

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :  
 :  
ELBA ARVELO A/K/A ELBA PERALTA (T/A :  
RESTAURANT LOS TAXISTAS), :  
 :  
 : Petitioner, : DOCKET NO. PR 15-171  
 :  
To Review Under Section 101 of the Labor Law: : RESOLUTION OF DECISION  
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 April 6, 2015, :  
 :  
 : - against - :  
 :  
THE COMMISSIONER OF LABOR, :  
 :  
 : Respondent. :  
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**APPEARANCES**

Law Office of Delmas A. Costin, Jr., P.C. (Delmas A. Costin, Jr. of counsel), for petitioner.  
Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Fredy Kaplan of counsel), for respondent.

**WITNESSES**

Petitioner Elba Arvelo, Patricia Acosta, Juana Peralta, Alejandro Rodriguez, and Aleida Falcon for petitioner.  
Labor Standards Investigator Leo Lewkowitz, Tony Escobar, and Xenia Chireno Paulino for respondent.

**WHEREAS:**

Elba Arvelo filed a petition in this matter on June 5, 2015, seeking review of two orders issued by the Commissioner of Labor (Commissioner, respondent, or DOL) on April 6, 2015, against Elva Arvelo A/K/A Elba Peralta (T/A Restaurant Los Taxistas) (Arvelo or petitioner). The Commissioner filed his answer to the petition on July 15, 2015.

Upon notice to the parties a hearing was held in this matter on February 26 and March 11, 2016, in New York, New York, before Devin A. Rice, 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 to make statements relevant to the issues.

The order to comply with Article 19 under review directs compliance with Article 19 and payment to the Commissioner for unpaid minimum wages due and owing to Xenia Chireno Paulino in the amount of \$15,625.43 and Tony Escobar in the amount of \$121,565.25, for a total amount of \$137,190.68 in unpaid minimum wages for the time period from June 4, 2005 to May 2, 2012, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$65,041.38, liquidated damages (25%) in the amount of \$34,297.67, and assesses a civil penalty (100 %) in the amount of \$137,190.68, for a total amount due of \$373,720.41.

The order under Articles 5 and 19 assesses a \$400.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about March 1, 2006 through December 31, 2010; a \$400.00 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 January 1, 2011 through February 8, 2012; a \$400.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 137-2.2 by failing to give each employee a complete wage statement with each payment of wages during the period from on or about June 4, 2005 through December 31, 2010; a \$400.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 146-2.3 by failing to give each employee a complete wage statement with each payment of wages during the period from on or about January 1, 2011 through May 2, 2012; an \$800.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o'clock in the morning to two o'clock in the afternoon from on or about June 4, 2005 through May 2, 2012; and an \$800.00 civil penalty for violating Labor Law § 161 by failing to allow employees at least 24 consecutive hours of rest in any calendar week during the period from on or about June 4, 2005 through May 2, 2012.

Petitioner alleges the orders are unreasonable or invalid because she was not an employer, and therefore, is not individually liable for the wages, interest, and penalties respondent determined she owes. For the reasons discussed below, we find petitioner was not an employer and revoke the orders against her<sup>1</sup>.

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<sup>1</sup> Respondent moved after petitioner rested to dismiss the petition on the ground that petitioner failed to meet her burden of proof. Because only the Board is authorized to dismiss a petition by resolution of decision, the hearing officer reserved decision on the motion. The motion is denied. As set forth in this decision, petitioner met her burden of proof. Respondent also moved at the end of the hearing to dismiss the petition because petitioner did not lay "out the allegations beyond a preponderance of the evidence." This motion is also denied. As set forth in this decision, we have reviewed the record, found petitioner met her burden of proof, and grant the petition.

## SUMMARY OF EVIDENCE

### A. Petitioner's Evidence

#### *Testimony of petitioner Elba Arvelo*

Petitioner Elba Arvelo testified that she is a home health attendant formerly employed from 2001 to 2012 as a vendor on a food truck owned by Marino Zapata, which was doing business in Bronx, New York, as Restaurant Los Taxistas. Petitioner earned \$275.00 a week plus tips, which Zapata eventually raised to \$325.00 a week. Petitioner received no other income from the truck, did not share the profits, and did not supervise or give instructions to other employees. Petitioner obtained a food vendor license to work on the truck. As the holder of a food vendor license, petitioner was required to file quarterly sales tax returns, which were paid through Zapata's accountant.

