STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
MOHAMEDALI H. AMLANI A/K/A MOHAMED ALI,	:	
Petitioner,	:	DOCKET NO. PR 14-265
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law and an Order Under Articles 5 and 19 of the Labor Law, both dated September 16, 2014,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

The Wool Law Group (N. Richard Wool of counsel), for petitioner.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Jake A. Ebers of counsel), for respondent.

WITNESSES

Mohamedali H. Amlani, for petitioner.

Labor Standards Investigator Marie Elena Fazzio, for respondent.

WHEREAS:

On October 29, 2014, petitioner Mohamedali H. Amlani (petitioner or Amlani) filed a petition for review of two orders issued by the Commissioner of Labor (respondent, Commissioner, or DOL) on September 16, 2014 against Mahomedali H. Amlani[1] a/k/a Mahomed Ali[2] alleging he is not an employer. Respondent filed her answer on March 5, 2015.

[1] At hearing, petitioner spelled his name Mohamedali Amlani as it appears on the caption, not as it appears on the orders to comply.

[2] The orders under review were also issued against GA Petroleum, Inc. (T/A Citgo). At hearing, petitioner's attorney stated that he represented only petitioner Amlani, and that the petition was not filed on behalf of G.A. Petroleum.

The first order to comply with Article 19 of the New York State Labor Law (minimum wage order) directs payment to the Commissioner in the amount of $19,500.00 for wages due and owing to Jose Flores (Flores) for the period from July 25, 2008 to July 25, 2013, and $22,928.96 for wages due and owing to William Flores Lopez (Flores Lopez) for the period from July 10, 2009 to March 9, 2011, for a total of $42,428.96 in wages due and owing to Flores and Flores Lopez (together, claimants), with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $16,508.74, 25% liquidated damages in the amount of $10,607.24, and a 100% civil penalty in the amount of $42,428.96, for a total amount of $111,973.90 due under the minimum wage order.

The second order under Articles 5 and 19 of the New York State Labor Law (penalty order) imposes a $500.00 civil penalty for violating Labor Law § 661 as supplemented by 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee, $500.00 civil penalty for violating Labor Law § 661 as supplemented by 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages, $500.00 civil penalty for violating Labor Law § 162 by failing to give employees at least 30 minutes off for the noon day meal when working a shift of more than 6 hours extending over the noon day meal period, and $500.00 civil penalty for violating Labor Law § 161 by failing to allow employees at least 24 consecutive hours of rest in any calendar week, for a total amount of $2,000.00 due under the penalty order. Each violation listed in the penalty order was for the period from on or about July 25, 2008 through July 25, 2013.

Upon notice to the parties a hearing was held on May 26, 2015 in Hicksville, New York, before Administrative Law Judge Jean Grumet, 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 to make arguments.

SUMMARY OF EVIDENCE

Petitioner's Evidence

Testimony of Petitioner Mohamedali H. Amlani

Amlani testified he has long worked at a Westbury, New York Citgo gas station (station). Until September 2011 it was owned by GA Petroleum, Inc. (GA Petroleum) whose owner was Amlani's ex-wife Shamin Amlani (Shamin). Since September 2011, it has been owned by Westbury Petro, Inc. (Westbury Petro) whose owner was Asif Virani (Asif). Amlani and his ex-wife have been separated since about 2005, do not talk to each other and Amlani does not know how she sold the station. Amlani's job was the same both before and after the sale: pumping gas and staffing a station store that sells drinks, snacks and car-related products like oil and windshield, brake and anti-freeze fluids.

The station opens at 6:00 a.m. every day but Amlani normally worked only from 6:00 p.m. to midnight Monday through Friday, "[v]ery rarely" in the daytime, when he has another job. The station closed early on weekends, and some days also for a time before his night shift. The station has two one-car gas pumps and a coin-operated tire inflator and vacuum cleaner. It does not do repairs or have bays for repairs. Customers have to pay inside the store, but Amlani knows many customers and if he is busy leaves the pumps on so they can gas up themselves and

pay afterwards; this has not led to significant cash shortages. When GA Petroleum owned the station, its only employees were Amlani, Shamin and Farid Virani (Farid). Farid also worked for Westbury Petro until a date Amlani does not recall; as of the hearing date the station's only employees were Amlani, Asif and "Mr. Bhatti." Amlani is paid $350.00 or $400.00 per week in cash; Shamin paid him every week or two, while Asif either pays him or authorizes him to take his own pay out of the store till. While Amlani sometimes bought items for the business or went to the bank to deposit money, he never had any responsibility to pay employees or pay bills. "I just work there, just an employee."

