STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: IBRAHIM ISSA A/K/A ANTHONY ISAA AND BRONXDALE AUTO CARE, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Article 19 of the Labor Law, both dated May 4, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	:	DOCKET NO. PR 16-020 RESOLUTION OF DECISION

APPEARANCES

Law Office of Craig T. Bumgarner, Carmel (*Craig T. Bumgarner* of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Benjamin T. Garry* of counsel), for respondent.

WITNESSES

Petitioner Ibrahim Issa, for petitioners.

Senior Labor Standards Investigator Gerard Capdevielle, for respondent.

WHEREAS:

On January 25, 2016, petitioners Ibrahim Issa A/K/A Anthony Issa and Bronxdale Auto Care, Inc., filed a petition with the Industrial Board of Appeals seeking review of two orders issued by respondent Commissioner of Labor on May 4, 2009.[1] Respondent answered on June 17, 2016.

Upon notice to the parties, a hearing was held on November 1, 2016, in New York, New York, before Vilda Vera Mayuga, Chairperson of the Board and designated hearing officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

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[1] Bronxdale Auto Repair Center, Inc., was named on the orders to comply but did not file a petition for review and is therefore not a party to this action.

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment of minimum wages due and owing to claimants Samir Abuawwad, Carlos Quezada, and Faisal H. Alazzam in the amount of $80,311.87 for the period from May 1, 2000, through May 1, 2006; July 7, 2002, through February 11, 2005; and February 3, 1998, through February 1, 2004, respectively. The order assesses interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $56,158.68, and a civil penalty in the amount of $80,312.00. The total amount due is $216,782.55.

The order under Article 19 of the Labor Law (penalty order) assesses a civil penalty in the amount of $1,000.00 for each of the following counts: (1) for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and / or furnish true and accurate payroll records for each employee for the period from February 3, 1998, through February 1, 2004; and (2) violation of Labor Law § 661 and 12 NYCRR 142-2.7 by failing to provide each employee complete wage statements with every payment of wages for the period from February 3, 1998, through May 1, 2006. The total amount due is $2,000.00.

Petitioners contend that the orders are unreasonable or invalid because: (1) after 2001, petitioner Issa was not an employer within the meaning of the New York Labor Law and therefore not liable for wages due and owing; (2) after April 18, 2003, petitioner Bronxdale Auto Care, Inc., was not an employer within the meaning of the New York Labor Law and therefore not liable for wages due and owing; (3) and that respondent's wage calculations are erroneous because petitioners paid employees consistent with the Labor Law's minimum wage and overtime requirements. As discussed below, we find petitioner Issa was not a statutory employer after 2001 and petitioner Bronxdale Auto Care, Inc., was not a statutory employer after April 18, 2003. We further find respondent's wage calculations unreasonable as to petitioner Issa. We also find respondent's wage calculations as to petitioner Bronxdale Auto Care, Inc., unreasonable in part and reasonable in part and modify the wage calculations and interest accordingly. And, finally, we find that the penalty order is unreasonable and revoke it in total.

SUMMARY OF EVIDENCE

Testimony of Petitioner Ibrahim Issa

Petitioner Ibrahim Issa testified that, as its president, he incorporated Bronxdale Auto Care, Inc., in approximately 1995 or 1996 to run and operate an automobile repair shop and gasoline station located at 1982 Bronxdale Avenue, Bronx, New York. 1982 Bronxdale Avenue was Bronxdale Auto Care Inc.'s sole location. Issa managed the day-to-day operations of the shop. Each employee worked a set number of hours, and Issa paid employees weekly in cash or with a business check. He did not use a time-card system because the business was small, and "[i]f somebody doesn't show up, whoever is in charge knows." Issa does not possess records relating to the corporate entity or its payroll practices, but he maintained payroll records and had an accountant who handled payroll when he ran the corporation. Bronxdale Auto Care, Inc. paid its employees a minimum wage, including overtime, as necessary. Bronxdale Auto Care, Inc. was dissolved in 2003 and is no longer an active entity.