Petitioner testified that Zapata was frequently out of the country. During those times, Zapata relayed messages to the food truck's staff by calling Juana Peralta and directing that she or another employee go to his apartment located across the street from the truck to answer the phone there so that he could give instructions. Petitioner sometimes received instructions in this way, which she communicated to the rest of the staff. When Zapata was present, he handled the money from the truck and distributed wages to the employees. When Zapata was out of the country, the day shift employees, including petitioner, paid the staff based on instructions Zapata left in a notebook. The salaries and schedules were also written by Zapata on a blackboard in his apartment that employees had access to. According to petitioner's testimony, Zapata supervised the truck and the kitchen, and when he was in the Dominican Republic, "everybody knew what their assignment was."

Petitioner described Tony Escobar's work at Los Taxistas as cooking, bringing food and supplies to the truck when needed, cleaning and maintenance. Petitioner testified that Zapata hired Escobar, set his schedule and paid him his wages. When Zapata was out of the country, other employees, including petitioner, gave Escobar his wages based on Zapata's instructions. Petitioner explained that when supplies were needed for the truck, she or another employee would ask Escobar to bring whatever was needed. Petitioner testified that, for example, if there were no more glasses or juice, she would ask Escobar to, "do us a favor, why don't you go and bring us some glasses or some juice."

Petitioner testified that Xenia Chireno Paulino worked at the food truck serving food to customers. Petitioner stated that a co-worker, Aleida Falcon, recommended that Zapata hire Paulino, and that based on Falcon's recommendation, Zapata "placed [Paulino] to work."

#### *Testimony of Juana Peralta*

Juana Peralta testified she is the cousin of the late Marino Zapata, the prior owner of Restaurant Los Taxistas. She has worked at the truck since 2001 as a food vendor. Peralta testified that Zapata passed away in 2013, and the truck is now owned by Alejandro Rodriguez. Zapata, when he owned the truck, was the only person authorized to hire or fire employees, set pay rates, and make work schedules. When Zapata was in Santo Domingo, he wrote the work schedules on a blackboard in his apartment and the employees "fixed" the schedule. In Zapata's

absence, Peralta, Marisol Polanco, and petitioner went to Zapata's apartment, read the schedule left on the blackboard by Zapata, and told the other employees what their hours were. Zapata set and changed Peralta's schedule. She testified that when she took vacations to the Dominican Republic, Zapata would change her schedule when she returned, because "he cannot remove the employee that was working" her shift in her absence. Other times, Zapata changed her schedule at her request.

Peralta testified that when Zapata was out of the country, he kept contact with his business by telephone twice a day. According to Peralta, Zapata was the only supervisor at Los Taxistas. When he was absent, all the employees were responsible for the business and acted based on Zapata's instructions. Peralta explained that the business was able to function when the "boss is not there" because the employees themselves worked out changes to the schedule, completed the payroll and payment of wages based on Zapata's instructions, collected the money from the truck and put it in Zapata's apartment, which was also used to purchase food and supplies, and communicated by phone with him.

Peralta testified that Zapata hired Tony Escobar, explaining that he was "working at another company, and [Zapata] brought him from that company to his company." Peralta explained that Escobar worked at the market where Zapata purchased food for the truck and requested a job from Zapata, who "brought him to his company." Escobar's job at Los Taxistas included chopping meat at an off-site kitchen and bringing food to the truck. Peralta testified that Zapata was Escobar's "boss," and that when Zapata was out of the country, Escobar "knew all the functions that he had to do."

Peralta also testified that Xenia Chireno Paulino worked at Los Taxistas. Peralta was not present when Paulino was hired. Paulino did the same work as Peralta, which was to sell food. Paulino normally worked 10:00 p.m. to 2:00 a.m., and her "boss" was Zapata.

#### *Testimony of Aleida Falcon*

Aleida Falcon testified she has worked at Restaurant Los Taxistas since 1997 preparing food at an off-site kitchen. She testified she was hired by Marino Zapata, her prior boss, and that her current boss is Alejandro Rodriguez. Falcon testified that only Zapata set her schedule and pay rate and gave her instructions during the time he owned the business. Falcon further testified that petitioner's role at the truck was the same as hers, a worker.

Falcon testified that she recommended to Zapata that he hire Xenia Chireno Paulino, and "he brought her to work." She testified that Zapata hired Tony Escobar after meeting him at a market. Falcon was present at the truck when Escobar first arrived with Zapata.

