STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: JAGTAR SINGH, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, and an Order under Articles 5 and 19 of the Labor Law, both dated August 14, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 14-245 RESOLUTION OF DECISION

APPEARANCES

White Ricotta & Marks, P.C., Long Island City (*Thomas Ricotta* of counsel), for petitioner.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Larissa C. Bates* of counsel), for respondent.

WITNESSES

Jagtar Singh, Jagpreet Singh and Gurvinder Singh for petitioner.

Rolando Santos and Labor Standards Investigator Cecilia Maloney for respondent.

WHEREAS:

On October 14, 2014, petitioner Jagtar Singh filed a petition with the Industrial Board of Appeals pursuant to Labor Law § 101 seeking review of two orders issued against him and The Wine Shoppe of Oakland Gardens, Inc. by respondent, Commissioner of Labor, on August 14, 2014. The Wine Shoppe of Oakland Gardens, Inc. did not appeal the orders or otherwise appear in this proceeding. Respondent filed her answer on December 3, 2014. Upon notice to the parties, a hearing was held in New York, New York, on April 30, 2015, before Wendell P. Russell, Jr., then counsel to the Board, and the designated Hearing Officer in the proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and file post-hearing briefs.

The order to comply with Article 19 (wage order) directs petitioner and The Wine Shoppe of Oakland Gardens, Inc. to pay wages in the amount of $150,006.05 due and owing to Rolando Santos for the period from September 10, 2006, through July 22, 2012, $49,514.33 in interest at 16% calculated to the date of the order, $37,501.51 in liquidated damages, and $150,006.05 in civil penalties, for a total due of $387,027.94.

The order under Articles 5 and 19 (penalty order) directs petitioner and The Wine Shoppe of Oakland Gardens, Inc. to pay civil penalties in the amount of: $800.00 for failure to keep and/or furnish true and accurate payroll records for the period of September 10, 2006 through July 22, 2012, in violation of Labor Law § 661 and 12 NYCRR 142-2.6; $800.00 for failure to provide each employee with a complete wage statement with each payment of wages from September 10, 2006 through July 22, 2012, in violation of Labor Law § 661 and 12 NYCRR 142-2.7; $800.00 for failure to provide at least 30 minutes off for a meal when Santos worked a shift of over six hours from July 18, 2007 through July 22, 2012, in violation of Labor Law § 162; and $800.00 for failure to provide at least 24 consecutive hours of rest in any calendar week for the period from July 18, 2007 through July 22, 2012, in violation of Labor Law § 161.

The petition alleges that: (1) petitioner was not Santos' employer because Santos was an independent contractor who provided occasional services to petitioner; or, in the alternative, (2) the order should be modified to reduce the amounts due because petitioner did not own The Wine Shoppe during the entire claim period.

We find as discussed below that respondent's determination petitioner was Santos' employer was reasonable. The penalty order is affirmed and the wage order is modified to reduce the claim period by a year.

SUMMARY OF EVIDENCE

Petitioner's Evidence

Testimony of petitioner Jagtar Singh

Petitioner Jagtar Singh filed an application for a liquor license in 2009, but did not begin operating The Wine Shoppe until March 2010 due to the lengthy licensing process. Petitioner owned another liquor store, Egan Wine & Liquor, from 2003 to 2005, which he sold to his brother, Gurvinder Singh, on April 10, 2005. Petitioner testified that after selling the business to his brother, he continued to work at Egan Wine & Liquor until 2010 when he began operating his new business, The Wine Shoppe.

Petitioner testified that claimant Rolando Santos, also known as "Vic," occasionally worked at The Wine Shoppe, but never had an established work schedule. Petitioner testified that Santos' primary work was to collect cans for recycling throughout the neighborhood. The Wine Shoppe's business hours were from approximately 10:00 a.m. until 7:00 p.m., and the store was open seven days a week. Santos only worked an hour or two on some afternoons. Santos cleaned the store and bagged bottles for customers, but was not a cashier as is stated in the claim form Santos filed with respondent. Petitioner testified that Santos worked for him at The Wine Shoppe from March 2010 until March 2012. Petitioner sold The Wine Shoppe in July 2012.

