STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
CHAUDHRY M. RAZZAQ A/K/A CHAUDHRY CHAUDRY AND JEROME AUTO REPAIR CORP.,	:	
Petitioners,	:	DOCKET NO. PR 17-131
To Review Under Section 101 of the Labor Law: Order to Comply with Article 19 and an Order Under Article 19 of the Labor Law, both dated June 26, 2017,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

TWW Law Professional Association, Mahwah, New Jersey (*Thomas W. Williams* of counsel), for petitioner Chaudhry M. Razzaq.

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

WITNESSES

Chaudhry M. Razzaq, for petitioner Chaudhry M. Razzaq.

Fernando Serrate and Senior Labor Standards Investigator Pierre Magloire for respondent.

WHEREAS:

Petitioners filed a petition in this matter on August 28, 2017, pursuant to Labor Law § 101, seeking review of orders issued against him by respondent Commissioner of Labor on June 26, 2017. Respondent filed her answer to the petition on August 30, 2018.

Upon notice to the parties a hearing was held in this matter on November 13, 2018 in New York, New York before Molly Doherty, Chairperson, and the designated hearing officer in this proceeding. Petitioner Chaudhry M. Razzaq (hereinafter "Razzaq") appeared at the hearing via video from the Board's Albany office, as did Razzaq's's attorney, Thomas W. Williams (hereinafter "Williams"). No one appeared for the corporate petitioner, Jerome Auto Repair Corp. (hereinafter "Jerome Auto Repair"). Respondent's attorney also appeared from the Board's Albany

office. The claimant and respondent's investigator appeared in person. At the commencement of the hearing, Williams stated on the record that he was not the attorney for Jerome Auto Repair despite having filed a petition on behalf of Jerome Auto Repair. Williams had not taken any steps to formally withdraw as Jerome Auto Repair's attorney and he was instructed by the Board to do so in writing on or before November 21, 2018. Williams did send a letter prior to that date stating that he was not the attorney for Jerome Auto Repair and he purportedly sent the same letter to Jerome Auto Repair. The Board then sent a letter to Jerome Auto Repair at four separate addresses to provide it with another opportunity to appear in this matter before the Board. The letter indicated that Jerome Auto Repair must notify the Board of its intentions with respect to this matter on or before February 14, 2019. No one from Jerome Auto Repair contacted the Board. Each party that appeared 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 19 (minimum wage order) under review directs compliance with Article 19 and payment to respondent for unpaid minimum wages to Fernando Serrate in the amount of $16,582.46 for the time period from December 4, 2010 to November 16, 2013, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $9,580.57, liquidated damages in the amount of $16,582.46, and assesses a civil penalty in the amount of $16,582.46, for a total amount due of $59,327.95.

The order under Article 19 (penalty order) assesses a $2,000.00 civil penalty for violating Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 146-2.1 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about December 4, 2010 to November 16, 2013.

Petitioners allege that the orders are invalid and unreasonable because Razzaq was not an employer and because the claimant was paid all the wages that he was owed.

SUMMARY OF EVIDENCE

Testimony of Chaudhry M. Razzaq

Razzaq testified that he hired Fernando Serrate (hereinafter "Serrate"), the claimant, in 1999 to work at an auto repair shop that he owned. That shop was called Unique Diagnostic and was located on West 25th Street or West 29th Street in New York City. In about 2000, Razzaq moved his shop to 1680 Jerome Avenue in the Bronx and renamed it Best Auto Repair. Serrate continued working there as his employee. In 2005, Razzaq sold the business to his brother, Mohammad Chaudhry (hereinafter "Chaudhry"), and another person, Sawed Khan, and they renamed it United Car Care.[1] United Car Care operated at the same address, 1680 Jerome Avenue, as Razzaq's shop, but Razzaq was no longer an owner. About four or five months after he sold the business, Razzaq began working for United Car Care as a cashier. He worked there for four or five years, until sometime in 2009. Serrate also worked there during the entire time Razzaq worked there. Razzaq stopped working at United Car Care in 2009 and sometime in 2011 he opened his own auto repair shop located in White Plains, New York, named United Car Care Number Seven.

[1] Chaudhry was also named in the orders issued by respondent, but he never filed a petition with the Board to appeal those orders.

During that two-year period between ending his work at United Car Care and opening United Car Care Number Seven, he did "some work in grocery stores." Razzaq was the sole owner of United Car Care Number 7, which closed in 2017 or 2018. Serrate never worked for United Car Care Number 7. Razzaq believes United Car Care became Jerome Auto Repair Shop in about 2012 and that it closed in 2015 or 2016. Razzaq did not offer any documentation into evidence at the hearing related to his ownership of any of the shops that he testified that he had owned.

While working at United Car Care as a cashier, Razzaq did not hire or fire anyone. He would give employees checks if no one else was there to give them out but the checks were not made out or signed by him. Chaudhry signed the checks.

Razzaq signed the affidavit submitted with his petition for this case. The affidavit states that Razzaq never owned Jerome Auto Repair. It also states that Razzaq was appealing the underlying Order to Comply on behalf of Jerome Auto Repair Corp. and that Serrate worked 40 hours per week, which he was paid for. The affidavit further states that Jerome Auto Repair Corp. closed its business four years prior to respondent opening its investigation.