Amlani knew the claimants as people who hung around and sometimes borrowed money from him, but they were not employees. "They used to go across the street and hang there too." Flores was at the station two to five days a week. For tips, Flores Lopez sometimes fetched items from the store for customers or helped them by cleaning cars, checking and putting air in tires, checking and changing oil and changing tires. Neither claimant served any necessary function at the station. Amlani does not know why the owner allowed them to stay there, especially since one claimant (he did not say which) "made the place a mess . . . I cleaned it many times, and the same thing again, and his friends also used to hang there." Flores Lopez, who would come and go, "told me I made so much in tips . . . . He was there in the morning. He used to be sometimes in the evening too."

Amlani learned that the station was being investigated by DOL when he received a letter. He thinks he informed Westbury Petro's owner Asif, who "says this is for GA Petroleum, so he didn't care." Amlani did not inform Shamin, GA Petroleum's owner.

Amlani entered into the record several Westbury Petro tax documents that he testified he obtained from Asif. He testified these are certificates required to be posted at gas stations as they show authorization to collect sales tax and sell cigarettes. Amlani also testified about a number of quarterly wage reporting and unemployment insurance returns (NYS-45 forms) in evidence that reflect payment of wages only to Farid and Amlani. According to Amlani, all certificates required to be posted were in the name of either GA Petroleum or Westbury Petro, depending on the date, but none named an individual.

Respondent's Evidence

Testimony of Labor Standards Investigator Marie Elena Fazzio

Labor Standards Investigator (LSI) Marie Elena Fazzio testified she has been an LSI for eight years and worked with LSI Karla Mansilla, the investigator on this case, who is no longer employed by respondent. LSI Fazzio helped train LSI Mansilla and accompanied her on two visits to the station.

LSI Fazzio testified that DOL received a minimum wage/overtime complaint from Flores Lopez against "Citgo gas station" dated March 9, 2011. In his complaint, Flores Lopez alleged that he worked for the station from July 10, 2009 to the date of filing, "stocking & putting gas on cars," was paid $400.00 cash per week for 85 hours of work, and averaged $150.00 per week in tips. The complaint named "Ali owner" as the name and position of the person who hired Flores Lopez, and stated that the station had three employees. Fazzio further testified that respondent's investigative file reflects Mansilla requested additional information from Flores Lopez on July

17, 2013 and unsuccessfully attempted to reach him by phone on August 5, 2013, but there is no record that any additional information was received.

Fazzio testified that she visited the station on July 12, 2013 with Mansilla who interviewed Flores in Spanish. Both Flores and Mansilla signed a Minimum Wage Field Investigation Employee Statement, which stated that Flores was a stocker, earned $80.00 per day and $450.00 per week, and "[d]id not want to provide additional information." Notes from that visit show that Mansilla and Fazzio noticed that the station's tobacco license posted on the wall was in petitioner's name. Also during the July 12, 2013 visit, Mansilla left with Flores a Notice of Revisit addressed to "Mohameddi Arlani [sic]," "Owner," stating that she would revisit the station on August 2, 2013 at 10:00 a.m. when petitioner should make available payroll records and employee time sheets for the period since July 12, 2007. No records were provided during the revisit when Flores gave Mansilla a business card for petitioner's attorney. Mansilla reached out to petitioner's attorney to request records, but did not receive any.

Fazzio further testified that Flores completed a Spanish-language DOL questionnaire indicating that he worked at the station Monday through Saturday from "6" to "4" with no meal breaks, having been hired by "Ali" five years before. "Ali" was also Flores' boss and the person who paid him. Flores was paid $450.00 per week and sometimes received tips.

