STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: AMANDEEP SINGH AND RENNON CONSTRUCTION CORP., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and Article 19 of the Labor Law, dated November 16, 2018, - against - THE COMMISSIONER OF LABOR, Respondent.	:	DOCKET NO. PR 18-085 RESOLUTION OF DECISION

APPEARANCES

Amandeep Singh, for petitioners pro se.

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

WITNESSES

Amandeep Singh, for petitioners.

Senior Labor Standards Investigator Shaun Abrilz, for respondent.

WHEREAS:

Petitioners Amandeep Singh (hereinafter "Singh") and Rennon Construction Corp. (hereinafter "Rennon Construction") filed a petition in this matter on December 13, 2018, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor on November 16, 2018. Respondent filed her answer to the petition on January 10, 2019.

Upon notice to the parties a hearing was held in this matter on May 31, 2019, in New York, New York before Molly Doherty, Chairperson of 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 (hereinafter "unpaid wages order") under review directs compliance with Article 6 and payment to respondent for unpaid wages due to claimants in the amount of $1,582.88 for the time period from April 4, 2017 to April 17, 2017 and June 18, 2018 to June 22, 2018, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $311.12, 100% liquidated damages in the amount of $1,582.88, assesses a 50% civil penalty in the amount of $791.44, and assesses a separate civil penalty for violations of Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) § 142-2.6 in the amount of $500.00, for a total amount due of $4,768.32.

At the hearing, respondent moved to amend the unpaid wages order to withdraw the $476.00 claim for Fareez Mohammed, including the portion of the interest, liquidated damages and civil penalty calculated based on that amount and to reduce the claim for Francisco Milla (hereinafter "Milla") by $230.00 and to, thus, recalculate the interest, liquidated damages and civil penalties to reflect the reduced wages for Milla's claim. Petitioners did not oppose the motion. The motion is granted and the amended amounts in the unpaid wages order are $876.88 in unpaid wages due to Milla from April 4, 2017 to April 17, 2017, interest continuing thereon at the rate of 16% calculated to the date of the order in an amount to be determined by respondent, 100% liquidated damages in the amount of $876.88, 50% civil penalty in the amount of $438.44, and a separate civil penalty for violations of Article 19 of the Labor Law, Section 661, and Department of Labor Regulations (12 NYCRR) § 142-2.6 in the amount of $500.00.

Petitioners allege that the order is invalid and unreasonable because Milla only worked for them for one day, which he was paid for, and he otherwise worked for another company.

SUMMARY OF EVIDENCE

Wage Claim

Milla filed a claim for unpaid wages alleging that he was owed a total of $1,106.88 in unpaid wages from April 4, 2017 to April 17, 2017.[1] The claim form states that the agreed pay rate for his work was $27.75 per hour. Milla worked 14.5 hours over two days during the first week of work that ended on April 10, 2017 and 25.38 hours over three days during the second week of work that ended April 17, 2017. The claim form does not specify which days during each week the claimant worked. The claim form states that he was not paid any wages. Attached to the claim form are three checks. One check is in the amount of $230.00 from Rennon Construction with the date April 14, 2017. Two checks are from Seven Siblings Corporation. One check from Seven Siblings Corporation is dated April 21, 2017 and is in the amount of $402.50 and states on the memo line that it is for the week of April 10, 2017. The second check from Seven Siblings Corporation is dated April 28, 2017 and is in the amount of $704.38 and states on the memo line that it is for the week of April 17, 2017. The combined total in the two Seven Siblings Corporation checks is $1,106.88, the amount being sought for unpaid wages on the claim form. The two Seven Siblings Corporation checks purportedly had insufficient funds, as indicated by markings on the check and in a document from TD Bank that is attached to the claim form.

[1] The claim form also includes a $30.00 bank fee in the total amount sought but respondent did not include that fee in the order to comply since it was not for wages.

Amandeep Singh's Testimony

Amandeep Singh is the president of Rennon Construction, which has been in operation for about five years. Rennon Construction does masonry work on buildings in NYC and the surrounding region. Much of the masonry work requires scaffolding to be erected outside of buildings. Rennon Construction hires independent workers to erect scaffolding and pays those workers a daily rate. Those workers are generally hired through different "foremen" that Rennon Construction knows. Singh testified that they call the "foremen" to hire however many workers are needed for a particular job. Singh further testified that those workers are like independent contractors. Rennon Construction owns the scaffolding. Rennon Construction verifies that each worker hired to erect scaffolding has required certification to do such work. Rennon Construction issues an individual worker a pay check and the worker either retrieves the pay check from Rennon Construction's office or Rennon Construction gives the paycheck to the foreman who hired the worker and the foreman gives the worker the check.

