STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ANA V. MINANGO AND JAW SWEATER INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated August 10, 2016, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 16-119 RESOLUTION OF DECISION

APPEARANCES

Law Office of William H. Salgado, Elmhurst (*William H. Salgado* of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Roya Sadiqi* of counsel), for respondent.

WITNESSES

Ana V. Minango, Zoila Millan, for petitioners.

Labor Standards Investigator Emelina Garcia, and Claimants, for respondent.

WHEREAS:

On October 7, 2016, petitioners Ana V. Minango and JAW Sweater, Inc. filed a petition for review of two orders issued against them by respondent Commissioner of Labor on August 10, 2016. Respondent filed her answer on November 10, 2016.

Upon notice to the parties, a hearing was held on February 14, March 16, March 21, and March 30, 2017 in New York, New York, before Administrative Law Judge Jean Grumet, the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

The first order under review (minimum wage order) is an order to comply with Article 19 of the New York Labor Law and originally directed petitioners to pay $116,253.22 in wages owed to three claimants, together with interest at 16% per annum calculated to the date of the order of $62,225.20, 100% liquidated damages in the amount of $116,253.22, and a 100% civil penalty of $116,253.22, for a total amount due of $410,984.86. Respondent amended the minimum wage order during the hearing by withdrawing one claim and reducing the total wages owed under the amended orders to $79,087.05 for the period from November 4, 2012 through February 9, 2014. The interest was reduced to $42,331.80, liquidated damages to $79,087.05, and the civil penalty to $79,087.05, for a total due under the amended minimum wage order of $279,592.95.

The second order under review (penalty order) is an order under Article 19 of the Labor Law and imposed a $1,000.00 civil penalty 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 for the period from December 26, 2009 to February 9, 2014.

The petition alleges that the orders are invalid because: (1) petitioners were never claimants' employers; (2) claimants were not employed by petitioner Minango and their relationship was not subject to Labor Law Article 19 and 12 NYCRR Part 142; and (3) petitioners were denied due process because they were not given the opportunity to present evidence concerning the relationship between petitioner Minango and claimants. The petition also contests the civil penalties, liquidated damages and interest assessed in the orders. For the reasons set forth below we affirm the orders.

SUMMARY OF EVIDENCE

Respondent's Investigation

Make the Road New York, an advocacy group based in Brooklyn, New York, filed a complaint with respondent, dated September 29, 2014, alleging, among other things, that petitioner Ana V. Minango employed claimants, her niece and nephew, at JAW Sweater, a sweater factory she owned, located in Ridgewood, New York, and failed to pay claimants minimum wages and overtime. Based on this complaint, respondent initiated an investigation of petitioners, substantiated the allegations, and issued the orders being appealed.

Labor Standards Investigator Emelina Garcia testified she was one of the investigators assigned to investigate the allegations against petitioners. On November 5, 2014, Garcia and other investigators visited JAW Sweater Inc. where they interviewed Minango and 18 individuals working at the factory, and requested petitioners' payroll records. Respondent's notes of the visit indicate that Minango told the investigators her nephew lived with her, worked on and off at the factory, always worked there after school, and that she paid him $300.00 weekly; however, when informed by the investigators that claimants alleged they had not been paid for their work, she replied that they did not work at the factory.

Garcia testified that she revisited the factory on November 19, 2014. Minango initially stated that she had helped the claimants financially, but neither claimant worked at the factory, and later stated that claimants helped when the factory received large orders, although this was not a weekly occurrence as claimants alleged, she did not make claimants punch time cards, and kept

no payroll records for them. Garcia testified a long-time employee she interviewed confirmed that claimants worked at the factory. Because Minango acknowledged that claimants worked at the factory, Garcia computed their underpayments based on the original allegations and later statements claimants made to respondent.

Garcia testified that the 100% civil penalty was recommended by Senior Investigator Paul Kalka because Minango acknowledged that claimants worked at her factory but she did not provide true and accurate records of their working hours. Kalka recommended the 100% civil penalty taking into consideration the size of the firm, the good faith of the employer, the gravity of monetary violations, and non-wage and recordkeeping violations. Garcia stated that Kalka's reasons matched her findings during the investigation. She testified that the imposition of 100% liquidated damages was based on the law.