Petitioner's records of profit and loss reflect The Wine Shoppe's daily earnings and expenses, including the hours worked and money paid to "Vic." The records indicate that Santos earned between $5.00 and $20.00 each time he worked at The Wine Shoppe. Petitioner explained that he included the cost of food and/or lottery tickets provided to, and requested by, Santos as part of his earnings.

Petitioner testified that he did not keep track of the hours worked by employees at The Wine Shoppe because he did not have any employees, but he did keep track of the hours worked by and payments made to Santos in the expense column of the Profit and Loss records for tax purposes.

Testimony of Jagpreet Singh

Jagpreet Singh is petitioner's son. He worked for his father at The Wine Shoppe a few days per week as needed. Jagpreet testified that he saw Santos working at The Wine Shoppe approximately three or four times per week. Jagpreet observed that Santos sometimes stood by the register and bagged bottles for customers. Jagpreet testified that petitioner did not keep track of the hours he worked nor was he paid by the hour. Instead, his father would give him money when he needed "pocket money."

Testimony of Gurvinder Singh

Gurvinder Singh is petitioner's brother. Gurvinder testified that he purchased Egan Wine & Liquor from petitioner in 2005. Petitioner continued to work at Egan Wine & Liquor after he sold it to Gurvinder. Gurvinder testified that he does not know Santos.

Respondent's Evidence

Testimony of Labor Standards Investigator Cecilia Maloney

Labor Standards Investigator Cecilia Maloney visited The Wine Shoppe on two occasions while investigating Santos' claim that he was not sufficiently compensated for all the hours worked. Because petitioner was not present during her first visit, Maloney left a Notice of Revisit requesting that payroll records be provided at a later date. Petitioner was present during Maloney's revisit, when he told her he did not have payroll records but he did have, and showed her, a "cash book." Petitioner handed Maloney some pages from the cash book, and she noticed entries of $250.00 to $340.00 by the name "Rolando," but no entries using claimant's nickname, "Vic," nor any information regarding the number of hours worked or notations regarding lottery tickets or food offered to claimant in place of wages. When Maloney asked about hours worked, petitioner told her Santos only worked from "time to time." Maloney testified that she asked petitioner why he would pay Santos a weekly salary of at least $250.00 if he only worked from time to time, to which he responded by taking the pages reflecting Santos' wages out of her hands. Petitioner, who called his accountant during the revisit, refused to let Maloney make copies of the cash book.

Maloney noticed during her visits to the store that the hours of operation indicated on the door were 9:00 or 10:00 a.m. until 10:00 p.m., which correlated to the hours Santos claimed he worked.

Maloney testified that the cash book petitioner showed her during the investigation is different from the profit and loss records that petitioner referred to during his testimony. Petitioner did not provide the profit and loss records to Maloney during the investigation and she had never seen them prior to hearing. Maloney testified the records petitioner showed her indicated that Santos was paid approximately $250.00 per week, which led her to conclude that Santos could not have worked a mere few hours per week as alleged by petitioner. Maloney calculated the underpayment due to Santos based on the minimum wage rate at the time and Santos' statements regarding the hours he worked and amounts he was paid. Santos told Maloney that he did not work from January through May 2011 because he was out of the country. Maloney, therefore, did not include that time period in her calculations.

Maloney testified that she asked petitioner for payroll records from the liquor store he previously owned, Egan Wine & Liquor, but he refused to provide such records because Santos did not work there.

Testimony of claimant Rolando Santos

Claimant Rolando Santos testified he worked for petitioner from May 2003 through July 2011. He initially worked at Egan Wine & Liquor until a fire at the store in 2009. Petitioner directed Santos to work at The Wine Shoppe soon after the fire at Egan Wine & Liquor. First at Egan Wine & Liquor, and then at The Wine Shoppe, Santos worked seven days per week, most days from 10:00 a.m. until 10:00 p.m., without a meal break. On Fridays and Saturdays, Santos worked until 11:00 p.m., and on Sundays he worked from noon to 9:00 p.m. Petitioner paid Santos approximately $250.00 in cash each week. Santos testified he had one co-worker, Bela Singh, but did not specify whether she worked at Egan Wine & Liquor and/or The Wine Shoppe.

