STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: JOHN ELLIS A/K/A JOHN C. ELLIS SR. (T/A J ELLIS & SONS), Petitioner, 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 6 and 19 of the Labor Law, both dated July 15, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 15-245 RESOLUTION OF DECISION

APPEARANCES

John C. Ellis, petitioner pro se.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Taylor A. Waites* of counsel), for respondent.

WITNESSES

John C. Ellis, Freddy Abdo, and Walter Marin, for petitioner.

Senior Labor Standards Investigator Kenneth Hartnett, Vincente Burbano, Raul Mera, Mauricio Reyes, and Santiago Torres, for respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on August 19, 2015 for review of orders issued by respondent Commissioner of Labor against petitioner John Ellis a/k/a John C. Ellis Sr. (T/A J Ellis & Sons). Respondent filed her answer on September 25, 2015. Upon notice to the parties a hearing was held on March 23, April 21, and October 27, 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, to make statements relevant to the issues, and to file post-hearing legal briefs.

The order to comply with Article 19 (wage order) directs petitioner to comply with Article 19 of the Labor Law and seeks payment to respondent for wages due and owing to nine named claimants in the amount of $74,287.70 for the period from December 8, 2013 through November 28, 2014, with interest continuing thereon at the rate of 16% calculated to the date of the wage order in the amount of $9,771.35, and assesses a 150% civil penalty in the amount of $111,431.55, for a total amount due of $214,062.53.

The order under Articles 6 and 19 of the Labor Law (penalty order) imposes a $1,000.00 civil penalty against petitioner for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about December 8, 2013 through November 28, 2014; a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with each payment of wages during the period from on or about December 8, 2013 through November 28, 2014; a $1,000.00 civil penalty for violating Labor Law § 191 (1) (a) by failing to pay wages weekly to manual workers not later than seven calendar days after the end of the week in which the wages were earned for the time period from on or about December 8, 2013 through November 28, 2014; and a $1,000.00 civil penalty for violating Labor Law § 195 (1) by failing to provide employees, in writing, at the time of hiring, and annually, a notice containing the rate or rates of pay and basis thereof, the regular pay day designated in advance by the employer, or by failing to obtain written acknowledgment from each employee of such notice, during the period from on or about December 8, 2013 through November 28, 2014; for a total civil penalty due of $4,000.00.

Petitioner alleges the orders are invalid or unreasonable because claimants are independent contractors, or employed by independent contractors, and not his employees, under the Labor Law, and therefore he is not an employer under the Articles 6 and 19 of the Labor Law. Respondent moved at hearing for the Board to dismiss the petition because petitioner had failed to produce evidence sufficient for us to find the orders unreasonable or invalid. The hearing officer reserved decision on the motion. We deny the motion. However, as discussed below, on the entire record before us, we find petitioner did not meet his burden of proof to show the orders are unreasonable or invalid.

SUMMARY OF EVIDENCE

Petitioner's evidence

The orders under review were issued after an investigation by respondent of several claims for unpaid wages filed against petitioner related to painting projects at various locations in New York City. Petitioner runs an unincorporated painting business in Fresh Meadows, New York. Petitioner advertises himself as a painter, but testified he rarely does any painting himself, nor does he generally hold any type of workers' compensation or liability insurance. Petitioner holds no business licenses, because, according to petitioner, painters do not need to be licensed. Petitioner described his business as obtaining contracts from customers to do painting jobs and then subcontracting those jobs to "independent contractors" to do the actual work.

Petitioner explained that he solicits jobs through print and digital advertising and word of mouth, and that when a potential customer contacts him he meets with the customer to look over the job and scope of work and to negotiate a price for the work. Petitioner then contacts one of

several "independent contractors" he typically works with to explain the scope of work and contract price. If the subcontractor agrees to do the work, petitioner takes his fee up front from the customer out of the contract price, and, according to petitioner, the customer will then normally pay the balance directly to the subcontractor who does the work. Petitioner conceded however that on some jobs that involve multiple subcontractors, he may be paid by the customer and then distribute the money to the subcontractors because somebody needs to "referee" the payments.

Petitioner testified that he does not do any of the painting work himself except for very rare exceptions on small jobs. Petitioner also testified that he does not supervise the subcontractors or their workers, does not hire the subcontractor's workers, and is only present at the job site if a customer complains about the work, at which point as a "courtesy" he will meet with the customer, check the work, and give suggestions to the subcontractor or the contractor's workers if necessary on how to correct the problem.