Claimants' testimony

Claimants testified that they worked for Minango, their aunt, at JAW Sweater Inc. after she loaned them money to come to the United States. Claimants, who lived with Minango, testified Minango required them to work at the factory to pay off this debt.

Minango's niece testified that she began working for petitioners the day after she arrived at Minango's home on December 22, 2012. On her first day of work, Minango drove her to the factory at 8:00 a.m., and Minango showed her how to pack sweaters. Minango's niece spent her first day at work packing sweaters and cleaning the factory. The following day, Minango gave her niece a schedule: prepare breakfast as well as lunch to bring to the factory, walk Minango's dogs, and go to work at the factory at 5:30 a.m. to 6:00 a.m. Her niece either walked 15 minutes to the factory or Minango drove her. Minango told her niece that she would have to work in the factory to repay the money Minango spent bringing her to the United States. Minango had a notebook and said she was deducting $300.00 per week from her niece's $8,000.00 debt for the work she did at the factory. For the first two months, but not thereafter, Minango showed her niece notations in the notebook of the $300.00 weekly deductions. Minango paid for food, which her niece cooked, and bought her niece clothes, but did not give her niece any money.

Minango's niece testified that she worked at the factory seven days a week, usually finishing at 7:00 p.m., sometimes as late as 10:00 p.m. Her hours were 7:00 a.m. to 6:00 p.m. on Saturdays, and 8:00 a.m. to 3:00 p.m. on Sundays, when only she and her brother worked. She and the other employees were given a 10-minute break at 10:00 a.m. and a half hour lunch break at 12:30 p.m. each day. Minango's niece filled in for any absent employee, sewed, packed, sometimes ironed, sometimes cut thread, and attached labels and shoulder tapes to sweaters. Her niece did not have a factory key but opened the factory with her brother, who did. Both claimants stayed after other workers left at 6:00 p.m. or 7:00 p.m., and left after turning off the machines, cleaning the factory, taking trash outside on collection days, and preparing material for the next day's work. Jacqueline Perez, and sometimes Minango, told Minango's niece what to sew.

Minango's nephew testified that he worked for Minango from November 4, 2012 to February 7, 2014, after Minango loaned $7,000.00 to his sister and $7,000.00 to him so that they could come to the United States. On November 4, 2012, when he began living at his aunt's house, Minango wrote this debt in a notebook and told him he had to start working to repay it. She told her nephew that she would deduct $300.00 each week from his debt for his work from Monday to

Sunday and she also told him that when his sister arrived, she would also have to work because "I have a lot of debt . . . . And that is the reason I brought you in."

After this conversation, Minango took her nephew to the factory and explained that he would pack, iron, fold sweaters, carry material and sew. Her nephew also cleaned the factory, collecting and storing threads and pieces of material, sweeping, and taking out the garbage. He sometimes signed receipts for boxes of materials, and unloaded and sorted them. Minango and her partner, Jacqueline Perez, taught him the job and directed his work.

Minango's nephew worked seven days a week anywhere from 5:00 a.m. and 6:00 a.m. to 8:00 p.m. or 9:00 p.m., working fewer hours on the weekends. He usually walked 15 to 20 minutes to the factory and was usually the first employee to arrive and sometimes open the factory, to which Minango gave him keys. Opening the factory included starting the boiler (which took half an hour to warm up before steam was available to press sweaters), packing, and waiting for the arrival of other employees (who started at 7:00 a.m. and worked until 4:00 p.m. or 5:00 p.m.). After the other employees left, Minango's nephew cleaned, continued packing, sometimes put stickers on sweaters with a gun, and prepared work for the next day. Minango's nephew worked until Minango called to say he should leave or came to pick him up. He took a 15-minute break around 10:00 a.m., and a half hour lunch break around noon. Each day, Minango or Jacqueline Perez told him to take his breaks. His lunch was prepared by his sister the night before.