Santos collected cans for recycling prior to working for Singh, and continued to do so during his employment but only on Sunday mornings since The Wine Shoppe opened at noon on Sundays. He also collected cans early Friday and Saturday mornings on occasion. To earn extra money, Santos also worked for his sister on some Mondays, Wednesdays and Fridays early in the morning for an hour and a half, prior to reporting to work for petitioner Singh.

Santos testified petitioner's profit and loss records were inaccurate with respect to the days he had worked. For example, Santos testified that he was in the Philippines from January 11 through May 11, 2011, yet petitioner's records indicate that he worked and was compensated during that time-period. Santos testified that he informed respondent during its investigation that he was out of the country on those dates.

ANALYSIS

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

Burden of Proof

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; Board Rules [12 NYCRR] §

65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it]); see also *Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [Oct. 11, 2011]). For the reasons stated below, we find that petitioner did not meet his burden of proof to show that the orders are unreasonable.

Petitioner Failed to Maintain and Provide Payroll Records

Article 19 of the Labor Law requires employers to maintain payroll records, for at least six years, that show, among other things, the wage rate of each employee, number of hours they worked daily and weekly, including the time of arrival and departure of each employee working a spread of hours exceeding ten, the amount of gross wages, and the net wages paid (Labor Law § 661; see also 12 NYCRR 142-2.6 [a]). Article 19 of the Labor Law further requires employers to provide employees a statement with each payment of wages showing the hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages (12 NYCRR 142-2.7). Payroll records must be produced to the Department of Labor for inspection when requested (Labor Law § 661).

There were two sets of records discussed at hearing. While investigator Maloney testified that during one of her field visits to The Wine Shoppe she was shown, but not provided copies of, a cash book that listed Santos' weekly earnings, petitioner testified about, and introduced into evidence, business records that reflected Santos' daily earnings, if any.

The records petitioner introduced into evidence were so indecipherable that the entries related to claimant had to be read into the record, line by line and page by page. These records reflect the daily sales and expense activities of The Wine Shoppe. The entries indicating "Vic" under the expense column do not satisfy the requirements of Article 19 of the Labor Law as they do not consistently and credibly track the hours worked by Vic, nor the time in which he arrived to work and left for the day. While petitioner's explanation of some line items did include the time in which Santos arrived and left work, many did not. These records also do not show Santos' name and address, as Santos is referred to solely by his nickname "Vic," nor do they show his social security number or wage rate as required by Article 19. While petitioner explained that this document was primarily used to calculate how much he needed to pay in quarterly taxes, they lack information required to comply with the payroll records regulations (Labor Law § 661; see also 12 NYCRR 142-2.6 [a]).

Also, these records are not credible. For example, Santos testified that he stopped working for petitioner in July 2011, and that the July 2012 date entered in his claim form was in error. Yet, petitioner's business records have entries for Santos up until the July 2012 date indicated on his claim form, rather than July 2011. Likely prepared in response to the claim period that appears in the order to comply, the business records provided by petitioner are not credible. We cannot credit the records as accurate or reliable evidence that Santos was properly compensated for the hours worked.

Where the employer has failed to keep legally required payroll records, 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 the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dept 1989]; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2013]; *Matter*

of Garcia v Heady, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp.*, 156 AD2d 818, 821 (3d Dept 1989), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer." In addition, the employer "cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records" as required (*Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 688-89 [1949]; *see also Mid-Hudson Pam Corp.* 156 AD2d at 821; *Matter of Mohammed Aldeen*, PR 07-093 [May 20, 2009], aff'd *sub nom Matter of Aldeen v IBA*, 82 AD3d 1220 [2d Dept 2011]). We find respondent properly calculated the underpayment of wages due to Santos based on the minimum wage rate at the time and Santos' statements regarding the hours worked and amounts paid.

