

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :
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GUY NICOLAS A/K/A GUY NICHOLAS AND :
CAPITAL DISTRICT AUTO CARE SERVICE, LLC, :
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Petitioners, : DOCKET NO. PR 16-123
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To Review Under Section 101 of the Labor Law: : RESOLUTION OF DECISION
Orders to Comply with Articles 6 and 19, and an Order :
under Articles 6 and 19 of the Labor Law, all dated :
September 2, 2016, :
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- against - :
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THE COMMISSIONER OF LABOR, :
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 :
Respondent. :
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APPEARANCES

Guy Nicolas a/k/a Guy Nicholas, petitioner pro se, and for Capital District Auto Care Service, LLC.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (Steven J. Pepe of counsel), for respondent.

WITNESSES

Guy Nicolas a/k/a Guy Nicholas and Tonya Jean Crew for petitioners.

Larry Williams and Senior Labor Standards Investigator Kenneth Hartnett for respondent.

WHEREAS:

On October 27, 2016, petitioners Guy Nicolas a/k/a Guy Nicholas and Capital District Auto Care Service, LLC (“shop” or “dealership”) filed a petition with the Industrial Board of Appeals pursuant to Labor Law § 101 seeking review of three orders issued against them by respondent Commissioner of Labor, on September 2, 2016. Respondent filed her answer on December 2, 2016. Upon notice to the parties, a hearing was held in Albany, New York, on March 20 and April 7, 2017, before Michael A. Arcuri, member of the Board and designated Hearing Officer in the proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The order to comply with Article 19 (minimum wage order) directs petitioners to pay overtime wages in the amount of \$375.39 due and owing to Larry N. Williams for the period from April 21, 2015 through January 16, 2016, \$37.19 in interest at 16% calculated to the date of the order, \$375.39 in liquidated damages, and \$375.39 in civil penalties, for a total due of \$1,163.36.

The order to comply with Article 6 (unpaid wages order) directs petitioners to pay wages in the amount of \$15,167.88 due and owing to Larry N. Williams for the period from April 21, 2015 through January 16, 2016, \$1,502.66 in interest at 16% calculated to the date of the order, \$15,167.88 in liquidated damages, and \$15,167.88 in civil penalties, for a total due of \$47,006.30.

The order under Articles 6 and 19 (penalty order) directs petitioners to pay civil penalties in the amount of: \$1,000.00 for failure to keep and/or furnish true and accurate payroll records, in violation of Labor Law § 661 and 12 NYCRR 142-2.6; \$1,000.00 for failure to provide each employee with a complete wage statement with each payment of wages, in violation of Labor Law § 661 and 12 NYCRR 142-2.7; and \$1,000.00 for failure to provide employees with written notice at the time of hiring, containing their rate of pay and designated payday, or failing to obtain written acknowledgement from employees of receipt of such notice, in violation of Labor Law § 195 (1). All violations are for the period from April 21, 2015 through January 16, 2016, and total \$3,000.00.

At hearing, some of respondent's exhibits were rejected and the hearing officer reserved on the admissibility of some of petitioners' exhibits. We find that all exhibits presented by the parties are admitted.

The petition alleges that: (1) petitioner Nicolas did not own or operate Capital District Auto Care Service, LLC, and (2) petitioner Nicolas was not, and had never been, Williams' employer.

We find, as discussed below, that respondent's determination that Nicolas was Williams' employer was not reasonable. The wage orders are revoked as to Nicolas, and the penalty order is affirmed.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of petitioner Guy Nicolas a/k/a Guy Nicholas

During the relevant time period, Nicolas owned and operated GNA Auto Care, Inc., an auto-repair shop and used car dealership. He maintained records of the weekly hours worked by the people he hired to help with auto repairs or the cleaning of the shop and paid them in cash or check. Since Nicolas did not have a consistent volume of business, he did not have workers in the shop every day on a fulltime basis, and would book approximately three to four people as contractors, to work sporadically on an as needed basis. GNA Auto Care, Inc. also conducted

business under the name Capital District Auto for the portion of Nicolas' business that involved purchasing damaged cars at auction to fix and sell them.

Nicolas met Williams in 2006 when both drove taxis for Capital Land Taxi. During the claim period, Williams was still working as a cab driver, while also providing advertising services for Nicolas' business. The two had a verbal agreement that Williams would receive \$150.00 for each car-buying customer he referred to Nicolas. On occasion, Williams picked up auto-parts for Nicolas, who paid Williams the cab fare to and from the pick-up location because Williams picked-up the items while driving his cab. Nicolas did not keep track of these payments. Nicolas did not have an agreement to pay Williams \$500.00 per referral (nor per week) as the average profit margin for each car sold was between \$800.00 and \$900.00 and he had an established practice of paying people \$150.00 per referral. Nicolas testified that Williams sent him text messages, wherein Williams requested owed commissions / referral fees, not wages, from Nicolas. Williams also sent letters to Nicolas during the claim period under his own business letterhead titled "Larry's Advertising" and "Larry's Mobile Advertising."