#### *Testimony of Alejandro Rodriguez*

Alejandro Rodriguez testified that he is the current owner of Restaurant Los Taxistas. He purchased the business in 2012 from Marino Zapata. At the time he purchased Los Taxistas from Zapata, he owned other food trucks and knew how to run the business without needing to learn from Zapata. Rodriguez knows petitioner as a former employee of the food truck who used to sell him food before he bought the business from Zapata.

*Testimony of Patricia Acosta*

Patricia Acosta testified she worked as a food vendor for Restaurant Los Taxistas from December 2005 to March or April 2006. Marino Zapata owned the business during that time and was present five to six days a week, and was very active in running the business. Zapata hired Acosta and set her schedule at the time of hiring. Acosta explained that in order to work at the food truck, she was required to obtain a mobile food vendor license. In order to obtain the license, she had to first obtain a sales tax certificate and pass a food protection course. The sales tax certificate includes a tax identification number to use when filing quarterly sales taxes. Employees on food trucks who hold a food vendor license must file quarterly sales taxes and pay a minimum of \$50.00. Acosta testified that when she worked at Los Taxistas she followed these requirements. Acosta sometimes worked the same shift as petitioner, but they usually worked different shifts. Acosta testified that she does not know Xenia Chireno Paulino.

Acosta testified that Tony Escobar worked at the food truck during the time she worked there. He took care of the truck, brought food from the kitchen, and handled logistics. Acosta heard Zapata tell Escobar what work to do and when to come in to work, and also heard Escobar ask Zapata for days off. Acosta explained that Zapata set the work schedules for the employees and that "since Mr. Escobar was in charge of the logistics, he would be clear and tell him what time I need you here and what time he could leave and come back."

Acosta testified that she put the money she received from customers in the cash register. At the end of each day, Zapata collected the money and left with it.

B. Respondent's Evidence

*DOL's Investigation*

Tony Escobar filed a claim with the Department of Labor (DOL) against Marino Zapata on or about May 18, 2010, alleging unpaid minimum wages and overtime for work performed from June 4, 2005 to the date of the claim. The claim names petitioner as an assistant, who hired and managed Escobar. Xenia Chireno Paulino filed a claim against Restaurant Los Taxistas on January 19, 2012.<sup>2</sup> A DOL investigator's interview notes attached to Paulino's claim form indicate that Paulino worked at a food truck located in Bronx, New York, owned by petitioner.

Because of the claims filed by Escobar in 2010 and Paulino in 2012, Labor Standards Investigator Leo Lewkowitz and a Spanish speaking investigator made a field visit to Restaurant Los Taxistas on January 25, 2012, to attempt to inspect records and interview employees. Lewkowitz testified that because no records were available, he left a "notice of revisit" with Marisol Polanco, the individual he considered at the time was an agent of the employer, stating investigators from DOL would return on February 8, 2012, to inspect payroll and other records of employees working for the food truck. Lewkowitz testified that he believed after his initial visit to the food truck on January 25, 2012, that Polanco was an employer based on her demeanor and that she seemed to be in charge of the other employees working at the truck that day.

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<sup>2</sup> Paulino's claim form is completed in Spanish on a Spanish language claim form. The hearing officer informed counsel for respondent on the record that the Board would not consider the statements made in Paulino's claim unless a certified English translation was provided within three weeks of March 11, 2016, which was the last day of hearing. Respondent failed to provide an English translation of Paulino's claim to the Board as directed.

An investigative report prepared by Lewkowitz, dated May 14, 2013, indicates that Marino Zapata informed DOL he was the owner of Restaurant Los Taxistas, that Marisol Polanco appeared to be in charge of the food truck when inspected by Lewkowitz, and that Zapata, Polanco, and petitioner filed forms with New York State Department of Tax and Finance remitting sales tax. Notes in DOL's "contact log" made by Lewkowitz indicate that respondent found petitioner to be an employer because she was in charge of the food truck when Zapata was absent from the country due to illness.

Lewkowitz testified that during his investigation he verified that Zapata owned the license plate for the food truck and took full responsibility for the business. However, he also believed petitioner and Polanco were employers based on information provided by the claimants. Lewkowitz originally determined Polanco was an employer along with petitioner and Zapata, but his supervisor did not agree because the claimants did not identify Polanco as hiring, directing, controlling or paying them. Lewkowitz conceded that he never communicated directly with petitioner, nor did he have any credible information indicating petitioner had an ownership interest in the business. He met her once at DOL's offices when she along with others accompanied Zapata to a "records interview," but did not question her about her role in the business or ask Zapata about petitioner's role.

