

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:	
	:	
BRENDAN SPIRO,	:	
	:	
Petitioner,	:	
	:	
To Review Under Section 101 of the Labor Law:	:	DOCKET NO. PR 13-179
An Order to Comply With Article 6 of the Labor Law,	:	
and An Order Under Article 19 of the Labor Law, both	:	<u>RESOLUTION OF DECISION</u>
dated August 30, 2013;	:	
	:	
- against -	:	
	:	
THE COMMISSIONER OF LABOR,	:	
	:	
Respondent.	:	
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APPEARANCES

Brendan Spiro, petitioner pro se.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Harry Dunsker and Jeffrey G. Shapiro of counsel), for respondent.

WITNESSES

Brendan Spiro for petitioner.

Gordon Tashjian, Nilesh Tiwari, and Senior Labor Standards Investigator Jeremy Kuttruff for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on October 31, 2013, and seeks review of two orders issued against Elias Batalias and Brendan Spiro and Better Living Food Corp. (T/A Vandaag). Batalias and Better Living Food Corp. did not appeal the orders and are not parties to this proceeding. Respondent Commissioner of Labor filed an answer to the petition on December 19, 2013.

Upon notice to the parties a hearing was held in this matter on October 8 and December 18, 2014, in New York, New York, before Wendell P. Russell, then Counsel to the Board, and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present

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

The order to comply with Article 6 (unpaid wages order) under review directs compliance with Article 6 of the Labor Law and payment to the Commissioner for unpaid wages due and owing to Gordon Tashjian and Nilesh Tiwari for the time period from March 14, 2012 to May 20, 2012, in the amount of \$6,862.00, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$1,409.87, 25% liquidated damages in the amount of \$1,715.50, and assesses a 100% civil penalty in the amount of \$6,862.00, for a total amount due of \$16,849.37.

The order under Article 19 of the Labor Law (penalty order) assesses a \$500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about March 14, 2012 through May 20, 2012.

Petitioner alleges the orders are invalid or unreasonable because he is not affiliated with or a principal of Better Living Food Corp., did not control the affairs of Better Living Food Corp., did not have access to the business records during DOL's investigation, and Nilesh Tiwari was not an employee of Better Living Food Corp.

SUMMARY OF EVIDENCE

The Board makes the following findings of fact and conclusions of law pursuant to Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

Petitioner's evidence

Testimony of Brendan Spiro

Petitioner Brendan Spiro testified that he is a restaurant consultant providing business advisory services to clients in areas related to start up and operation of a restaurant. Petitioner testified that he has been a full-time individual consultant since 2007 incorporated as Quality Restaurant Corp., and has no employees. His clients have been in the restaurant industry or are looking to get into it. Petitioner obtains his clients by word of mouth, personal references, and from a website.

Petitioner testified that he was a consultant for Better Living Food Corp., which operated a restaurant in New York, New York trading as Vendaag. Petitioner testified that he worked as a consultant to Vendaag's owner, Elias Batalias, and had no ownership interest in the business. Petitioner started his relationship with Batalias in 2009 by advising him on construction, operation, equipment, and assisting with the startup of Vendaag, which was established in 2010. Petitioner was involved with Vendaag "continuously" through 2013, and his status as a consultant was memorialized by a "consultant agreement," dated December 10, 2009. The "consultant agreement" provides that petitioner is responsible for, among other things, "on-site management, all related tasks to preopening and operational duties," staffing, and training. Petitioner testified he was

present five days a week at Vendaag at first and less as the contract wore on, and that he oversaw, at the request of Batalias, "any work that was currently going on."

Petitioner testified that he was involved in staffing and "at the owner's direction" interviewed candidates, made recommendations, and told applicants if they were hired. Petitioner also helped to supervise the staff "in as much as directing managers to deal with staff and also advising the staff." Petitioner explained that he was involved in hiring Gordon Tashjian, and told him what his wage rate would be, but had "no particular supervisory capacity over" him. Petitioner agrees Tashjian was not paid, but testified that Batalias is responsible for the unpaid wages owed to Tashjian. Petitioner further explained that Nilesh Tiwari was referred to Vendaag by the accounting firm used by Batalias, and was employed as a bookkeeper. Petitioner reviewed reports prepared by Tiwari and reviewed his other work at times when asked. According to petitioner, Tiwari was an outside vendor who made his own hours.

Petitioner testified that he oversaw the maintenance of employment records for the restaurant, supervised the person who signed off on the transmission of payroll, oversaw entry of records into the payroll system, and reviewed business records for inaccuracies. Petitioner, however, did not have access to the records after Batalias "summarily closed" the business in 2013 and "cut communications." Batalias told petitioner to notify the employees that he was closing the restaurant. Petitioner testified that he told the staff the restaurant was closed and any outstanding payroll would be addressed by Batalias.