Nicolas testified that Williams wanted to open his own car dealership. Nicolas offered to help teach him how to run the business, and assisted Williams in getting an auction access card, which allowed Williams to enter auto auctions and make purchases. Individuals who want to purchase cars at auctions can only get an auction access card by being affiliated with a dealer or broker, and Williams obtained his card through his affiliation with Nicolas and his dealership. Williams never purchased any cars on Nicolas' behalf, nor did he help fix any of the cars Nicolas purchased because Williams was not a mechanic and did not have the required skill and knowledge to do auto repairs.

Williams occasionally visited Nicolas' auto-shop, but when Williams had a car there for repair, he would visit up to three times a week. Nicolas arrived at his shop around 9:00 a.m., except on the two days a week that he attended auto auctions, in which case he arrived in the afternoon or did not go to the shop that day. When Nicolas was not in the shop, he sometimes contracted with Elizabeth Neimann or Randy Garhart to answer phones, and/or fix specific car parts. Neimann and Garhart worked for Nicolas from May through August 2015. Since Nicolas did not have enough business to require that someone always be at the auto shop, he often did not have anyone there for the day.

Nicolas never provided respondent with payroll records because he did not have any as he did not have employees. The workers that sometimes helped at his shop were contractors and many had their own businesses. For example, Neimann and Garhart had a business called June Auto Repair.

On rebuttal, Nicolas testified that at the auctions, when people won a bid on a car, the auctioneers automatically logged the name and registration number of the bid winner in their computer system. Nicolas added that he, not Williams, was named on all of Nicolas' winning bids. Nicolas also testified that his shop opens at 9:00 a.m., and the auction card for the Manheim auction is issued free of charge.

Testimony of Tonya Jean Crew

Crew met Williams when she was looking to purchase a car and Williams introduced her to Nicolas. Williams presented himself as an owner and partner at the shop. Crew purchased a car from Nicolas in August 2015, and through the end of the claim period (January 2016) and thereafter, often visited the shop for repairs and maintenance, to trade the car in for another one, and to bring friends who were potential buyers. The repairs and maintenance were performed by mechanics at the shop, never Williams. Crew testified that whenever she saw Williams at the shop, he was sitting in his cab or standing outside smoking. Crew never saw Williams doing any kind of work at the shop, such as selling cars, doing repairs, or cleaning.

Crew further testified that because Nicolas did not have many workers at the shop, she often had to wait to have her car serviced. She usually saw a master mechanic, perhaps named Ed, and a helper of some sort.

Respondent's Evidence***Testimony of Senior Labor Standards Investigator Kenneth Harnett***

Harnett testified that he conducted an initial field visit to the auto shop on April 5, 2016. There were several workers at the shop that day, including a man answering the phone and two or three people working on vehicles. Harnett attempted to interview some workers, but they all refused to be interviewed. Since Nicolas was not present during the initial site visit, Harnett called him to come down to the shop so they could speak, but Nicolas refused.

Despite Harnett's requests for payroll records throughout the investigation, Nicolas did not provide Harnett with any time or payroll records for Williams or any other worker, and insisted that Williams was not his employee, but mentioned having two employees. Harnett testified that Williams having an auction card supported respondent's determination that he was employed by Nicolas.

Testimony of claimant Larry Williams

Williams has been a cab driver for 20 years, and met Nicolas when the two drove cabs for the same company. He started working for Nicolas on April 15, 2015, as indicated on his "dealer license card," which reflects when Williams became authorized to purchase cars at auction on behalf of Nicolas. Williams testified that Nicolas asked him to be his partner in the business, with a salary of \$500.00 per week plus commission. Williams worked for Nicolas until January 2016. Williams agreed to have Nicolas hold onto his earned salary and commissions and to apply those funds to a new taxi that Williams was planning on purchasing. Nicolas never paid Williams wages, but paid him some of the commissions owed.

Williams worked Monday through Friday from approximately 8:00 a.m. when he opened the shop and let Richie, the mechanic, enter, until 6:00 or 7:00 p.m., with the occasional break on weekdays to pick his daughter up from school. Williams also worked every Saturday, arriving around 8:00 a.m. and leaving at some point between 4:00 p.m. and 6:00 p.m., although he would take a midday break.