Lewkowitz also testified that he reviewed sales tax records submitted by Zapata pursuant to a records request, which included quarterly sales tax records filed by petitioner, and concluded they linked petitioner to the business, because it was unlikely an employee would file such a document unless she was an officer of the corporation. Lewkowitz conceded that throughout the investigation he was not aware that any person selling food on a food truck in New York City is required to have a food vendor license, sales tax certificate, and file quarterly sales tax returns.

Although no interview notes are in evidence, Lewkowitz testified that he spoke with Escobar as part of his investigation. Escobar indicated to Lewkowitz that petitioner was his "supervisor/manager," and that petitioner "hired, directed, and controlled him." Lewkowitz also interviewed Paulino, who also identified petitioner as her "supervisor/manager." According to Lewkowitz, Paulino's untranslated claim form indicates she was "hired, directed and controlled and paid by" petitioner.

#### *Testimony of Tony Escobar*

Tony Escobar testified he has worked at Restaurant Los Taxistas since July 2005. He testified that he filed his claim with DOL because petitioner<sup>3</sup> had changed his schedule and reduced his salary. He testified that petitioner hired him, told him what his job would be, gave him his work schedule every week, and paid him his wages. Escobar did maintenance work and prepared meats and juices. He testified that petitioner supervised him, and, in her absence, Marisol Polanco was his supervisor.

Escobar testified that from 2005 to 2012 his job duties never changed. He cleaned the truck, brought materials to the truck when needed, and went shopping for items needed for the business. Escobar testified that he knew what needed to be done and completed his work. He also testified that on a daily basis petitioner told him what was needed and he went to Marino

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<sup>3</sup> Escobar's claim is against Marino Zapata and lists petitioner as a "supervisor, manager or foreman."

Zapata's apartment to get it. For example, petitioner told him to prepare meats and juices, to clean, and to buy supplies. Escobar explained that he would not know what was needed at the truck unless somebody told him.

Escobar testified that Alejandro Rodriguez is the current owner of Restaurant Los Taxistas. When asked whether he knew Marino Zapata, Escobar first testified that he had met him a few times and he had no role in the business, denied he had ever owned Los Taxistas, and then when asked by the hearing officer why he filed his claim with DOL against Zapata, said that "we all supposed that he was the owner of the truck . . . I knew that he was the owner of the truck."

#### *Testimony of Xenia Chireno Paulino*

Xenia Chireno Paulino testified she worked at Restaurant Los Taxistas from 2010 to 2012 selling food and working in the kitchen. She testified that petitioner hired her, managed her, and told her at the time of hiring what her hours of work and wage rate would be. She also testified, however, that she got the job at the food truck through a co-worker, Aleida Falcon, and that petitioner and Marisol Polanco set her schedule. Paulino further testified that her wages were given to her by petitioner or sometimes Polanco. Petitioner, Falcon, or Polanco sometimes sent Paulino to Marino Zapata's apartment to pick up items that were needed for the truck. Paulino testified that she understood that Zapata owned the business although she only saw him twice. She explained that Zapata was almost always in Santo Domingo because he was in poor health. Paulino did not have a food vendor license when she started to work at the truck, but obtained one when petitioner told her she should get it.

### ANALYSIS

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

Petitioner Elba Arvelo alleges respondent's determination she is individually liable for wages owed to the claimants is unreasonable because she was not an employer, and she has the burden of proof to establish by a preponderance of the evidence that the orders 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 as discussed below that petitioner met her burden of proof.

"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]).

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]; *Ovadia v Industrial Bd. of Appeals*, 81 AD3d 457 [1<sup>st</sup> Dept 2011] *revd on other grounds* 19 NY3d 138 [2012]).

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]).

#### Petitioner did not hire or fire employees

We credit petitioner’s testimony that she did not have the authority to hire and fire employees, and did not hire the claimants. Her testimony was corroborated by the testimony of several witnesses who testified that they were hired by Marino Zapata. Patricia Acosta and Aleida Falcon each credibly testified they were hired by Zapata, and Juana Peralta testified that only Zapata had authority to hire employees for his business. We also credit petitioner’s testimony that Zapata hired Escobar after meeting him at the market where Zapata purchased food for the truck. Her testimony was corroborated by Peralta and also by Falcon’s specific and credible testimony that she was present at the food truck when Escobar arrived with Zapata. We also credit petitioner’s testimony that Zapata hired Xenia Chireno Paulino on Falcon’s recommendation, which was corroborated by Falcon’s testimony and by Paulino’s own testimony that she got the job at the food truck through Falcon.