Fazzio testified that DOL searched for records concerning both GA Petroleum and Westbury Petro, and learned from a Workers' Compensation Board record that while GA Petroleum had owned the station when Flores Lopez originally filed a claim in March 2011, by the end of 2011 Westbury Petro had replaced it as the entity with ownership. According to Fazzio, DOL does not have any documents which show that Amlani was the owner of either GA Petroleum or Westbury Petro.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules of Procedure and Practice [Board Rules] 66.1 [c], 12 NYCRR 66.1 [c]), and if the Board finds based on that hearing that the order or any part thereof is invalid or unreasonable, the Board is empowered to affirm, revoke or modify the order (Labor Law § 101 [3]). Since the hearing before the Board is *de novo*, we must consider the testimony and evidence at hearing in making our determination. (*Matter of Zi Qi Chan and Jason Tong and Henry Foods, Inc.*, PR 10-060 [March 20, 2013]). Petitioners have the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (Board Rule 65.30 [12 NYCRR 65.30]; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

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).

Petitioner Was Not An Employer

"Employer" as used in Article 19 of the Labor Law means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) 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 FLSA (*Bonito v. Avalon Partners, Inc.*, 106 AD3d 625, 625 [1st Dept 2013]; *Cohen v Finz & Finz,* 131 AD3d 666 [2d Dept 2015]).

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; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*id.*). 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).

On the record before us, there is little evidence supporting any of the *Herman* factors necessary for employer status. Amlani testified without contradiction that he was not an owner of either GA Petroleum or Westbury Petro, and that he was merely the employee who worked the evening shift. He did not pay any employees or bills for either company, did not have knowledge of when Shamin sold or transferred the business to Asif, and did not possess any business records other than the ones presented at hearing that he obtained from Asif. The burden of going forward thereby shifted to DOL to submit sufficient evidence establishing that Amlani possessed the requisite authority over claimants' employment such that he may be deemed an individual employer under the statute. The evidence submitted fell short of the mark.

Neither claimant nor the Spanish speaking investigator who communicated with Flores during the investigation testified. While Fazzio was present with Mansilla at the July 12, 2013 visit to the station and witnessed Flores working, Flores gave no indication of who hired him or supervised his work and "didn't want to finish the claim form because he didn't want to get into trouble." The interview sheet filled out by Mansilla and signed by Flores during that visit

indicates Flores did not mention Amlani: no answer to the question "Name/position of person hiring you" is given and the entry beside the question "Name of supervisor" reads "$450/week." Although Fazzio testified that Flores later filled out a questionnaire stating that "Ali" hired Flores, was his boss and paid him, and Flores Lopez's claim form states that "Ali owner" hired him, there was no testimony that "Ali" was, in fact, Amlani. Claimants' statements to DOL in the claim form, interview sheet, and questionnaire that "Ali" was a supervisor or owner is insufficient to rebut petitioner's testimony to the contrary (*Matter of Elba Arvelo a/k/a Elba Peralta (T/A Restaurant Los Taxistas)*, PR 15-171 [May 25, 2016]; *Keith Woronoff and Katz's Furniture Corp. (T/A La-Z-Boy)*, PR 09-208 [December 14, 2012]). The hearsay evidence from both claimants here is insufficient to serve as a valid and reasonable basis for finding Amlani to be individually liable as an employer (*See Matter of Robinson Leon*, PR 12-092 [April 29, 2015]).

We find based on the totality of the circumstances of the record before us, that respondent's determination that petitioner is individually liable as an employer under Article 19 of the Labor Law was unreasonable. Because we find petitioner was not an employer, the minimum wage order is revoked.

The Penalty Order is Revoked

Having found that there was no valid and reasonable basis to find that Amlani was claimants' employer, we necessarily also revoke the penalty order finding that he violated Labor Law § 661 as supplemented by 12 NYCRR 142-2.6 and 12 NYCRR 142-2.7, Labor Law §§ 161 and 162, all of which pertain to employers. Because we find petitioner was not an employer, the penalty order against him is revoked.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is revoked as to Mohamedali H. Amlani; and
2. The penalty order is revoked as to Mohamedali H. Amlani; and
3. The petition for review be, and the same hereby is, granted.

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 Albany, New York, on
July 13, 2016.