or document evidencing Amell's leased-employee status or the relationship between or among companies that allegedly leased or paid her. He could not recall significant details about how support staff at his office was hired or paid.

We credit Amell's detailed and specific testimony about her work. She testified that she had never worked from home, and had always and only worked in petitioners' offices during her 40-hour-plus-a-week job. Amell credibly testified that she did not take work home with her, had only logged on to her work computer once or twice from home, and that at the office, she performed work that was assigned to her by Ventura, whom she understood to be her "boss." She testified that Ventura had interviewed her prior to her being hired, explained the terms of her employment and terminated her when she refused to sign a non-compete agreement. Amell's testimony supports the claim that petitioners exercised control over the type and manner of her work, her hours of work, her rate of pay, and her place of work, and that she was subject to William Tell's office policies and procedures that included acceptable and unacceptable office attire and personal appearance standards. We also credit her testimony that she understood The Capitol Group and Schlager and Schlager, which issued her paychecks and W-2s, to be "payroll" companies. Finally, we note that when cross-examined by petitioners' counsel, who suggested that she had not been underpaid, Amell creditably explained that the amounts shown on her 2008 W-2s and 1099 did indeed reveal an underpayment, given the increase in her pay to approximately $16.00 an hour for 2008.

Considering the totality of circumstances, we find that Amell was an employee whom petitioners suffered to work as a broker's assistant. Ventura hired her, established her rate of pay and terms of work, instructed her on what work was to be done, and fired her when she refused to sign a non-compete agreement. Petitioners did not meet their burden of proof to refute specific and credible evidence regarding claimant's place of work, job duties, hours, rates and increases of pay, hiring and firing.

The Wage Order Is Affirmed

The wage order is affirmed. New York law requires that an employer maintain 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 §§ 195 and 661, 12 NYCRR 142-2.6).

Here, beyond submitting one 1099 for Amell for 2008 in the amount of $12,345.05 in "non-employee compensation," petitioners did not produce any required records, even after having written DOL several letters regarding Amell's status as an employee and attempting to show that Amell was leased from another company or companies, but producing no documentation concerning the business relationships between William Tell and such companies.

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though results may be merely approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dept. 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept. 2013]). Here, DOL relied on a wage-and-hour audit of William Tell by the US DOL finding that William Tell owed Amell $5,239.50 in unpaid wages; Amell's testimony; her claim form; and her 2008 W-2s and 1099 from William Tell. While petitioners challenged their status as Amell's employer, they did not challenge, in their petition, the calculation of wages due and owing; thus, we decline to review that calculation and affirm the wage order of $5,239.50 as valid and reasonable in all respects.

Interest

New York Labor Law § 219 (1) provides that when the Commissioner determines wages are due, the order directing payment of those wages shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services 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 find that the computations made by the Commissioner in assessing interest in the wage order are valid and reasonable in all respects.

Civil Penalty

The wage order assesses a 50% civil penalty. Labor Law § 218 [1], in relevant part, provides:

> "if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an

> employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty . . . . In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

In assessing the civil penalty in this case, the Commissioner was required to give "due consideration" to the size of petitioners' business, their good faith, the gravity of the violation, any history of prior violations, and in the case of petitioners' wage violation, their failure to comply with recordkeeping requirements. Petitioners presented no evidence to challenge the validity or reasonableness of the Commissioner's determination of the civil penalty and respondent submitted documentary evidence that supports its determination of a 50% civil penalty. Therefore, we find the civil penalty valid as issued by respondent.

The Penalty Order Is Affirmed

Respondent imposed a civil penalty against petitioners in the amount of $500.00 for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records. Petitioners presented no evidence at the hearing to challenge the reasonableness or validity of the imposition of penalties. We have found that petitioners were Amell's employers and that they presented no evidence with respect to maintaining or furnishing proper payroll records for claimant or any documentation regarding third-party leasing arrangements. The Board finds that the computations the Commissioner made in imposing the penalty order are valid and reasonable in all respects. The penalty order is affirmed.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is, otherwise denied.

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 affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is, otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

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

Michael A. Arcuri, Member

Frances P. Abriola, Member