The burden having shifted, we find respondent did not produce sufficient and credible evidence that petitioner hired claimants. Although Escobar testified that petitioner hired him, his credibility was undermined by his insistence throughout his testimony that Zapata had no role in the business and was not the owner. Paulino’s testimony that petitioner hired her was inconsistent with other testimony she provided that she got the job at Restaurant Los Taxistas through Falcon. DOL’s investigator testified that he never asked petitioner or Zapata during his investigation whether she had authority to hire and fire employees. We find on the weight of the credible evidence that petitioner did not hire the claimants, nor did she have the authority to do so.

Petitioner did not supervise or control employee work schedules or conditions of employment

Petitioner testified that she did not make employee work schedules or supervise or control claimants' conditions of employment. The credible evidence shows that the owner, Zapata, made the schedules and supervised his employees when he was present in New York and attending to his business, but that he was often absent because of poor health and took extended trips to Santo Domingo. During these absences, according to petitioner's credible testimony, which was corroborated by Peralta, Zapata left instructions for his trusted employees to follow in his absence and also communicated with the food truck twice a day. We credit petitioner's and Peralta's testimony that Zapata wrote the employees' work schedules on a black board and that one of the trusted employees – petitioner, Peralta, Marisol Polanco, or Aleida Falcon – would tell the other employees their schedules and relay other information from Zapata to the employees based on Zapata's instructions. That petitioner may have had some authority with respect to making accommodations to the schedules when Zapata was out of the country for employees who needed to change their hours or take time off is not sufficient control over the work schedules and conditions of employment to find her individually liable as an employer (*Matter of Fen F. Lim et al.*, PR 14-049 and 14-053 at pp 9-10 [April 13, 2016]).

The burden having shifted, respondent presented no sufficient or credible evidence that petitioner supervised or controlled employee work schedules or conditions of employment. Escobar testified that petitioner gave him work assignments and told him his schedule once a week, and that when petitioner was absent, Marisol Polanco supervised his work. Escobar, however, also testified that his job duties, which included bringing food and supplies to the truck, never changed, and that he would not know which supplies were needed unless somebody told him. Paulino testified that petitioner and Polanco made her schedule and that sometimes she was sent by petitioner, Paulino, or Polanco to pick up supplies for the food truck from Zapata's apartment. Claimants' testimony is largely consistent with petitioner's evidence that when Zapata was out of the country he left the work schedules and other instructions for trusted employees, including petitioner, to convey to the other employees. That claimants were not aware Zapata ran his business through a few trusted employees while he was out of the country and believed petitioner was in charge is not sufficient to show petitioner in fact supervised or controlled work schedules and conditions of employment. Merely passing on instructions from the individual with actual authority does not indicate employer status, and to the extent petitioner supervised claimants in Zapata's absence, "credible evidence indicates [she] did not have authority to act on her own" which weighs against a finding of employment status (*Matter of Yolanda Braham*, PR 13-064 at p 10 [June 10, 2015]).

We also find that petitioner did not supervise or manage Escobar to an extent that indicates an employment relationship. Petitioner testified that Escobar's job was to bring supplies to the truck when they were needed, so that, for example, when the vendors serving customers were low on food, juice, or other items, they would ask Escobar to bring those things to the truck for them. Escobar, himself, testified that he would not know what supplies were needed at the truck if he were not told. We find that petitioner's requests to Escobar to bring certain items to the truck when needed were similar to the instructions a server gives to a bus person, where the server and bus person need to communicate with each other in order to perform their respective jobs. Communication that is necessary for co-workers to have in order for them to perform their respective jobs does not rise to the level of supervision and control required to find employment status (*Matter of Lim, Supra* at p 9). The same is true of petitioner's

occasional instructions to Paulino to go to Zapata's apartment to bring back items needed for the food truck. This limited supervisory role of a trusted employee does not rise to the level of employment status.

Petitioner did not determine employees' rates and methods of payment

We credit petitioner's testimony that she did not set claimants' pay rates and had no authority to do so. She testified that Zapata set the pay rates and paid employees, and that when he was absent, she along with other trusted employees, prepared the pay roll and paid themselves and the other employees based on Zapata's written instructions. Petitioner's testimony was corroborated by Peralta, who described how the employees themselves paid each other when Zapata was in Santo Domingo. The fact that petitioner handed claimants their wages when the owner was not present is not evidence that she decided how much or in what manner to pay the claimants. Physically handing an employee a pay envelope absent additional evidence of an individual's role in a business' actual policy making does not support a finding of individual liability as an employer (*Chan v Sung Yue Tung Corp.*, 2007 U.S. Dist. LEXIS 7770 \*37 [SDNY 2007]).