The claims relate primarily to work at three painting jobs obtained by petitioner in 2014 and, according to petitioner, subcontracted to Louis Rivera, Freddy Abdo, and Raul Mera. The jobs included a large job to paint the interior of a home in Bayside, a job in Flushing to paint the fire escapes of a residential tower, and a job in Manhattan to paint the hallways of a residential building. Petitioner testified he does not know claimants Hector Alava, Vincente Burbano, Moises Flores, Josue Lopez Vera, or Mauricio Reyes, and believes claimant Santiago Torres works for Raul Mera. He explained that because he subcontracts his jobs to independent contractors, his interaction with the subcontractors' workers is minimal.

Petitioner testified that he contracted with Louis Rivera for the Manhattan job, but that Rivera, who was on vacation at the time the work was done, had his business partner, Freddy Abdo, do the work. Petitioner testified that Rivera owns and operates his own painting business and is fully insured. Petitioner showed the job to Rivera, explained the scope of work and price, and Rivera agreed to do the job. Petitioner further testified that Abdo is Rivera's partner in Rivera's painting business, and that he subcontracted the painting job to Rivera, not Abdo, but Abdo did the work in Rivera's absence along with another painter who "works with them." Petitioner testified he was in constant contact with Rivera by phone as the work progressed and that he received complaints from the building manager about the work, which he relayed to Rivera. Because of the complaints about the work, petitioner went to the site to take photographs to show Rivera. Petitioner explained that when he went to the building to take the photographs, he saw Abdo, but did not supervise him. According to petitioner, Rivera asked him to go to the job site to meet with Adbo and "go over it with him so that this could be fixed before [Rivera] got home." Petitioner testified the work was not fixed before Rivera returned from vacation and that Rivera was dissatisfied. Petitioner does not know whether the building owner paid Rivera for the work, nor does he know whether Abdo received money from Rivera.

Freddy Abdo testified Rivera is a licensed and insured contractor. Abdo testified he works for Rivera but is not his business partner. Abdo does not know whether petitioner subcontracted with Rivera to do the Manhattan job. Rivera sent Abdo to petitioner to discuss the job, and petitioner told Abdo what work needed to be done.

Abdo testified that he used his own tools, but petitioner told him to buy paint and promised to reimburse him. Petitioner, according to Abdo, gave him instructions on how to do the job and was present on four or five occasions to check on the progress of the work. Rivera, who was on

vacation at the time, was never present at the work site. When Abdo asked the building owner to be paid, he referred Abdo to petitioner, saying "go and talk to [petitioner], because I already gave him the money." Abdo testified that Vincente Burbano worked with him on the Manhattan job.

Petitioner testified that he obtained a contract for painting work at a cooperative apartment tower in Flushing. Petitioner subcontracted with Raul Mera to paint one set of fire escapes and with Rivera to paint another set. Petitioner testified that Rivera sent Walter Marin to work at the job site.

Marin testified that he obtained the painting work in Flushing because "petitioner was speaking with Louis Rivera and Mr. Rivera told me to work for [petitioner]. Not for Louis Rivera, but for [petitioner]." Marin, however, also testified that he worked for Rivera, not petitioner, although Rivera did none of the painting himself. Petitioner did not supply any tools or supplies; Rivera provided the paint. Petitioner's role in the work, according to Marin, was limited to collecting money from the building owner and telling Marin what work to do, "[t]he parts that were rusted, primer, and painting but I knew how to do it."

Marin testified that he did not speak to petitioner about the job, rather Rivera told him to do the work, and petitioner only went once to the job site and did not return until the work was completed to collect the money. Marin testified he was not fully compensated for his work.

Petitioner testified that he subcontracted with Mera to paint the interior of a home in Bayside. Petitioner testified he negotiated a contract with the owner to do the job for $14,000.00. The contract provided that the work had to be finished within 30 days or there would be a penalty of $100.00 for each day the work took in excess of 30 days. Petitioner testified that he explained the contract to Mera and gave him a copy. Petitioner explained that:

> "[Mera] went over and, as usual, an independent contractor looked it over and agreed on the scope of the work. The price minus my fee, of course, whatever is left, and he would – he agreed to do the job. He began the job and he did the job."

Petitioner testified that because the owner asked Mera to do a separate job at another location, which Mera accepted despite petitioner warning him about the penalty clause, the job took longer than 30 days. The owner did not pay the balance due on the contract because the late fees exceeded the amount due.

Respondent's evidence

DOL's investigation

Walter Marin, Hector Alava, Josue Lopez Vera, Moises Flora, Mauricio Reyes, Raul Mera, Vincente Burbano, and Freddy Abdo filed claims with respondent against petitioner for unpaid minimum wages/overtime and unpaid wages related to work at various locations in New York City. Santiago Torres filed a similar claim with respondent against petitioner and Raul Mera.