Beginning in 2001, Issa ceded day-to-day operation of the business to Aymen Abdel Rahim. Rahim continued to do business under Bronxdale Auto Care, Inc. Under an arrangement

between Issa and Rahim, Rahim ran Bronxdale Auto Care, Inc., "as if it was [Rahim's]." It was solely Rahim's responsibility to "[m]ake enough money to run the business and pay [Issa] rent." Issa paid no money toward wages or the operation of the business. Issa remained the leaseholder on the property, so the sole benefit he gained from Bronxdale Auto Care, Inc., after 2001, was monthly rent for the space it occupied.

In 2003, Rahim incorporated under the name Bronxdale Auto Repair Center, Inc. Issa had no ownership interest in, was not a corporate officer for, and received no profits from Bronxdale Auto Repair Center, Inc. Issa's interaction with Bronxdale Auto Repair Center employees was "minimal" and related to when Issa would stop by to collect rent from Rahim. For approximately five years, Issa "sublet" the premises to Bronxdale Auto Repair Center, Inc.

Issa first learned of the claims against him in 2015 when he received a letter stating there was a judgment against him. Prior to receiving the letter, he had no knowledge that he or his business were under investigation for violation of the Labor Law.

Testimony of Senior Labor Standards Investigator Gerard Capdevielle

Senior Labor Standards Gerard Capdevielle testified that claimant Alazzam's February 3, 2004, minimum wage claim states that "Toney Issa" was the owner of Bronxdale Auto Care, Inc., and hired Alazzam. Claimant Quezada's March 22, 2005, minimum wage claim shows Rahim as the person responsible for Bronxdale Auto Care, Inc. A narrative report issued by Investigator C. Suarez notes that during a May 1, 2006, field visit, Rahim identified himself as the manager. A May 1, 2006, employee statement from claimant Abuawwad identifies Rahim as his supervisor. A May 1, 2006, employee statement from another employee lists Rahim as the person who hired and supervised him. Respondent never attempted to contact Rahim about what relationship he had, if any, to petitioners.

The employer never provided payroll records to DOL. Capdevielle acknowledged a May 1, 2006, notice of revisit requesting employment records from "Tony Issa / Bronxdale Auto Repair Center, Inc." A May 10, 2006, notice of labor law violation names Bronxdale Auto Care, Inc. as the entity at issue and Tony Issa as its president. Capdevielle testified that it is DOL's practice to serve the notice on or mail the notice to the employer but could not say whether either was done. A May 16, 2006, letter addressed to Bronxdale Auto Care, Inc., to the attention of "Tonny Assa," regarding claimant Quezada states in relevant part: "When I visited the . . . location you were not there, nor did you leave any records for review, as requested on notice submitted to your manager Imen Rahim on 5/1/2006."

The Department of States' "entity information" for Bronxdale Auto Care, Inc., notes the corporation was incorporated on January 25, 1995, at 1982 Bronxdale Avenue, and had as its executive officer petitioner Issa. The Department of State record for Bronxdale Auto Repair Center, Inc., of the same address, shows it was incorporated as of April 18, 2003. The Bronxdale Auto Repair record does not include a name for the CEO. Capdevielle explained that a printout from DOL's "mainframe" notes that Bronxdale Auto Repair Center, Inc., is the "successor to" Bronxdale Auto Care, Inc.

Capdevielle calculated wages owed to claimants based on statements made in their claim forms and interviews with employees when DOL visited the worksite.

SCOPE OF REVIEW AND BURDEN OF PROOF

A hearing before the Board is original (Board Rules of Procedure and Practice [Board Rules] [12 NYCRR] § 66.1 [c]). The Labor Law provides that an order of the Commissioner is presumed valid (Labor Law § 103 [1]). The party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act § 306 [1]; Board Rules [12 NYCRR] § 65.30; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). A petitioner must prove that the challenged order is invalid or unreasonable by a preponderance of evidence (Labor Law § 101 [1]; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [Oct. 11, 2011]). Should the Board find the order or any part thereof invalid or unreasonable, the Board must revoke, amend, or modify it (Labor Law § 101 [3]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Employer Status

Petitioner Issa is Not a Statutory Employer After 2001

It is uncontested that petitioner Issa was a statutory employer until the beginning of 2001, after which petitioners contend that petitioner Issa was a corporate officer and did not exercise the requisite operational control at Bronxdale Auto Care Center to be liable for wages due and owing under the Labor Law. We agree. As a matter of economic reality, we find that petitioner Issa was not a statutory employer and therefore not liable for wages due and owing after 2001.