From November 4, 2012 to November 24, 2013, Minango did not pay her nephew any money. During his first month of work, Minango showed him a notebook she kept which listed the weekly $300.00 deductions from his debt, and after that he trusted her. Minango also provided room, board and clothes during this period. On November 24, 2013, Minango told him his debt was paid off and she began paying him $300.00 per week in cash on Monday or Tuesday. Minango told him that he could not punch a time card.

Minango's nephew testified that from April 4 to September 9, 2013 he attended GED classes Monday through Friday from 8:50 a.m. to 2:00 p.m., and then took a bus back to the factory. On those days, he woke at 5:00 a.m., went to the factory to work until 8:00 a.m., and returned to work from 3:00 until 8:00 or 9:00 p.m. because Minango told him that he had to return to work after school. After obtaining his GED, Minango's nephew enrolled in English classes that met Tuesday through Thursday from 6:30 to 9:00 p.m. On those days, he worked at the factory from 5:00 a.m. or 6:00 a.m. to 6:00 p.m., but he attended these classes for only about a month, because Minango was pressuring him to work and he was too tired. Minango's nephew admitted that at an earlier guardianship proceeding, he testified that he did not work.

Petitioner's testimony

Petitioner Ana V. Minango is the owner of JAW Sweater Inc., a sweater factory that employed 10 to 16 workers. The factory's hours varied depending on business but it generally opened at 8:00 a.m., sometimes later, and closed by 4:30 p.m., sometimes earlier, on weekdays; rarely operated on Saturday; and never operated on Sunday. Minango was at the factory 90% of the time it was open, six to seven hours a day, and was "in charge a hundred percent . . . on everything."

Claimants are children of Minango's sister, who died in 2010. In September or October 2012 Minango, having borrowed part of the money from friends, gave her niece and nephew money to come to the United States. Minango testified that her nephew lived in her house from November 2012 to the end of January 2014. He was enrolled in a GED program from April 4 to September 9, 2013, and left Minango's house at 6:30 a.m. or 7:00 a.m. to attend school from 8:50 a.m. to 2:45 p.m. During that time, according to Minango, her nephew sometimes stopped by the factory for coffee. After getting his GED, Minango's nephew enrolled in evening classes at a community college but did not complete the semester.

Minango's niece lived in Minango's house from December 2012 to August 29, 2013 and spent her time cooking, taking care of her brother, and calling her children. Minango's niece sometimes went with Minango to a school to study English. Minango initially testified that she kept a log of each time her niece went to the factory, then stated that she couldn't keep a log because her niece was at the factory "every single day, like, sometimes;" that she "didn't keep a log because there was – she wasn't doing anything;" and that her niece visited the factory "[v]ery rarely." When Minango's niece went to the factory, it was because Minango "would send her to bring down the food," or because her niece wanted to use the office computer and phone, or because she came "to request money or supposedly to call her children." Claimants also went to the factory to pick up sweaters for their own use.

Minango testified that neither claimant ever worked at the factory and that she provided both with free room, board and clothing. Minango testified that she never asked claimants to work, even when there were large orders, because she never needed them. Minango also stated that she gave claimants money partly borrowed from friends and "never expected them to return the money because they were like my children," yet she also testified that she loaned the money to claimants.

Minango further testified that when asked by DOL investigators whether the claimants worked at the factory, "I said no, that is not true. . . . I said yes, they came to the factory. They feel like they own everything that I have." According to Minango, "the investigator said that I was giving [my nephew] three hundred dollars, I said yes. I always give him, I gave him every week three hundred dollars to put away as a college fund. That was the agreement we have." Minango stated that she gave claimants the money to come to the United States after she bought a house in September or October 2012, did not expect to be paid back, and "[t]he reason that I didn't want to give them the money, two big events occur. First the passing of my sister. The second one I bought my house . . . . That is the reason I didn't want to give them the money at that time."