Williams' responsibilities included opening the shop, ordering parts, and tending to customers. Nicolas often arrived around 2:00 p.m. and left around 4:00 p.m. Williams sometimes closed the shop, and other times Nicolas did. Several other people worked at the shop with Williams, including mechanics Richie, J.J. and Phil, Neimann and her husband Garhart, and a receptionist named Betsy. Williams never managed payroll, which was handled by Nicolas. As sales manager, which is the title on the business cards that Nicolas issued for Williams, he supervised and gave direction to Neimann and Garhart.

Williams received his auction card from Nicolas, for which Nicolas paid \$300.00. Williams attended auctions to bid on cars alongside Nicolas for Nicolas' business. Both of their auction card registration numbers were connected to Nicolas' business, so whenever Williams won a bid, Nicolas accompanied him to the counter and requested that the bid and eventual purchase be registered under his registration number, and not that of Williams'.

Williams referred many customers to Nicolas, but rarely received commissions. When Williams asked Nicolas to pay him owed wages, Nicolas told Williams that he was not going to give him any money because Williams did not work for him and was only at the shop because he had nothing better to do.

ANALYSIS

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

Burden of Proof

Petitioners' burden of proof in this matter is to establish, by a preponderance of the evidence, that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *see also Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [Oct. 11, 2011]).

For the reasons stated below, we find that petitioner Nicolas met his burden of proof to show that the orders to comply with Articles 6 and 19 are unreasonable. However, Nicolas failed to prove that the penalty order was unreasonable, and we affirm the penalty order as to him.

Although Nicolas filed his petition on behalf of himself and Capital District Auto Care Service, LLC, the business did not present any evidence at the hearing. In his petition, Nicolas argued that he did not own or operate Capital District Auto Care Service, LLC, and testified that he was not associated with Capital District Auto Care Service, LLC. Nicolas explained that his business, G&A Auto Care, Inc., conducted business under the name Capital District Auto, not Capital District Auto Care Service, LLC. As such, we revoke the orders to comply with Articles 6 and 19 as to Nicolas only. Since co-petitioner Capital District Auto Care Service, LLC failed to present any evidence at the hearing, all orders, including the penalty order, remain valid and reasonable as to the corporate petitioner.

Employer Status: Nicolas was an Employer

As used in Article 19 of the Labor Law, “employer” means any “individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer,” and in Article 6, “employer” is defined as “any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service” (Labor Law §§ 651 [6], 190 [3]). “‘Employed’ includes permitted or suffered to work” (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA), 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 used for analyzing employer status under the FLSA (*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 F Supp 2d 314, 319 n6 [SDNY 2003]). Article 19 of the Labor Law defines “employee” as “any individual employed or permitted to work by an employer in any occupation,” while the definition under Article 6 includes “any person employed for hire by an employer in any employment” (Labor Law §§ 651 [5], 190 [2]).

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 as the purpose of examining them is to determine the economic reality based on a “totality of circumstances” (*id.*). Under the broad New York and FLSA definitions, more than one entity or person can be found to be a worker’s employer (*id.*). Applying the Herman test to Nicolas and his relationship with shop workers, we find that Nicolas was an employer. Based on Nicolas’ testimony regarding the intricacies of his auction bidding schedule, and the shop’s operating hours on such days, it is clear that he controlled employee work schedules as workers ran the shop while Nicolas was not present. Nicolas testified that he attended auctions a couple of days a week, during which time, shop workers would either be fixing cars or car parts, answering the phone, or tending to other shop matters. The workers reported to the shop and performed the tasks as required by Nicolas because he was managing the shop’s labor needs in relation to the business he was generating from the sale of cars, and the needs of the business based on the cars he purchased at auction. As such, Nicolas not only had the power to hire and fire the shop’s workers, but he also controlled their conditions of employment. And while, after initially stating the contrary, Nicolas testified that he did not maintain employment/payroll records, he did testify to setting the hourly rate of pay for some of his workers, specifically Randy Garhart and Elizabeth Neimann, who he paid an hourly rate of \$12.00 and \$10.00, respectively.

Nicolas exercised a great degree of control over the workers, as evidenced by his testimony regarding having such competitive profit margins that he needed to be precise when adjusting his workers' schedules and tasks performed. We find that Nicolas was an employer to at least some of the workers at his shop. However, as discussed below, we find that Nicolas did not employ Williams.