Respondent's evidence

Claims

On June 12, 2012, Gordon Tashjian filed a claim for unpaid wages with DOL alleging that he worked at Vendaag as a waiter from September 31, 2011 through May 20, 2012 at a wage rate of \$5.25 an hour plus tips, and was not paid for the weeks ending May 13 and May 20, 2012. Tashjian's claim identifies petitioner as the "superintendent/manager or foreman" and alleges petitioner was the "responsible person" at the firm.

On April 15, 2013, Nilesh Tiwari filed a claim for unpaid wages with DOL alleging that he worked as a bookkeeper at Vendaag until May 18, 2012 at a rate of \$12.00 an hour, and was not paid for the weeks ending March 20, 2012 through May 18, 2012. Tiwari listed Elias Batalias as the responsible person at the firm and alleged petitioner was a superintendent/manager or foreman.

Testimony of Gordon Tashjian

Gordon Tashjian testified that he worked as a waiter at Vendaag from September 31, 2011 until the restaurant went out of business on May 20, 2013. Tashjian worked as a waiter at a wage rate of \$5.25 an hour plus tips. Tashjian testified petitioner interviewed and hired him, and was in charge of the daily operations of the restaurant. According to Tashjian, petitioner was at the restaurant on a regular basis, and "as the staff understood he [was] the general manager." In addition to interviewing and hiring him, Tashjian testified that petitioner set his schedule, managed his work, and instructed him how to complete the sheet that was used each night to record the tips he had received.

Tashjian testified he was not paid for the last two weeks he worked at Vendaag, which included tips that had been collected and pooled, but which were never dispersed to the staff. Tashjian informed petitioner he had not been paid, but received no response.

Testimony of Nilesh Tiwari

Nilesh Tiwari testified that he worked as a bookkeeper at Vendaag from early 2012 until the restaurant went out of business on May 18, 2012. Tiwari testified that petitioner interviewed him and set his schedule and wage rate. According to Tiwari, petitioner was in charge at Vendaag and informed him that he was the general manager of the restaurant and a partner to the owner. Petitioner hired Tiwari at \$10.00 an hour and eventually raised his wage rate to \$12.00 or \$12.50 an hour. Petitioner also set Tiwari's work schedule of five days a week, eight hours per day, and informed him there might be additional hours when needed. Tiwari further testified that petitioner oversaw his hours and monitored what time he clocked in and out.

Tiwari testified that petitioner directed his bookkeeping work and reviewed it before it was sent to the restaurant's accountant. Furthermore, instructions from the accountant were relayed to Tiwari by petitioner. Petitioner told Tiwari to follow his instructions and not to "bring change" to Vendaag. Tiwari testified that he did not work independently. Petitioner gave him instructions on a daily basis, and when he was not present to do so in person, he left written instructions. Tiwari explained that petitioner specifically told him not to make any decisions, to call petitioner if "there is anything to be decided."

Tiwari testified that petitioner did payroll for Vendaag and signed and reviewed checks. Tiwari explained that because the business was not in good financial condition, petitioner asked if he could defer paying him, which Tiwari accepted because he trusted that petitioner would eventually pay the entire amount of unpaid wages. Additionally, due to lack of funds, petitioner occasionally paid Tiwari with post-dated checks. After the business was closed, petitioner told Tiwari that the owner, Elias Batalias, was responsible any unpaid wages.

Burden of proof

The petitioner's burden of proof in this matter is to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30; *see also Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [2011]). We find petitioner failed to meet his burden of proof.

Petitioner Brendan Spiro was an employer

Petitioner Brendan Spiro alleges respondent's determination he is individually liable for wages owed to the claimants is unreasonable because he was a consultant to Elias Batalias and Better Living Food Corp., and not an employer. We find as discussed below that petitioner failed to meet his burden of proof to show respondent's determination that he was an employer is invalid or unreasonable.

"Employer" as used in Article 6 of the Labor Law 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 § 650 [6] [similar definition of employer under Article 19 of the Labor Law]). “Employed” means “suffered or permitted to work” (Labor Law § 2 [7]). The federal Fair Labor Standards Act, like the New York Labor Law 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 stated that the test used for determining employer status by explaining that:

“Because 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]).