Singh testified that Rennon Construction hired Milla to work for one day. He did not recall why he was only needed for one day. Singh had a document that Rennon Construction used as an attendance record showing work locations from April 2, 2017 to April 15, 2017 and Milla is on that document only for April 13, 2017. Rennon Construction paid Milla $230.00, which is the daily rate, by check on April 14, 2017 for the April 13, 2017 day of work. Singh testified that he did not know who Seven Siblings Corporation is and that he does not know anything about the work Milla did for Seven Siblings Corporation. Singh also testified that he did not know why his company was being asked for wages for work Milla did for Seven Siblings Corporation.

Senior Labor Standards Investigator Shawn Abrilz's testimony

Senior Labor Standards Investigator Shawn Abrilz (hereinafter "Abrilz") testified for the respondent. Abrilz testified that he never spoke to Milla and that he did not know who Seven Siblings Corporation is. Abrilz further testified that Seven Siblings Corporation had been included by the claimant in his claim form but by the time respondent sent out the final collection letter, Seven Siblings Corporation was no longer included, only Rennon Construction was included.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the order issued by the Commissioner is invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078 at p. 24 [October 11, 2011]). 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 (Labor Law § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]).

Petitioners argue that they only hired the claimant, as an independent scaffolding contractor, for one day of work and they paid him for that day of work.

Under the Construction Industry Fair Play Act (hereinafter "Fair Play Act"), it is presumed that a person in the construction industry is an employee. (Labor Law § 861-c [1], [2]; *see also Matter of Barrier Window Sys., Inc. v Commissioner of Labor*, 149 AD3d 1373, 1374 [3d Dept 2017]; *Traver v. Lowe's Home Ctrs., LLC*, 2016 US Dist LEXIS 26533, *5 [ED NY 2016]; *Matter of Jaroslaw S. Skorupski and Best Choice Renovation Inc.*, Docket No. PR 16-019, at p. 5 [September 13, 2017]; *Matter of John Ellis a/k/a John C. Ellis Sr.*, Docket No. PR 15-245, at pp. 6-8 [May 3, 2017]. Petitioners must demonstrate through specific statutory criteria that Milla is an independent contractor or a separate business entity to rebut the presumption that he is an employee (Labor Law § 861-c [1], [2]). This presumption of employment in the construction industry applies to Labor Law Articles 6 and 19, the articles relevant to this proceeding (Senate Introducer Mem in Support, Bill Jacket, L 2010, ch 418, at 8).

The Fair Play Act sets forth three criteria, sometimes referred to as the ABC test, and each criteria must be satisfied for someone to be properly classified as an independent contractor: "(a) the individual must be free from control and direction in performing the job, both under his contract and in fact; (b) the service must be performed outside the usual course of business for which the service is performed; and (c) the individual is customarily engaged in an independently established trade, occupation, profession or business that is similar to the service at issue." (Labor Law § 861-c [1]; *see also Barrier Window Systems*, 149 AD3d at 1374-1375; *Traver v. Lowe's Home*, 2016 US Dist LEXIS 26533, *5; *Matter of Jaroslaw S. Skorupski*, PR 16-019, at p. 5; *Matter of John Ellis*, Docket No. PR 15-245, at pp. 6-8.) The Fair Play Act also sets forth twelve criteria, each of which are required to be met, to determine whether a person is a separate business entity. (Labor Law § 861-c [2]; *see also Barrier Window Systems*, 149 AD3d at 1375; *Traver v. Lowe's*, 2016 US Dist LEXIS 26533, *6; *Matter of Jaroslaw S. Skorupski*, Docket No. PR 16-019, at pp. 7-8; *Matter of John Ellis,* Docket No. PR 15-245, at pp. 8-10.) We find that petitioners, a construction company,[2] failed to offer sufficient evidence to prove that each criterion in the ABC test was met. Thus, we need not consider whether petitioners proved the twelve criteria to establish that Milla had a separate business entity (Labor Law § 861-c [1], [2]).

Under the ABC test, claimant was an independent contractor if (a) he was free from petitioners' direction and control in building scaffolding for petitioners; (b) the scaffolding work done by claimant was outside the usual course of petitioners' masonry business; and (c) claimant was customarily engaged in an independently established occupation similar to the scaffolding work he performed for petitioners (Labor Law § 861-c [1]; *Barrier Window Systems*, 149 AD3d at 1374-1375; *Matter of Jaroslaw S. Skorupski*, Docket No. PR 16-019, at p. 6; *Matter of John Ellis,* Docket No. PR 15-245, at pp. 7-8). Petitioners do not meet their burden to prove claimant was an independent contractor unless they show claimant met all three of the required criteria (*see Traver v. Lowe's Home*, 2016 US Dist LEXIS 26533, *9).

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[2] Labor Law § 861-b defines "construction" as "constructing, reconstructing, altering, maintaining, moving, rehabilitating, renovating or demolition of any building, structure, or improvement, or relating to the excavation of or other development or improvement to land." We find masonry work and scaffolding installation is encompassed within the definition of construction because it involves altering and maintaining a building or structure (*Matter of John Ellis,* Docket No. PR 15-245, at p. 7 n 2).