Claimants' testimony that petitioner determined their rates of pay is not credible. As discussed above, we find Escobar's testimony is unreliable based on his inconsistent testimony concerning Zapata's role in the business. To the extent he testified petitioner gave him his wages and reduced his wage rate when she changed his schedule, this is not inconsistent with our finding above that petitioner carried out instructions given to her by Zapata concerning payroll and scheduling. Indeed, there is no dispute that petitioner sometimes handed out the wage envelopes to employees of the food truck when Zapata was away. We also find Paulino's equivocal testimony about the circumstances of her hiring insufficient to support respondent's allegation that petitioner set Paulino's rate of pay where other credible evidence shows she was hired by Zapata and that Zapata was the only individual authorized to determine wage rates for his employees.

Petitioner did not maintain employment records

There is no evidence that to the extent Zapata may have kept employment records for his business such as the schedules and pay rates written in his notebook and blackboard that petitioner maintained those records or was responsible for doing so.

Petitioner is not individually liable as an employer

The record shows that petitioner was an employee of Restaurant Los Taxistas during the relevant time period, who may have had a trusted and elevated status in the running of the business when the owner was out of the country as compared to the claimants, but was not claimant's employer as a matter of economic reality. Petitioner earned wages as low or lower than the claimants, had no meaningful authority or operational control in the business, did not make policy decisions, had no ownership interest, and did not share in the business' profits. The burden having shifted, respondent did not present sufficient evidence to show his determination was reasonable. To the extent respondent determined petitioner was an employer based on sales tax filings she made, the record is clear that all employees working on food trucks in New York City are required to hold a mobile food vendor license and file quarterly sales taxes, and any

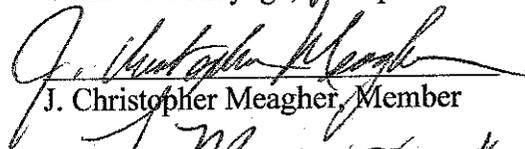
assumption that following these requirements indicates an ownership interest in a food truck business or that such an individual is an employer is incorrect. Furthermore, claimants' statements to DOL in their claim forms that petitioner was a supervisor, manager, foreman, or owner is insufficient to rebut petitioner's testimony to the contrary (*Matter of Franbilt et al.*, PR 07-019 at p 5 [July 30, 2008]; *Matter of Keith Woronoff et al.*, PR 09-208 at p 4 [December 14, 2012]). 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 Articles 5 and 19 of the Labor Law was unreasonable. Because we find petitioner was not an employer, the orders are revoked.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

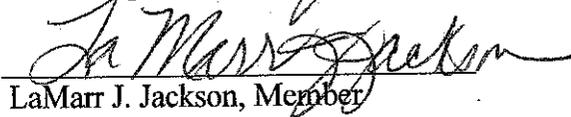
1. The orders are revoked.
2. The petition for review be, and the same hereby is, granted.



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  
May 25, 2016.

assumption that following these requirements indicates an ownership interest in a food truck business or that such an individual is an employer is incorrect. Furthermore, claimants' statements to DOL in their claim forms that petitioner was a supervisor, manager, foreman, or owner is insufficient to rebut petitioner's testimony to the contrary (*Matter of Franbitt et al.*, PR 07-019 at p 5 [July 30, 2008]; *Matter of Keith Woronoff et al.*, PR 09-208 at p 4 [December 14, 2012]). 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 Articles 5 and 19 of the Labor Law was unreasonable. Because we find petitioner was not an employer, the orders are revoked.

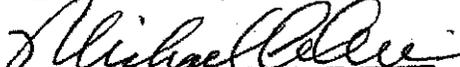
**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The orders are revoked.
2. The petition for review be, and the same hereby is, granted.

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Vilda Vera Mayuga, Chairperson

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J. Christopher Mcagher, Member

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LaMarr J. Jackson, Member

  
\_\_\_\_\_  
Michael A. Arcuri, Member

Dated and signed by a Member  
of the Industrial Board of Appeals  
at Utica, New York, on  
May 25, 2016.