Senior Labor Standards Investigator Kenneth Hartnett testified that he became involved in the investigation of petitioner in 2014 and 2015 when the claims against petitioner were filed.

Hartnett testified that respondent requested records and information from petitioner. Petitioner did not provide the requested information. Hartnett, who did not personally interview any of the claimants, testified that respondent determined the claimants were not independent contractors because:

> "Based on what the claimants were saying to us and we also were considering the lack of records from [petitioner] and . . . they also did similar type services as Mr. Ellis. They were all painting and plastering contractors. With the direction and control from Mr. Ellis, we made, based upon our experience, we made these people employees of the company, because Mr. Ellis did not provide any type of contracts to show that these people were a different type of business. He provided no payroll records to show that these people were employees. We asked him several times for these records and he produced nothing to show us. Therefore, we have to make the assumption that these people are employees because of burden of proof is on the employer."

Records in evidence indicate that because petitioner did not produce any payroll records or other information such as written contracts, respondent used the information from the claim forms to determine petitioner was liable for the unpaid wages claimed.

Vincente Burbano testified he painted halls for petitioner in Manhattan. Burbano found out about the job from Freddy Abdo, who he often worked with on jobs subcontracted by petitioner to Abdo. Burbano testified that petitioner was "there a little bit the first day as always, showing us everything that we had to do and then he would leave." Burbano testified that Abdo provided the materials and supervised his work. Burbano was not paid for his work.

Raul Mera testified he subcontracted with petitioner to paint a set of fire escapes in Flushing for $10,000.00, completed the work, and was never paid. Mauricio Reyes testified petitioner hired him to paint fire escapes in Flushing for $20.00 an hour to be paid daily by petitioner. Reyes testified he learned of the job from Mera, who "told me, look there is a big job, come with me and you look at it and we do the job if it is convenient for you." Reyes looked over the job with petitioner and Mera and agreed to do the work. Reyes testified that petitioner told him what to do and was constantly at the work site looking over the work to make sure the job was done well. Reyes further testified that petitioner purchased and delivered paint to the work site every two to three days. Reyes testified he was not paid for his work.

Mera testified that petitioner also contacted him about subcontracting him to paint a large home in Bayside. Petitioner told Mera to bring workers and to complete the work within one month. Mera agreed to do the work for a fixed price and signed a "piece of paper." Mera testified that at the time he did not own a company, although his voicemail said "Premier Painting."

Mera testified that after the work began he realized it was too much work for the amount of money that had been agreed. Mera complained to the home owner, who referred him to petitioner. Mera testified he spoke to petitioner about his concerns about the scope of the work and asked to be paid by the hour, which, according to Mera, petitioner agreed. Mera testified he was not paid for his work.

Santiago Torres testified Mera hired him to help paint a house in Bayside. Torres filed his claim against petitioner and Mera, because they were both in charge of the contract. Torres testified he has known petitioner for approximately nine years, and that petitioner "is always taking care of – doing the contracts. He receives the deposit and Mr. Mera, Raul, he leaves Mr. Mera Raul in charge as a foreman to work for him." Torres testified he was supposed to be paid in cash by petitioner, but was never paid for his work.

Torres described the work as a "big job" in a large house, and that the owner:

> "never wanted to give money to Mr. Raul Mera to hire more people, more materials. He always said it had to go through [petitioner's] monies. That it had nothing to do with Mr. Mera. That the contract had been made with [petitioner] . . . but since the job wasn't completed in the time that it was supposed, they closed the doors, and they didn't let anybody get in there anymore. During the time, I wasn't paid. Neither me or the rest of the people. We were eight persons."

Torres testified that Mera supplied the paint for the job and told him what time to show up for work each morning, and "was always there as a foreman. Told me whatever had to be done and instructed me." Petitioner only showed up when the owner called him because of an issue with the work at which time he told the workers how to correct the mistakes and "what we have to do so that [the owner] would give him the money."

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rule (12 NYCRR) § 65.39.

Petitioner has the burden to show by a preponderance of evidence that the orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rule [12 NYCRR] § 65.30; *Matter of RAM Hotels, Inc.*, PR 08-078 at p 24 [Oct. 11, 2011]). Petitioner argues the orders are unreasonable because he subcontracted work to "independent contractors," and therefore is not an employer. We find as discussed below that petitioner failed to meet his burden of proof.