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*Id.* § 103 [1]). Petitioners have the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (Board Rules [12 NYCRR] § 65.30; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.,* 1 AD 3d 850, 854 [3d Dept 2003]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Petitioners Were Not Denied Due Process

At the outset, we reject petitioners' contention that they were denied due process because they were prevented from submitting relevant or additional evidence during the investigation. The Board has repeatedly held that due process is satisfied by the opportunity to contest the orders at a hearing before the Board (*Matter of Clifton J. Morello [T/A Iron Horse Beverage LLC*], PR 14-283 [Sept. 14, 2016] at 6; *Matter of Angelo A. Gambino and Francesco A. Gambino [T/A Gambino Meat Market, Inc.]*, PR 10-150 [July 25, 2013] at p. 6; *Matter of David Fenske [t/a Amp Tech and Design, Inc.]*, PR 07-031 [Dec. 14, 2011], at 8).

Petitioners Were Employers and Claimants Were Petitioners' Employees

"Employee" as used in Article 19 of the Labor Law means "any individual employed or permitted to work by an employer." (Labor Law § 651 [5]). "Employer" is defined as including "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). Furthermore, to be "employed" means that a person is "permitted or suffered to work" (Labor Law § 2 [7]).

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). The United States Supreme Court, in discussing the broad definition of "employ" set forth in the FLSA, has observed that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame" (*United States v Rosenwasser*, 323 US 360, 362 [1945]).

The test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test used for analyzing employer status under the Fair Labor Standards Act. (*Matter of Yick Wing Chan v New York State Industrial Board of Appeals*, 120 AD 3d 1120 [1st Dept 2014]; *Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 626 [1st Dept 2013]; *Cohen v Finz & Finz, P.C.*, 131 AD3d 666 [2d Dept 2015]; *Chung v New Silver Palace Rest., Inc.*, 272 FSupp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999], the Second Circuit Court of Appeals explained the "economic reality test" used for determining employer status:

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*Id.)* Under the broad New York and FLSA definitions of "employer," more than one person or entity can be found to be an employee's employer (*Zheng v. Liberty Apparel Co.*, 355 F3d 61 [2d Cir 2003]; *Matter of Stephen B. Sacher, Travco, Inc., and Sacher & Co., CPA, P.C.,* PR 11-151 [April 10, 2014]).

We find that the credible evidence amply demonstrates that petitioners were the claimants' statutory employers under the Labor Law. Minango owned JAW Sweater Inc. and testified that she was at the factory 90% of the time it was open, and was in charge of everything. We credit claimants' testimony that Minango told them to work, scheduled their work, set their conditions of employment, and directed their work. Once Minango's nephew's debt was paid off, Minango handed him $300.00 in cash each week, but refused to let him punch a time card. Minango provided her nephew with a key to the factory, told both claimants when to take breaks, and called her nephew to tell him when he could leave the factory. We find that as a matter of economic reality, both petitioners employed claimants, and were employers under the statute.

We also find that claimants were "suffered and permitted to work" and were petitioners' employees (Labor Law § 651 [5]). Claimants' testimony describing the work they did and the operations of JAW Sweater Inc. was clear, specific, detailed and credible. Claimants described the specific tasks they performed, their typical work day, and the conditions of employment. Minango's niece testified she sewed, packed, ironed, folded, cut thread and attached labels and shoulder tapes at Minango's direction. Her nephew testified that he opened the factory with a key supplied to him by Minango, and started the boilers so that there would be steam for the pressing machines when the other employees arrived at work; he received, unloaded and sorted deliveries of materials; and packed, ironed, folded and sewed, having been taught to do so by Minango and Jacqueline Perez. Both claimants testified that they also cleaned the factory at night, after other employees left. Minango's nephew testified that he left the factory only after Minango called him to tell him he could leave or picked him up from the factory. Claimants gave detailed descriptions of many of these tasks, accounts they could not likely have provided if, as Minango claimed, they came to the factory only to drink coffee, use the computer and phone, ask for money and take sweaters for their own use. Claimants' ability to describe in detail the day to day operation of the employer, including describing their own and other employees' job duties, lends credibility to their account.