Nicolas was not Claimant's Employer

In contrast to the other employees who worked at the shop, we credit Nicolas' testimony and find under the *Herman* test that as a matter of economic reality he was not Williams' employer. Nicolas credibly testified that he could not and did not control Williams' schedule or conditions of employment, or maintain employment records on his behalf, but simply agreed with Williams that he would be paid a referral fee for customers who wished to purchase cars from Nicolas. The relationship was evidenced by text messages that Williams sent Nicolas indicating that Nicolas owed him commissions/referral fees, not wages. Respondent's findings refer to wages that are owed based on an employment relationship outside of those commissions. Williams also signed "To Whom It May Concern" letters during the claim period under his own business letterhead titled "Larry's Advertising" and "Larry's Mobile Advertising," providing further evidence that he was operating a separate commissions/fee based entity. These letters were not refuted by Williams or respondent and show that Williams owned an advertising business - with ads placed on taxis - and that he employed at least two full-time sales associates, whom he referred to as employees. The letters are dated during the period of time when Williams claimed to have worked full-time for Nicolas, and support Nicolas' credible testimony that Williams provided advertising services to his business, in addition to referring potential buyers.

Nicolas credibly testified that Williams worked as a cab driver during the claim period, and the two had an oral agreement that upon referring a buyer to Nicolas, he would pay Williams a \$150.00 referral fee. Nicolas also testified that he paid Williams the cab fare to and from the location where Williams picked up auto-parts for him. Nicolas provided extensive and credible details about the workings of his business, and credibly testified that his shop was not sufficiently profitable for him to hire a non-mechanic, especially as a full-time employee.

While Williams was familiar with the names of some of the shop's workers, he failed to credibly describe his duties, or that of any of the workers aside from a title-specific description such as "mechanic." Williams did not describe the "customer service" that he provided to customers, and failed to rebut petitioner's evidence, including Crew's credible testimony, that Williams did not hold himself out to be Nicolas' employee at any point during her purchase of a car from Nicolas. We find Nicolas, as a matter of economic reality, was not Williams' employer and revoke the minimum wage and unpaid wages order with respect to Nicolas.

The Penalty Order is Affirmed

Although Nicolas initially testified that he kept track of the hours worked by workers at his shop, he later testified that he did not maintain payroll records during the claim period. Ultimately, he did not provide payroll records to the Department of Labor during their investigation, nor at the hearing. Article 19 of the Labor Law requires employers to maintain payroll records, for at least six years, that show, among other things, the wage rate of each employee, number of hours they worked daily and weekly, including the time of arrival and

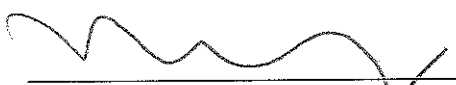
departure of each employee working a spread of hours exceeding ten, the amount of gross wages, and the net wages paid (Labor Law § 661; *see also* 12 NYCRR 142-2.6 [a]). Nicolas also testified that he paid his workers in cash or check, without mention of wage statements. Article 19 of the Labor Law further requires employers to provide employees a statement with each payment of wages showing the hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages (12 NYCRR 142-2.7). Article 6 of the Labor Law requires employers to provide employees, in writing, at the time of hiring, a notice containing the employees' rate or rates of pay and the regular pay date designated in advance by the employer, and must obtain written acknowledgement from the employees of receipt of such notice (Labor Law § 195 [1]).

Although, as described above, Nicolas was not Williams' employer, he is required to maintain records of the workers he did employ. Investigator Harnett testified that Nicolas told him he had two employees, and Harnett saw workers at the shop during respondent's initial site visit. Crew credibly testified that there were mechanics and others working at the shop. It is clear from the evidence presented at the hearing that while Nicolas was not Williams' employer, he was an employer to others.


Since Nicolas never provided legally required payroll records to the Department of Labor or produced them at the hearing, and Nicolas presented no evidence that he provided wage statements with each payment of wages, or provided employees a written notice at the time of hiring containing their rate of pay, designated payday and/or failed to obtain written acknowledgement from employees of receipt of such notice, the penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage and unpaid wage orders are revoked as to Guy Nicolas a/k/a Guy Nicholas and affirmed as to Capital District Auto Care Service, LLC; and
2. The penalty order is affirmed in its entirety; and
3. The petition be, and the same hereby is, granted in part and denied in part.

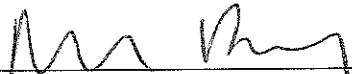


Vilda Vera Mayuga, Chairperson

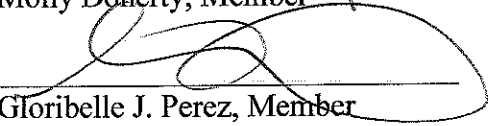


J. Christopher Meagher, Member

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
March 7, 2018.

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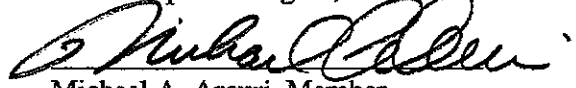
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Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member



Michael A. Arcuri, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
March 7, 2018.

Molly Doherty, Member

Gloribelle J. Perez, Member