In *Barrier Window Systems v Commissioner of Labor* (2017 NY Slip Op 03093, *2-3), the Third Department explained that:

> "The Fair Play Act, codified in Labor Law article 25-B, was enacted as a measure to curb widespread abuses in the construction industry stemming from the misclassification of workers as independent contractors resulting in unfavorable consequences for both the workers and the public (see Labor Law § 861-a). In accordance therewith, the Fair Play Act contains a statutory presumption that a person performing services for contractor engaged in construction shall be classified as an employee unless it

> is demonstrated that such person is an independent contractor or a separate business entity (see Labor Law § 861-c [1], [2])."

The Fair Play Act's presumption of employment in the construction industry "shall be used for all determinations of employment status of construction workers under the labor law and workers' compensation law" (Senate Introducer's Mem in Support, Bill Jacket, L 2010, ch 418, § 1), which includes Labor Law Articles 6 and 19, the articles relevant to this proceeding.[1]

The Third Department in *Barrier Windows Systems*, explained that:

> "In order to be considered an independent contractor, a person must satisfy three criteria set forth in the statute: (a) the person must be free from the contractor's direction and control in performing the service; (b) the service performed must be outside the usual course of the contractor's business; and (c) the person must be customarily engaged in an independently established occupation similar to the service performed (see Labor Law § 861-c [1] [a], [b], [c]). This new statutory test is sometimes referred to as the ABC test (see Governor's Approval Mem, Bill Jacket, L 2010, ch 418). The separate business entity test, codified in Labor Law § 861-c (2), sets forth 12 criteria to be used to determine whether a person is a separate business entity and, thus, not subject to the presumption that he or she is an employee of the contractor. Notably, in each test, all of the criteria must be met to overcome the statutory presumption of an employment relationship."

(2017 Slip Op 03003, *3).

Petitioner, a contractor in the construction industry[2], had the burden to prove by a preponderance of the evidence that claimants were independent contractors who met all three sections of the ABC test, *or* were separate business entities, meeting all 12 factors of the statutory definition of a separate business entity.

Petitioner failed to prove claimants were independent contractors. Under the ABC test claimants were independent contractors if (a) they were free from petitioner's direction and control in performing painting services for petitioner; (b) the painting work done by claimants was outside the usual course of petitioner's painting business; and (c) claimants were customarily engaged in

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[1] In *Ovadia v Industrial Board of Appeals*, 19 NY 3d 138 (2012), *revg* 81 AD3d 457 (1st Dept 2011), the Court of Appeals reversed an appellate division decision that had upheld a Board decision finding a general contractor was the joint employer of its subcontractor's employees. The Court of Appeals rejected the Board's application of federal joint employment factors to a typical general contractor/subcontractor context in the construction industry. The presumption of employment in the construction industry was not raised in *Ovadia*, however, because Labor Law § 861-c, was not in effect in 2009 at the time of our original decision and was not considered by the Board in that proceeding.

[2] Labor Law § 861-b defines "construction" as "constructing, reconstructing, altering, maintaining, moving, rehabilitating, renovating or demolition of any building, structure, or improvement, or relating to the excavation of or other development or improvement to land." We find painting is encompassed within the definition of construction because it involves altering and maintaining a building or structure.

an independently established occupation similar to the painting work they performed for petitioner (Labor Law § 861-c [1] [a], [b], [c]; *Barrier Window Systems*, 2017 Slip Op 03003).

Claimants were not free from petitioner's direction and control. Petitioner testified he did not supervise claimants. Several claimants, however, provided credible testimony that petitioner supervised their work on jobs he had subcontracted to others. Walter Marin testified that he worked at the Flushing job subcontracted to Louis Rivera where petitioner instructed him to perform specific tasks. Freddy Abdo testified that petitioner spoke to him frequently to give instructions concerning work at the Manhattan job petitioner had subcontracted to Rivera because Rivera was not in the country at the time the work was done. Mauricio Reyes testified that petitioner hired him for the Flushing job subcontracted to Raul Mera, was constantly present at the job site, and along with Mera, supervised his work. The unrebutted and credible testimony of Marin, Abdo, and Reyes, indicates claimants were not free from petitioner's direction and control, which is further supported by petitioner determining the price of each painting job directly with the customer without any negotiation or input from claimants (*Barrier Window Systems*, 2017 Slip Op 03003, *6).

Claimants did not provide a service outside the usual course of petitioner's business (Labor Law § 861-c [1] [b]). Petitioner is a painter who offered painting services to the public as part of his usual course of business. The painting work done by claimants was, therefore, not outside the usual course of his painting business, and petitioner's description of Rivera and claimants as independent contractors is not controlling (*Ansoumana v Gristede's Operating Corp.*, 226 F Supp 2d 184, 190 [SDNY 2003]).

