ALAN SAVARICK

Docket No. PR 09-002

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:

ALAN SAVARICK,

Petitioner,

To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law and an Order under Article 19 of the Labor Law, both dated November 6, 2008,

- against -

THE COMMISSIONER OF LABOR,

Respondent.

DOCKET NO. PR 09-002

RESOLUTION OF DECISION

APPEARANCES

Alan Savarick, *pro se*.

Maria L. Colavito, Counsel, NYS Department of Labor, Larissa C. Wasyl of Counsel, for Respondent.

WITNESSES

Rose Giardina and Alan Savarick for the Petitioners; Senior Labor Standards Investigator Jeremy Kuttruff and Pedro Peralta for the Respondent.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on December 30, 2008. Upon notice to the parties a hearing was held on December 3, 2009 in Old Westbury, New York, before Devin A. Rice, Associate Counsel to the Board and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The Order to Comply with Article 6 (Supplemental Wage Order) and the Order to Comply under Article 19 (Penalty Order) under review were issued by the Respondent Commissioner of Labor (Commissioner) on November 6, 2008 against Petitioner Alan Savarick and Beacon Renovations, Inc a corporation that did not appear in this proceeding. The Wage Order directs compliance with Article 6 and payment to the Commissioner for supplemental wages (vacation) due and owing to claimant Pedro Peralta in the amount of $3,360.00 for the time period from February 26, 2006 trough May 30, 2007, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $774.73, and assesses a civil penalty in the amount of $3,360.00, for a total amount due of $7,494.73. The Penalty Order finds that the Petitioner and Beacon Renovations, Inc. violated Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for the period from February 26, 2006, and directs payment of a civil penalty in the amount of $500.00.

SUMMARY OF EVIDENCE

Testimony of Rose Giardina

Rose Giardina works as a bookkeeper for multiple companies owned by Petitioner Alan Savarick, including Beacon Direct Response and Beacon Renovations. She does payables and receivables for the companies she works for and also prepares their payrolls.

Giardina testified that Savarick's role in Beacon Renovations was only as a "silent partner," and that he had very little input into the operation of the business limited to providing advice to Beacon Renovations' owner, Chris Dopfel. Savarick had nothing to do with Beacon Renovation's payroll or the hiring, firing and managing of its employees.

Chris Dopfel told Giardina the number of hours worked Beacon Renovations' employees worked each week and she used that information to prepare the payroll. Beacon Renovations' payroll records showed that as of May 14, 2007, Claimant Pedro Peralta, was owed 240 hours of vacation.

Giardina testified there were errors in the computerized time records maintained for Beacon Renovations. Wage statements listed too much vacation time because the company's vacation policy was two weeks vacation per year which was forfeited if not used, so no employee could have more than 80 hours of accrued vacation time. According to Giardina, the data for vacation time was incorrect when it was initially entered into Beacon Renovations' computer system and was never corrected although Giardina often advised Dopfel that the "salary hours" needed correction.

Giardina did not know whether Dopfel provided Peralta with a written vacation policy, although one was normally given to all employees when hired by Beacon Renovations with a signed copy returned to the company. She also did not know whether Peralta ever returned a signed copy of the vacation policy to Beacon Renovations.

Testimony of Alan Savarick

Petitioner Alan Savarick operates several companies from a building that he owns in Rockville Center, New York. Prior to 2005, Claimant Pedro Peralta was employed as a manufacturer in the photo products division of Beacon Direct Response, a mail order premium fulfillment company owned by Savarick. Beacon Direct's photo procucts division, managed by Chris Dopfel, closed in 2005 because of the decline of the photo finishing industry.

After Beacon Direct's photo finishing division closed, Dopfel approached Savarick for assistance in forming a construction company to do home renovation work. Savarick agreed to assist Dopfel and used a dormant corporation he owned, Robara Corp., to start the new business which was then transferred to Beacon Renovations, Inc. Beacon Renovations was started by Dopfel at Dopfel's suggestion with Savarick's backing.

Although Savarick's name remained on the corporate filings as chairman of Beacon Renovations, Inc, he was only an investor, "not operationally involved" in the corporation. His investment in the company included donating office space, providing materials, tools, vehicles, paying for a bookkeeper, and assisting Dopfel with advertising and marketing. Savarick resigned from Beacon Reonovations' board of directors in 2007.

Savarick did not have the authority to hire or fire Beacon Renovations' employees or direct their work. Savarick was not Dopfel's supervisor and could not "overturn" Dopfel's decisions or give him instructions, although he could offer recommendations. Savarick received occasional updates from Dopfel concerning the company, and on two occasions visited a construction site to verify that work was being performed.