Petitioner was claimant's employer

Petitioner argued that he was not Santos' employer because Santos was an independent contractor who occasionally provided him services, and in the alternative, argued that he was not an employer prior to when he began operating The Wine Shoppe in 2010. Petitioner, however, failed to offer credible evidence in support of either argument.

As used in Articles 5 and 19 of the Labor Law, "employer" means any "individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer" (Labor Law § 651 [6]; *see also* Labor Law § 2 [6] [definition of employer applies to Article 5]). "'Employed' includes permitted or suffered to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA), 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 used for analyzing employer status under the Fair Labor Standards Act. (*Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 626 [1st Dept 2013]; *Cohen v Finz & Finz, P.C.*, 131 AD3d 666 [2d Dept 2015]; *Chung v. New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]). Article 19 of the Labor Law defines "employee" as "any individual employed or permitted to work by an employer in any occupation" (Labor Law § 651 [5]; *see also id.* § 2 [5] [definition applies to Article 5]).

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 as the purpose of examining them is to determine the

economic reality based on a "totality of circumstances" (*id.*). Under the broad New York and FLSA definitions, more than one entity or person can be found to be a worker's employer (*id.*). Applying this test to the present case, we find that petitioner was Santos' employer, and credit Santos' testimony establishing that, as a matter of economic reality, he was petitioner's employee and not an independent contractor.

The ultimate inquiry into whether an individual is an independent contractor is whether such person depends on someone else's business or is in business for herself (*Matter of Lasso*, PR 10-182, p. 5 [Apr. 29, 2013], *aff'd sub nom. Matter of Exceed Contracting Corp. v IBA*, 126 AD3d 575 [1st Dept 2015]). Accordingly, we must determine whether claimant Santos was "wearing the hat of an independent enterprise" (*id.*, PR 10-182, p. 5, quoting *Boston Bicycle Couriers, Inc. v Division of Employment & Training*, 778 NE2d 964 [Mass. App. Ct. 2002]). To make this determination, we must consider several factors known as the "economic reality test." They include: (1) the degree of control exercised by the employer over the worker; (2) the worker's opportunity for profit or loss and her investment in the business; (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 (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2d Cir 1988]; *Matter of Lasso*, PR 10-182 at 5 [citing *Brock* factors as test to determine independent contractor status under the Labor Law]). The test is based on the totality of circumstances and no one factor is dispositive; "[t]he 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" (*Superior Care*, 840 F2d at 1059). In applying the factors, the reviewing court is to be mindful that "the remedial nature of the statute . . . warrants an expansive interpretation of its provisions so they will have the widest possible impact in the national economy (citation omitted)" (*Herman v RSR Security Services, Ltd.*, 172 F3d 132, 139 [2d Cir 1999]).

Santos credibly testified that petitioner hired him in 2003 to work at Egan Wine & Liquor and later transferred him to work at The Wine Shoppe, indicating that petitioner exercised his authority to, not only, hire employees, but also, supervise and control their conditions of employment. Petitioner's testimony that he paid Santos $10.00 per hour, maintained records that tracked how much all employees were paid (even though he previously testified to not having employees), and often paid Santos in the form of lotto tickets and/or food in lieu of cash wages supports our finding that he determined the rate and method of payments. Both the cash book petitioner showed investigator Maloney, and the records petitioner referred to during his testimony show that he maintained records of payments made to Santos. While the purpose of the records petitioner entered into evidence was to track The Wine Shoppe's daily expenses, they also track the number of hours worked by workers, including Santos, further indicating that as a matter of economic reality, petitioner was Santos' employer.