There is some evidence in the record, at least with respect to Rivera, that he may have owned and operated his own painting company and held insurance. However, petitioner did not produce any testimony from Rivera about the nature of his independent business, nor did any of the claimants who testified indicate they operated an independently established business (*Barrier Window Systems*, 2017 Slip Op 03003, *7). Further, that Rivera may have secured workers' compensation insurance with a carrier is not dispositive of independent contractor status (Labor Law § 861-c [4]). Petitioner, therefore, failed to prove claimants met any of the requirements of the ABC test.

Petitioner also failed to prove that Rivera or claimants were separate business entities. The separate business entity test sets forth 12 criteria, all of which must be met, to determine whether a person is a separate business entity and, thus, not subject to the presumption that he or she is an employee of the contractor. Under Labor Law § 861-c (2) a business entity, including any sole proprietor:

> "shall be considered a separate business entity from the contractor where all the following criteria are met:
>
> "(a) the business entity is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of contractor for whom the service is provided to specify the desired result;
> "(b) the business entity is not subject to cancellation or destruction upon severance of the relationship with the contractor;

> "(c) the business entity has a substantial investment of capital in the business entity beyond ordinary tools and equipment and a personal vehicle;
> "(d) the business entity owns the capital goods and gains the profits and bears the losses of the business entity;
> "(e) the business entity makes its services available to the general public or the business community on a continuing basis;
> "(f) the business entity includes services rendered on a Federal Income Tax Schedule as an independent business or profession;
> "(g) the business entity performs services for the contractor under the business entity's name;
> "(h) when the services being provided require a license or permit, the business entity obtains and pays for the license or permit in the business entity's name;
> "(i) the business entity furnishes the tools and equipment necessary to provide the service;
> "(j) if necessary, the business entity hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the Internal Revenue Service;
> "(k) the contractor does not represent the business entity as an employee of the contractor to its customers; and
> "(l) the business entity has the right to perform similar services for others on whatever basis and whenever it chooses."

Claimants were not free from the direction or control over the means and manner of providing the service, subject only to the right of petitioner to specify the desired result (Labor Law § 861-c [2] [a]). We do not credit petitioner's testimony he did not supervise the claimants. As discussed above, the unrebutted and credible testimony of Marin, Abdo, and Reyes, proves claimants were not free from petitioner's direction and control. Abdo credibly testified petitioner responded to complaints from the building manager at the Manhattan job and was frequently at the site, which was corroborated by petitioner's own testimony that he was in constant contact with Rivera in an effort to resolve the complaints from management. Mauricio Reyes credibly testified that petitioner hired him to work at the Flushing job subcontracted to Raul Mera, and promised to pay him an hourly pay rate on a daily basis. This demonstrates petitioner was involved in directing and controlling the claimants' work beyond specifying the desired result as with a bona fide separate business entity.

Petitioner produced no evidence that any of the claimants had a substantial investment of capital beyond ordinary tools and equipment and a personal vehicle (Labor Law § 861-c [2] [c]). The record shows claimants used their own paint brushes and other small hand tools necessary to perform their tasks but had no other investment in the work aside from occasionally borrowing scaffolds from friends. Petitioner also produced no evidence that any of the claimants included services rendered on a Federal Income Tax Schedule as an independent business or profession (Labor Law § 861-c [2] [f]).

We need not consider whether claimants satisfied any of the other 12 factors, since petitioner having failed to prove claimants satisfied Labor § 861-c (2) (a), (c), and (f), failed to

prove claimants met all 12 statutory requirements for a separate business entity under the Fair Play Act.

Because petitioner failed to prove that claimants were independent contractors or separate business entities under the Fair Play Act, he did not rebut the presumption of employment in the construction industry, and respondent's determination he was claimants' employer is reasonable. That other individuals or entities, including Rivera, may also have been claimants' employers, as alleged by petitioner, does not disturb our finding since it is well settled that an employee may have more than one employer on a job (*see e.g. Matter of Franbilt, Inc, et al.*, PR 07-019 at p 5 [July 30, 2008]; USDOL Administrator's Interpretation No. 2016-1 found at https://www.dol.gov/whd/flsa/Joint_Employment_AI.htm).

NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The orders are affirmed; and

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

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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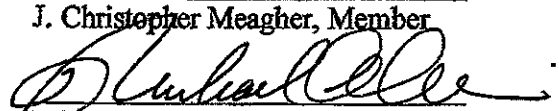
NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The orders are affirmed; and

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

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member



Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

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