When Savarick became aware that Beacon Renovations' payroll records contained errors, he informed Dopfel of the problem.

Savarick replied to the Department of Labor's (DOL) investigation once he learned of it. He sent DOL payroll records for the time the Claimant was employed by Beacon Direct, because he believed DOL was investigating Beacon Direct.

Testimony of DOL Labor Standards Investigator Jeremy Kuttruff

On October 25, 2007, DOL received a "claim for unpaid wages" from Pedro Peralta alleging that Beacon Renovations failed to pay him his first week's wages and his accumulated vacation pay. The claim form listed Chris Dopfel as the "responsible person" at the firm. Payment records attached to the claim form indicated that Peralta had accrued 240 hours of vacation time as of the pay period ending May 13, 2007.

Peralta's claim was assigned to DOL Labor Standards Investigator (LSI) Jeremy Kuttruff. At the time, LSI Kuttruff was a desk investigator stationed in Albany, New York, whose duties included reviewing claims for unpaid wages, investigating those claims, and with the help of his supervisors, making determinations concerning wage claims and referring such claims for an order to comply if necessary. LSI Kutruff, as a desk investigator, worked on "returned mail cases." Those cases involved investigations of cases where correspondence

sent to an employer was returned to DOL by the post office as undeliverable. Peralta's claim against Beacon Renovations was such a case.

LSI Kuttruff never spoke to Savarick, Peralta or Dopfel, the individual named on Peralta's claim form as the responsible person at the firm, and whose name appears on the Beacon Renovations business card Peralta provided DOL. LSI Kutruff used internet resources to find that Savarick was the chairman of Beacon Renovations and then initiated contact with Savarick based on that information. LSI Kutruff spoke to Savarick's bookkeeper, Rose Giardina, on three or four occasions and explained to her the evidence required by DOL to close its investigation.

LSI Kutruff informed Savarick in writing, and Giardina by phone, that Peralta's claim was for 240 hours of unpaid vacation time. He requested from Savarick in writing, and Giardina by phone, that they produce documentary evidence demonstrating that the owed vacation time was paid. LSI Kutruff testified that he never received any such documentation. He did, however, receive a letter from Savarick explaining that a clerical error had been made on Peralta's wage statement that incorrectly listed 240 hours of accrued vacation time and stating that Beacon Renovations had a "use it or lose it" vacation policy. Savarick's letter also advised that Peralta worked for a different company owned by Savarick prior to working for Beacon Renovations and that he had been paid in full for all work done for the prior company.

LSI Kuttruff determined that there was no evidence that Beacon Renovations ever provided Peralta with a copy of a vacation policy, Peralta's employment with Beacon Renovations and the prior company, Beacon Direct, was continuous, and that both employers were located at the same address and had Savarck as a principal. Therefore, he recommended that the Commissioner issue an Order for 240 hours of unpaid vacation pay. LSI Kuttruff also recommended imposition of a 100% civil penalty because the employer did not cooperate with the investigation, most correspondence was returned, there was no response from the employer until DOL sent a letter to Savarick's home address, and Savarick originally stated there was no vacation policy but then subsequently "came up with one." LSI Kuttruff also recommended an additional $500.00 penalty for failure to keep required records because Savarick informed DOL that Peralta was paid in full when the first company closed, but never submitted proof to DOL.

Testimony of Pedro Peralta

Claimant Pedro Peralta, testified through an interpreter that he "used to work for" Savarick for the "whole time" from 1991 to 2007 for a company called Beacon Direct. Peralta was not sure whether the company had ever changed names, although he did recall that when work at "the company" was slow, he changed jobs from cutting paper to carpentry. He did not remember when his job changed and was not sure whether the name of the company on his pay check ever changed because he is unable to read. Peralta did recall that when his work changed, he went to the same building he had always worked each day to get the truck, but that he would then go to different sites to do renovation work with a man named "Christian."

Peralta testified that Savarick never spoke to the workers. Peralta's manager was Christian, and Christian was the one who gave instructions to Peralta and the other workers. Additionally, Christian was the person who gave Peralta his wages each pay day. Peralta testified that he does not understand English and that "nobody spoke Spanish" to him at the job. Peralta further testified that he was never informed about vacation pay when he worked for Savarick, but was told he would receive two weeks vacation every year although he was not exactly sure because he cannot understand English. Peralta did not remember ever having received a memo written in Spanish detailing the vacation policy, and in any event, Peralta testified that he is not able to read.