Article 19 of the Labor Law defines "employer" as including "any individual, partnership, association, corporation, limited liability company . . . acting as employer" (Labor Law § 651 [6]). "Employed" means that a person is "permitted or suffered to work" (*id.* § 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 Labor Law is the same test for analyzing employer status under the FLSA (*Matter of Yick Wing Chan v. N.Y. State Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]; *Chung v. New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 318 n6 [SDNY 2003]).

In *Herman v. RSR Security Services 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 the economic reality based on a "totality of circumstances" (*id.*).

Applying the *Herman* factors to the instant case, we find that petitioner Issa was not an employer under the Labor Law after 2001. Issa credibly testified that, beginning in 2001, he stopped managing the Bronxdale Auto Care, and Rahim took over day-to-day operation of the business. Until 2003, Rahim continued to do business as Bronxdale Auto Care, but under an arrangement wherein Rahim ran Bronxdale Auto Care "as if it was his location." It was Rahim's responsibility to "[m]ake enough money to run the business and pay [Issa] rent." Issa paid no money toward wages or the operation of the business but remained the leaseholder on the property. The sole benefit Issa gained from the arrangement was monthly rent for the space.

The burden going forward thereby shifted to the Commissioner to submit sufficient evidence to establish that petitioner Issa possessed after 2001 the requisite authority over claimant's employment such that petitioner Issa may be deemed an individual employer under the Labor Law. The Commissioner failed to meet her burden. Although respondent introduced into evidence claimant Alazzam's February 3, 2004 minimum wage form, which alleged that petitioner Issa hired claimant Alazzam, no employee testified at hearing and no investigator with personal knowledge regarding the employee interviews testified that petitioner Issa hired or fired employees, that he supervised or controlled terms of employment, that he determined the rate or method of employment, or that he maintained employment records during the relevant period. Claimant Alazzam's identification of petitioner Issa in his claim form as the person who hired him, standing alone, is not dispositive of whether he was an employer. Furthermore, claimant Alazzam's identification of petitioner Issa as the person who hired him in 2004 is undermined by petitioner Issa's credible and otherwise unrebutted testimony that, after 2001, it was Rahim, who controlled all aspects of the day-to-day operation of the gas station. Petitioner Issa credibly testified that Rahim incorporated the business as Bronxdale Auto Repair Center, Inc. in 2003 and the sole benefit petitioner Issa received from Rahim was monthly rental income. The fact of petitioner Issa's attenuated business relationship with Bronxdale Auto Care, Inc., after 2003 is further supported by the Department of State's record for Bronxdale Auto Repair Center, Inc., which shows that the entity incorporated as of April 18, 2003. Unlike the record entity for Bronxdale Auto Care, Inc., which listed petitioner Issa as a corporate officer, nowhere does Bronxdale Auto Repair Center, Inc.'s record mention petitioner Issa.

Respondent's otherwise conclusory assertion that petitioner Issa is an employer ignores the well-settled test under *Herman* for determining employer status, when, in fact, the balance of respondent's evidence, unsubstantiated hearsay as it may be, suggests that an individual who is not a party to this action was the probable employer. Claimant Quezada's March 22, 2005, minimum wage claim lists Rahim as the person responsible for the business. Investigator Suarez's report notes that during a May 1, 2006, field visit, Rahim identified himself as the manager. Claimant Abuawwad's May 1, 2006, employee statement identifies Rahim as his supervisor. Similarly, the statement for the other employee respondent interviewed lists Rahim as the person who hired and supervised him. Notwithstanding evidence within respondent's possession that Rahim was a probable employer, Investigator Capdevielle testified that he had no knowledge of respondent taking steps to investigate Rahim's relationship to the claims at issue. Because Rahim

is not a party to this proceeding, however, we decline to make a finding as to his role in the matter before us.

Based on the totality of circumstances, we find respondent's determination that petitioner Issa is individually liable as an employer under Article 19 of the Labor Law after 2001 is unreasonable (*see Matter of Wong*, PR 12-090 at 7–10 [Oct. 26, 2016] [finding that a partner in a restaurant was not individually liable where he had "a minimal financial and operational stake" in the business and distinguishing cases in which the Board found a shareholder or corporate officer individually liable]). We therefore find that Issa was not a statutory employer after 2001.