Alleging that Santos had other jobs from time to time, such as collecting cans and working for his sister is not, in and of itself, sufficient to prove that Santos was an independent contractor, not an employee, nor that he was too busy to also work for petitioner. Considering the factors identified in *Brock* to determine whether someone is an independent contractor, we find that Santos was not an independent contractor because petitioner controlled the means and manner in which Santos performed his duties, set the rate of pay, and ultimately provided no persuasive evidence, such as contracts or invoices, to show that Santos was an independent contractor (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2d Cir 1988]). Furthermore,

Santos' role did not involve an opportunity for profit or loss, nor was there a specialized degree of skill and independent initiative required to perform his work (*id.*).

Petitioner's sale of Egan Wine & Liquor to his brother does not immunize him from a determination that he continued to be Santos' employer, especially since, as previously noted, more than one entity or person can be found to be a worker's employer (*Zheng v Liberty Apparel*, 355 F3d 61, [2d Cir 2003]). As such, ownership of the business (or lack thereof) is not a link (or bar) to a finding of an employer-employee relationship, but rather another factor to consider when analyzing the totality of the circumstances. Furthermore, petitioner and Santos' credible testimony regarding their respective continued employment with Egan Wine & Liquor after its 2005 sale to petitioner's brother strengthens the assertion that petitioner continued to hold a supervisory position over Santos.

The Board has repeatedly held that an individual with the power to control employees – even if that power is not continually exercised, and/or is shared with other individuals – can be liable as an employer. Under the economic reality test, employer status "does not require continuous monitoring of employees, looking over their shoulders at all times, or absolute control of one's employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control 'do not diminish the significance of its existence'" (*Herman*, 172 F3d at 139 [quoting *Donovan v Janitorial Services, Inc.*, 672 F2d 528, 531 (5th Cir 1982)]; see also *Carter v Dutchess Community College*, 735 F2d 8, 11-12 [2d Cir 1984] [fact that control may be "qualified" is insufficient to place employment relationship outside statute]; *Moon v Kwon*, 248 F Supp 2d 201, 237 [SDNY 2002] [fact that hotel manager may have "shared or delegated" control with other managers, or exercised control infrequently, is of no consequence]). Here, the sale of Egan Wine & Liquor did not relinquish petitioner's supervisory role over Santos as both of them continued to work at Egan Wine & Liquor – engaging in the same employer-employee relationship as they did prior to such sale, and continued to do so as petitioner transferred Santos from working at Egan Wine & Liquor to The Wine Shoppe at some point in 2009 or 2010.

Petitioner satisfied all four of the *Herman* factors, and we find that respondent's determination that he is individually liable as an employer is reasonable and valid. However, we modify the minimum wage order to reflect that petitioner is liable for underpayment of wages up until the July 2011 date in which Santos stopped working for him. Santos testified that the July 2012 date on his claim form is incorrect as he stopped working for petitioner in July 2011. Since the resulting Department of Labor calculations include that additional year of wages, the order is modified to reduce the wages due and owing to the time period from September 10, 2006 to July 22, 2011.

The Civil Penalty, Interest, and Liquidated Damages are Affirmed

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Article 19, she must issue an order directing payment of wages found to be due, "plus the appropriate civil penalty." The wage order assesses a 100% civil penalty.

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 (1) sets the "maximum rate of interest" at "sixteen per centum per annum."

The wage order imposes liquidated damages in the amount of 25% of the wages owed. Labor Law § 663 (2) provides that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law. Such damages shall not exceed 100% of the total amount of wages found to be due.

Inasmuch as petitioner failed to challenge the civil penalty, interest, or liquidated damages assessed in the wage order, the issue is waived pursuant to Labor Law § 101 (2). Because we modified the amount of wages owed, as discussed above, the civil penalty, interest, and liquidated damages shall be reduced proportionally.

The Penalty Order is Affirmed

As discussed above, petitioner was Santos' employer. Because petitioner presented no evidence that he maintained legally required payroll records, provided wage statements with each payment of wages, allowed for a 30 minute meal period during each 6 hour shift, or allowed Santos a day of rest each week, the penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is modified and respondent shall issue a modified wage order consistent with this decision within 30 days; and

2. The penalty order is affirmed; and

3. The petition be, and hereby is, granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
May 3, 2017.

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Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
May 3, 2017.