Peralta testified that when he took days off, he was paid for those days. When he stopped working for the company, his wife told him that he had 240 hours of vacation time available. Peralta testified that nobody ever informed him that vacation time was "use it or lose it."

Savarick testified in rebuttal that he never received the mail DOL sent to Beacon Renovation's business address because it was no longer in business and had been dissolved, and the mail was returned to sender by the post office. He did, however, reply to the correspondence DOL sent to his home address.

Savarick testified that Peralta never simultaneously worked for Beacon Direct and Beacon Renovations. There was an approximately two to three week period between the closing of Beacon Direct's photo division and the start of Beacon Renovations. Savarick gave Peralta painting work to do in Savarick's building during the interval.

Finally, Savarick testified that he know Peralta was paid his vacation time while employed by Beacon Direct, but did not bring those records because he was unaware that the matter involved Beacon Direct.

FINDINGS AND CONCLUSIONS OF LAW

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

The Petitioners have the burden to show that the Orders are invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30).

"Employer" as used in Articles 6 and 19 of the Labor Law means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* Labor Law § 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 230 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.,* 172 F3d 132, 139 (2d Cir 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

When applying this test, "no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive." (*Id.* [internal citations omitted]).

In *Petition of Franbilt, Inc. et al.*, IBA Docket No. PR 07-019 (July 30, 2008), we found that an individual was not an "employer" where he did not have the authority to hire or fire employees, control employee work schedules or their conditions of employment, or determine the rate and method of payment to employees. Likewise, in *Petition of Delledonne*, Docket No. PR 08-145 (July 22, 2009), we held that an individual petitioner did not have sufficient control over the employees in question to satisfy the economic reality test. We find that as in those cases, Savarick is not liable for the wages, civil penalties, and interest alleged by DOL, because he did not have sufficient control over the claimant to satisfy the economic reality test and was, therefore, not an employer under Articles 6 and 19 of the Labor Law.

We find that Savarick credibly testified that during the time period covered by the Orders, he did not have the authority to hire and fire employees, including the Claimant, employed by Beacon Renovations; did not supervise the Claimant's work schedule or that of any other employee of Beacon Renovations, or control their conditions of employment; did not determine the rate and method of payment of Beacon Renovations' employees; and did not exercise any other indicia of employment sufficient to demonstrate an employment relationship with the Claimant during the period of time covered by the Orders. We also find Savarick's testimony that Beacon Direct and Beacon Renovations were separate companies is credible, and see no basis for finding Savarick liable as a joint employer, a theory first raised by the Commissioner at hearing, especially where there is no evidence that the Claimant worked simultaneously for Beacon Direct and Beacon Renovations. Indeed, we find that there was no continuity of employment, only an appearance of continuity because Savarick gave the Claimant some painting work while he was between jobs, the Claimant appeared not to fully understand that Beacon Renovations was a different company from Beacon Direct, and Beacon Renovations used space in a building owned by Savarick that also housed Beacon Direct.

The Commissioner did not present sufficient evidence to contradict Savarick's and Giardina's testimony. Indeed, DOL's entire investigation appears to have consisted of researching New York Department of State records to find the name of a chairman or chief executive officer to issue Orders against without first ascertaining what such individual's actual role was in the company. We note that no DOL employee ever interviewed the Claimant or attempted to contact Dopfel, although the Claimant named Dopfel as the "responsible party" on his claim form. Furthermore, the Claimant's testimony demonstrated that at best he was confused about Savarick's role at Beacon Renovations, the circumstances of his job change from manufacturing to carpentry, and about whether he was employed by a different company following that change in job.

For these reasons, we find the Commissioner's determination that petitioner Alan Savarick was the Claimant's employer during the time period covered by the Orders is unreasonable.

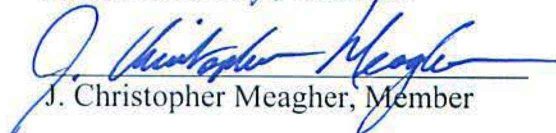
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 6 of the Labor Law dated November 6, 2008, is annulled with respect to Richard Alan Savarick; and

2. The Order Under Article 19 of the Labor Law dated November 6, 2008, is annulled with respect to Alan Savarick; and

3. The Petition of Alan Savarick be, and the same hereby is, granted.

Anne P. Stevason, Chairman



J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Dated and signed in the Office of
the Industrial Board of Appeals,
at New York, New York, on
April 21, 2010.