Petitioners' only evidence to support their claim that Milla was an independent contractor was Singh's testimony that the workers who erect scaffolding are temporary and are hired through a "foreman" to work day to day. Singh testified that those workers are independent contractors. This general conclusory testimony is not sufficiently specific to meet the required criteria in the ABC test and to rebut the presumption that Milla was an employee. The record reflects that petitioners are in the business of doing masonry work and Singh's testimony was that the masonry work often requires scaffolding to be built. Rennon Construction owns the scaffolding and Milla worked to build the scaffolding using Rennon Construction's equipment. Milla did not provide a service outside the usual course of petitioners' business (Labor Law § 861-c [1] [b]; *Matter of Jaroslaw S. Skorupski*, Docket No. PR 16-019, at p. 7). There is also no evidence in the record that Milla owned and operated his own business to build scaffolding. No one testified about Milla owning his own business nor was any evidence introduced showing that he entered into his own subcontractor agreements or secured his own workers' compensation insurance (*see* Labor Law § 861-c [4]; *see also Barrier Window Systems*, 149 AD3d at 1376-1377). Petitioners failed to prove claimant Milla met the requirements of the independent contractor test in the construction industry.

Because petitioners failed to prove that claimant Milla was an independent contractor, they did not rebut the presumption that he was an employee, and respondent's determination that petitioners were Milla's employer is reasonable. However, the evidence in the record only supports the determination that petitioners employed Milla for one day, on April 13, 2017, for which respondent agrees he was paid (*see Matter of Houcine Rached and Spectrum Jewelry, Inc.*, Docket No. PR 13-007, at pp. 4-5 [May 3, 2017]).

Singh credibly testified that petitioners employed claimant for one day, April 13, 2017, which was supported by petitioners' attendance records. Singh testified that petitioners paid Milla for that one day. Respondent conceded that payment was made and requested that the order to comply be modified to credit petitioners for that $230.00 payment to Milla. Singh also credibly testified that he did not know who Seven Siblings Corporation is. The burden going forward thereby shifted to respondent to submit sufficient evidence establishing that Milla worked for petitioners during the entirety of the period of his claim, which respondent failed to do (*see Matter of Perry R. Stuart and Long Island Limousine Service Corp.*, Docket No. PR 14-301, at p. 6 [October 26, 2016]).

Singh's testimony and documentary evidence were not refuted by respondent. Respondent's only witness, Abrilz, testified that he did not know who Seven Siblings Corporation is. Abrilz further testified that respondent had only included Seven Siblings Corporation in the initial stages of its investigations because the claimant had attached copies of checks issued by Seven Siblings Corporation. Respondent later removed Seven Siblings Corporation from the investigation despite the evidence of the checks issued by Seven Siblings Corporation including the exact claim period and the exact amount listed on the claim form. Abrilz failed to explain why checks issued by Seven Siblings Corporation that corresponded to the claim period and the claim amount were being used as evidence that the petitioners here owed Milla those wages. There is not a rational basis in the record to hold petitioners liable for the wages that Milla was not paid by Seven Siblings Corporation (*Gameel M. Omar and Wise Enterprises, Inc. (T/A Dairy King)*, Docket No. PR 16-089, at pp. 5-6 [June 14, 2017]).

Because petitioners met their burden of proof to show that they were not liable for the amount being sought in the amended unpaid wages order and respondent did not provide sufficient

and reliable evidence to rebut petitioners' proof, we find the unpaid wages order is unreasonable and we revoke it.

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 $500.00 penalty against petitioners for failure to keep and/or furnish true and accurate payroll records for each employee from on or about April 4, 2017 to July 1, 2018. Article 19 of the Labor Law requires employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law § 661). 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, if any (*id.*; Department of Labor Regulations [12 NYCRR] § 142-2.6). Petitioners did not challenge the penalty order nor offer evidence that they maintained legally requisite pay roll records. The attendance sheets entered by petitioners listed only the daily and weekly hours worked, which are not sufficient to meet the records requirement of Article 19 of the Labor Law. The violation for failure to maintain required payroll records can be affirmed independent of a viable wage claim (*see Matter of Silvar v Commissioner of Labor of the State of NY*, — AD3d —, 2019 NY Slip Op 05841 [1st Dept 2019]). We affirm the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petition for review be, and it hereby is, granted in part and denied in part;
2. The unpaid wages order as amended, interest, liquidated damages, and civil penalty is revoked; and,
3. The Article 19 civil penalty order is affirmed.

Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Gloribelle J. Perez, Member
New York, New York

Patricia Kakalec, Member
New York, New York

Najah Farley, Member
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Dated and signed by the Members
of the Industrial Board of Appeals
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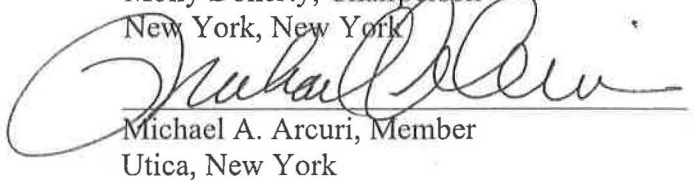

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