Petitioner Bronxdale Auto Care, Inc., is Not a Statutory Employer After April 17, 2003

It is uncontested that petitioner Bronxdale Auto Care, Inc., was an employer until April 17, 2003. Petitioner Issa credibly testified, and respondent failed to rebut, that Bronxdale Auto Care, Inc., was "dissolved" in 2003. Respondent's own evidence shows that Bronxdale Auto Repair Center, Inc., is the "successor" to Bronxdale Auto Care, Inc. On the record before us, we find respondent's determination that petitioner Bronxdale Auto Care, Inc., was an employer after April 17, 2003, is unreasonable.

Minimum Wage Order

The minimum wage order directs payment of wages due and owing to claimants Abuawwad, Quezada, and Alazzam in the total amount of $80,311.87 for the period from May 1, 2000, through May 1, 2006; July 7, 2002, through February 11, 2005; and February 3, 1998, through February 1, 2004, respectively. Because petitioners were under no legal obligation to maintain payroll records and offered credible and unrebutted evidence that petitioner Issa lawfully paid his employees, we find respondent's wage calculations as they relate to petitioner Issa to be unreasonable. We further find that respondent's wage calculations as they related to petitioner Bronxdale Auto Care, Inc., unreasonable in part and reasonable in part and modify the wage calculations accordingly. We modify the interest in proportion to the modified wage calculations and revoke the civil penalty in its entirety.

Petitioners Were Under No Legal Duty to Maintain Employment Records

Article 19 of the Labor Law, known as the Minimum Wage Act, requires employers to maintain for six years records of the hours their employees worked and the wages paid (Labor Law § 661; 12 NYCRR 142-2.6). The records must show for each employee, among other things, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, and allowances claimed, if any (Labor Law § 661; 12 NYCRR 142-2.6). In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such 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]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2010]). In the absence of legally required records, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employee's evidence (*Anderson v Mt. Clemens Pottery*, 328 US

680, 687–88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's credible evidence (*Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 20, 2014]).

When, however, the employer is under no legal obligation to maintain employment records, Labor Law § 196-a's presumption against petitioners does not apply (*Matter of Berkowitz*, PR 14-170 at 9 [Sept. 14, 2016]). In such an instance, a petitioner must still carry the threshold burden of showing that the challenged order is invalid or unreasonable before the burden shifts to respondent (*see* State Administrative Procedure Act § 306 [1]; Board Rules [12 NYCRR] § 65.30).

On the facts before us, we find that petitioners were under no legal duty to maintain employment records relating to the claim period. Petitioners contend that petitioner Issa first learned about the claims against petitioners in 2015 when he received a letter stating there was a judgment against petitioners. For her part, respondent entered into evidence a May 1, 2006, notice of revisit requesting employment records from "Tony Issa / Bronxdale Auto Repair Center, Inc" for the period of July 1, 2002, to May 1, 2006. A May 16, 2006, letter addressed to Bronxdale Auto Care, Inc. to the attention of "Tonny Assa" relating to claimant Quezada, stated that the May 1, 2006, notice of revisit was provided to Rahim in person. Respondent also offered into evidence a May 10, 2006, notice of labor law violation, which names Bronxdale Auto Care, Inc., as the entity at issue and petitioner Issa as its president. Investigator Capdevielle could not say, however, whether respondent had, pursuant to its own policy, mailed to or served on petitioners the notice of violation. Furthermore, respondent fails to recognize that any correspondence addressed to petitioners at 1982 Bronxdale Avenue in 2006 was addressed to a defunct corporate entity at a location where petitioner Issa had not personally or as Bronxdale Auto Care, Inc., conducted business for over three years. Given the Department of State records to this effect, petitioners have raised a substantial and credible doubt as to whether at any point in its investigation respondent's request for records were reasonably calculated to reach petitioners. As such, we find that respondent failed to timely seek employment records relevant to the claim period. Accordingly, petitioners were under no legal duty at the time they were requested to have possession of records for the claim period (*see* Labor Law § 661; 12 NYCRR 142-2.6). We further find Labor Law § 196-a's presumption inapplicable to the proceeding before us.

Respondent's Wage Calculations as They Relate to Petitioner Issa Are Unreasonable

Article 19 requires employers to pay no less than the applicable minimum wage to each covered employee (Labor Law § 652; 12 NYCRR 142-2.1). Article 19 also requires payment of an overtime premium of time and one-half the regular hourly rate for hours worked over 40 in one week (12 NYCRR 142-2.2).