The credible evidence demonstrates that petitioner sufficiently controlled the working conditions of Tashjian and Tiwari to support respondent’s determination that he was their employer under the Labor Law. Tashjian and Tiwari credibly testified that petitioner hired them, made their work schedules, supervised their work, and determined their rates and methods of pay. Their testimony was not rebutted. Petitioner, himself, agreed that he helped to supervise the staff, oversaw the maintenance of payroll records, and reviewed Tiwari’s work. The agreement petitioner entered with Batalias indicates that petitioner was responsible for on-site management, all tasks related to operational duties, staffing, and training. The record shows that petitioner was more than a mere consultant to the restaurant’s owner (*cf. Matter of Suhanosky*, PR 11-113 [October 2, 2013] [restaurant consultant not an employer where role and authority was limited and of a short duration]). Petitioner was present at the restaurant on a continuous basis after the expiration of the “consultant agreement”¹ throughout the entire duration that Vendaag was in business and despite claiming to have no ownership interest acted as an employer (*see e.g.* Labor Law § 2 [6] [ownership not a requirement for employment status]). That other individuals or entities may also have acted as claimants’ employer does not relieve petitioner of liability. It is well settled that employees may have more than one employer (*Matter of Bova*, PR 06-024 at p.7 [November 28, 2007]). We find respondent’s determination that petitioner is individually liable as an employer reasonable.

¹ The agreement expired April 10, 2010 but petitioner’s relationship with the restaurant lasted until it closed in May 2012.

Nilesh Tiwari was an employee

Petitioner alleges that Nilesh Tiwari is not covered by the orders, because he was an independent contractor. Petitioner presented no evidence indicating Tiwari was an independent contractor. The record shows petitioner controlled Tiwari's hours of work, paid him an hourly rate, supervised and reviewed his work and specifically instructed him not to make any independent decisions, rather to call if he had any questions, and that Tiwari's only employment during the relevant time period was at Vendaag. Additionally, there is no evidence in the record that Tiwari was in business for himself. We find as a matter of economic reality that Tiwari was an employee (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2d Cir 1988]).

The unpaid wages order is affirmed

Having found that petitioner is liable for the unpaid wages respondent found due, we affirm the unpaid wages order. Petitioner did not dispute that the wages are owed or the manner in which respondent calculated the amount of unpaid wages. Article 6 of the Labor Law requires payment of wages at regularly specified intervals depending on the type of business and classification of employment. Manual workers such as waiters must be paid weekly and not less than seven calendar days after the week in which the work was performed (Labor Law § 191 [1] [a]). Clerical workers such as bookkeepers must be paid not less frequently than semi-monthly on a regular pay day designated in advance (Labor Law § 191 [1] [d]). It is undisputed that claimants were not paid wages for the pay periods specified in their claim forms. Petitioner, as an employer, is individually liable for the unpaid wages.

Civil penalty

Labor Law § 218 (1) provides that if respondent determines an employer has violated certain provisions of Article 6, including failure to pay owed wages, she must assess an "appropriate civil penalty." The civil penalty assessed must be 200 % if respondent finds the violation was willful or egregious, or if the employer has previously violated the Labor Law. Otherwise, in assessing the amount of the penalty, the respondent must "give due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case [] of wages . . . the failure to comply with recordkeeping or other non-wage requirements" (Labor Law § 218 [1]). Respondent assessed a 100 % civil penalty against petitioner, which was not alleged in the petition to be unreasonable and therefore any objection to the civil penalty was waived by petitioner (Labor Law § 101 [1]).

Liquidated damages

Labor Law § 198 provides for the inclusion of up to 100 % of the amount of unpaid wages in liquidated damages unless the employer can show a good faith basis to believe such underpayment was in compliance with the law. Respondent assessed liquidated damages against petitioner in an amount allowed by statute. Petitioner waived any objection to the imposition of liquidated damages because the petition does not allege respondent's assessment of liquidated damages was unreasonable (Labor Law § 101 [1]).

Interest

Labor Law § 219 (1) 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 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.” The Commissioner’s determination of interest due was required by statute and did not exceed the statutory limit, and is therefore not unreasonable or invalid.

The penalty order is affirmed

The penalty order assesses a \$500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee. While the record suggests Vendaag maintained payroll records while in operation, petitioner failed to produce them to DOL during its investigation or at hearing. Petitioner claimed he had no access to the records once the restaurant was shuttered and that Batalias stopped communicating with him. Petitioner, however, made no attempt to subpoena the records prior to hearing despite being advised by the hearing officer that he could do so. The penalty order is affirmed, because petitioner, an employer, failed to furnish true and accurate payroll records as required by Article 19 of the Labor Law.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The unpaid wages order is affirmed; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, denied.



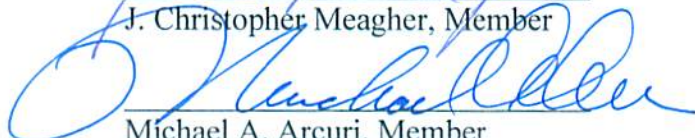
Dated and signed by the Members of the Industrial Board of Appeals in New York, New York on January 25, 2017.



Vilda Vera Mayuga, Chairperson



J. Christopher Meagher, Member



Michael A. Arcuri, Member

Absent

Molly Doherty, Member



Gloribelle J. Perez, Member