Minango's account, on the other hand, was shifting and inconsistent and lacked credibility. She testified variously that she kept a log of each time her niece went to the factory; that she could not keep a log because her niece came there "every single day, like, sometimes;" that she "didn't keep a log because there was – she wasn't doing anything;" and that her niece visited the factory "[v]ery rarely." Minango repeatedly testified she gave claimants money partly borrowed from friends and never expected them to return it, but also testified that she had loaned claimants the money. Garcia credibly testified that Minango also provided different accounts to respondent's investigators during the investigation, stating that her nephew had worked on and off and always after school and was paid $300.00 per week; that claimants did not work at the factory; that claimants helped when the factory received a large order but this was not a weekly occurrence as they alleged; that it was not true that claimants worked at the factory; and that "yes, they did work here."

While we acknowledge that petitioner's nephew admitted that he testified at an earlier guardianship proceeding that he did not work, we nevertheless find that his testimony before us was consistent, credible, and corroborated by the credible testimony of his sister. We do not credit Minango's testimony that claimants did not work at the factory. Her shifting and contradictory testimony was not believable against the back drop of the specific, detailed, and credible testimony of claimants. We find Minango's uncorroborated testimony unreliable and insufficient to meet petitioners' burden of proof.

Petitioners asserted that the familial relationship between Minango and her niece and nephew was not subject to Article 19 of the Labor Law or the Minimum Wage Order for Miscellaneous Industries, 12 NYCRR Part 142. Neither Article 19 nor 12 NYCRR Part 142 exempts or excludes family members. While the FLSA specifically exempts from coverage "mom and pop" establishments, only establishments that have immediate family members as their only regular employees are exempt from the FLSA enterprise requirements (29 USC 203 [s] [2]). The New York Labor Law does not include this exemption, and it is undisputed that petitioners employed at least 10-16 non-family members during the relevant period.

The Amended Minimum Wage Order is Affirmed

Having concluded that: (1) petitioners were claimants' employers; (2) claimants were petitioners' employees; and (3) due process was satisfied, we affirm the amended minimum wage order. The petition raised no other issue, and any other challenges to the orders have been waived pursuant to Labor Law § 101 [2].

The Civil Penalty Assessed in the Amended Minimum Wage Order is Affirmed

The amended minimum wage order assessed a civil penalty in the amount of 100% of the wages due. Labor Law § 218 (1) provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Article 19 of the Labor Law, respondent shall give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements." (*Id.)*

Garcia testified that the 100% civil penalty was imposed using the factors listed above because Minango acknowledged that claimants worked at her factory but did not provide true and accurate records of their working hours. The Board finds that the considerations and computations the Commissioner was required to make in connection with the imposition of the civil penalty amount set forth in the amended minimum wage order were valid and reasonable.

Liquidated Damages

The amended minimum wage order assessed liquidated damages in the amount of 100% of the wages owed. Labor Law § 218 provides that when wages are found to be due, respondent

shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. Petitioners offered no evidence that they had a good faith basis to believe their underpayment was in compliance with the law. We therefore affirm the imposition of 100% liquidated damages in the amended minimum wage order.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages 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 sets the "maximum rate of interest" at "sixteen per centum per annum." Here, respondent correctly determined that claimants were not paid owed wages and petitioners did not offer any evidence to challenge the imposition of interest. We therefore affirm the imposition of interest in the amended minimum wage order.

The Penalty Order is Affirmed

Labor Law § 218 (1) provides that where a violation is for a reason other than an employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed $1,000.00 for a first violation. In this case, respondent assessed a $1,000.00 penalty against petitioners for failure to keep and/or furnish true and accurate payroll records for each employee from on or about December 26, 2009 through February 19, 2014; a violation of Labor Law § 661 and 12 NYCRR 142-2.6. Petitioners failed to introduce any evidence that it kept required records for claimants. We affirm the penalty order.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The amended minimum wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same is, otherwise 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
October 25, 2017.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The amended minimum wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same is, otherwise 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
October 25, 2017.