Absent Labor Law § 196-a's presumption against petitioners, on the record before us, we find petitioners have met their burden of showing the minimum wage order is unreasonable as it relates to petitioner Issa. Petitioner Issa credibly testified that Bronxdale Auto Care, Inc., paid its employees a minimum wage and overtime pay, as necessary. He further testified that employees worked a set number of hours and that he paid them weekly in cash or with a business check. Petitioner Issa explained that he did not use a time-card system to track employee time because

the business was small, but he did maintain payroll records and had an accountant who handled payroll.

The burden thereby shifted to respondent to establish that petitioner Issa failed to pay claimants a minimum wage for hours worked during the claim period. Respondent failed to meet her burden. Investigator Capdevielle testified that he calculated wages owed to claimants using statements taken from the claimants' respective claim forms and statements made during employee interviews. Respondent failed to offer the testimony of any witness with personal knowledge regarding the claim forms or interview statements or otherwise provide accurate and reliable evidence sufficient to rebut petitioners' evidence. Standing alone, Investigator Capdevielle's testimony is insufficient to meet respondent's burden.

We find that respondent has failed to rebut petitioners' credible evidence that petitioner Issa paid his employees a minimum wage for hours worked before 2001 when he ceased operational control of Bronxdale Auto Care, Inc. We revoke the minimum wage order as to petitioner Issa as unreasonable.

Respondent's Wage Calculations as They Relate to Petitioner Bronxdale Auto Care, Inc., Are Unreasonable in Part and Reasonable in Part

As discussed above, petitioner Issa testified, and respondent failed to rebut, that Bronxdale Auto Care, Inc., lawfully paid its employees. His knowledge of Bronxdale Auto Care, Inc.'s business practices, however, is necessarily limited by the fact that in 2001 he relinquished control of the business to Rahim. We, therefore, find respondent's wage calculations unreasonable as they relate to Bronxdale Auto Care, Inc. prior to 2001. Because petitioners presented no evidence relating to Bronxdale Auto Care's business practices between 2001 and April 18, 2003, petitioners have not met their burden in this respect. We modify the minimum wage order as against Bronxdale Auto Care, Inc., to include only wages due and owing to claimants for the period of January 1, 2001, to April 17, 2003.

Interest

Labor Law § 219 (1) provides that when respondent 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." Petitioners failed to submit evidence at hearing challenging the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). We, however, modify the interest consistent with the modified wages petitioner Bronxdale Auto Care, Inc., owes, as described above.

Civil Penalty

Labor Law § 218 (1) authorizes the Commissioner to assess civil penalties upon giving "due consideration" to (1) the size of the employer's business; (2) the good faith basis of the employer that it followed the law; (3) the gravity of the violation; and (4) the history of previous violations. Petitioners contend, and respondent failed to rebut, that petitioners were not on notice of the claims against them until 2015. The orders under review were issued on May 4, 2009. Given

that the orders were issued five years prior to when petitioners became aware of them, there is no way respondent could, in determining the amount of the civil penalty, give due consideration to petitioners' good faith or lack thereof. We, therefore, find respondent failed to give due consideration to the factors set out in Labor Law § 218 (1) and revoke the penalty order it in its entirety as unreasonable.

Penalty Order

Article 19 of the Labor Law requires that employers establish, maintain, and preserve for not less than six years, contemporaneous, true, and accurate weekly payroll records and make such records available upon request of the Commissioner at the place of employment (Labor Law § 661; 12 NYCRR 142-2.6). Article 19 also requires that employers provide a complete wage statement with every payment of wages (Labor Law § 661; 12 NYCRR 142-2.7). As discussed above, we found that respondent failed to timely seek employment records relevant to the claim period, and, accordingly petitioners were under no legal duty to maintain records for the time at issue. Accordingly, we revoke the penalty order in its entirety.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order as to petitioner Issa is revoked; and
2. The minimum wage order as to petitioner Bronxdale Auto Care, Inc., is modified to include only wages due and owing to claimants for the period of January 1, 2001, to April 17, 2003; and
3. The interest in the minimum wage order is modified consistent with this decision; and
4. The civil penalty is revoked in its entirety; and
5. The penalty order is revoked in its entirety; and
6. The petition for review 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
July 26, 2017.