Testimony of Fernando Serrate

Serrate was hired by Razzaq in 1998 to work as a mechanic at an auto repair shop on West 25th Street in New York City. He continued to work for Razzaq after the auto repair shop moved to Jerome Avenue in the Bronx. In 2009, Razzaq fired Serrate and he went to work for another auto repair shop until Razzaq asked him to return and work for him again later that year. Serrate continued to work for Razzaq in 2010 until the shop closed in 2013. He worked from 8:00 a.m. to 6:00 p.m. on Mondays to Fridays and on Saturdays he worked from 8:00 a.m. to 3:00 p.m. Serrate was paid $800.00 per week but only $300.00 of that was paid in check, the remaining $500.00 was paid in cash. Serrate would be paid by Razzaq or his brother, whose name he knew as Chan or Chas, and he was paid on Saturdays. The pay checks often had insufficient funds so then Serrate would receive cash for those checks that had insufficient funds and Razzaq or his brother would give him a receipt for only some of that cash. Serrate stopped working for Razzaq in 2013. His last day of work was a Saturday and Razzaq and his brother told Serrate that they sold the shop, so it would be his last day of work.

Testimony of Senior Labor Standards Investigator Pierre Magloire

Senior Labor Standards Investigator Pierre Magloire (hereinafter "Magloire") testified that he reviewed the investigative work of the labor standards investigator who worked on this case. Magloire also attended a compliance conference on this case. He determined that a 100% civil penalty should be assessed against petitioners in the wage order though he could have assessed a 200% civil penalty. Magloire testified that the petitioners had a prior history of violations with the Department of Labor.

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 Board 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 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; *Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v Natl. 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]). For the reasons discussed below, we affirm the orders as issued against petitioners.

Petitioner Jerome Auto Repair Corp. Failed to Appear

Pursuant to Board Rule (12 NYCRR) § 65.24, "the failure of a party to appear at a hearing shall be deemed to be a waiver of all rights except the rights to be served with a copy of the decision of the Board and to request Board review pursuant to Rule 65.41," unless application for reinstatement is made within five days after the scheduled hearing. Petitioner Jerome Auto Repair failed to appear at the hearing and never communicated with the Board about the matter after the November 13, 2018 hearing date.

Petitioner Razzaq is an Employer

We find that Razzaq is individually liable as an employer under Article 19 of the Labor Law. "Employer" as used in Labor Law Article 19 means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). "Employed" means "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]), 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 FLSA (*Matter of Exceed Contracting Corp. v Indus. Bd. of Appeals*, 126 AD3d 575, 576 [1st Dept 2015]; *Ansoumana v Gristede's Operating Corp.*, 255 F Supp 2d 184, 188 [SDNY 2003]; *Chung v New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n 6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, (172 F3d 132, 139 [2d Cir 1999] citing *Carter v Dutchess Comm. College*, 735 F2d 8, 12 [2d Cir 1984] and *Goldberg v Whitaker House Coop.*, 366 US 28, 33 [1961]), the Second Circuit 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 included 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.*). Respondent determined that Razzaq was Serrate's employer based on Serrate's statements that Razzaq hired him and paid him. Razzaq's burden was to prove at the hearing that he is not, as a matter of economic reality, Serrate's employer (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Garcia v Heady*, 46 AD3d at 1090; *Matter of Angello v Natl. Fin. Corp.*, 1 AD3d at 854; *Matter of Jocelyne Wildenstein*, Docket No. PR 15-269, at p. 5 [October 26, 2016]). Razzaq's only evidence to prove he was not the claimants' employer was his own testimony, which was not credible.

Razzaq testified that, prior to the claim period, he hired Serrate and then sold his auto repair shop to his brother, Chaudhry, and Sawed Khan. After selling the shop, Razzaq testified that he only worked in the shop as a cashier or did not work there at all. Razzaq's testimony was too vague. He testified that he stopped working as a cashier at the auto repair shop located at the relevant address in 2009, two years prior to opening his own auto repair shop in White Plains, New York in 2011. Yet, Razzaq gave no specific testimony about what he did during the two-year period between when he stopped working and when he opened his new shop and the relevant period commenced during those two years, in December 2010. Serrate credibly testified that during the relevant period Razzaq and his brother, Chaudhry, paid Serrate, in check or cash. Serrate identified Razzaq on the video screen during the hearing as one of the people that would pay him. Serrate's testimony was unrefuted by Razzaq.

Razzaq's testimony was also not credible because it was inconsistent with the signed affidavit that he submitted to the Board to appeal the underlying order to comply. The affidavit states that Razzaq was filing the petition on behalf of Jerome Auto Repair Corp., despite not being an owner or an employee of Jerome Auto Repair. The petition's affidavit also states that Serrate worked 40 hours per week and was paid in full and that Jerome Auto Repair closed four years prior to respondent opening its investigation. During his testimony, Razzaq asserted that he did not know when Jerome Auto Repair closed. Razzaq's testimony was inconsistent with the statements in the petition.

We find Razzaq was not credible because his testimony was either vague or inconsistent with the affidavit he signed in support of his petition, thereby rendering it self-serving. Moreover, Razzaq's argument that his brother was an employer under the Labor Law, even if true, is unpersuasive and does not necessarily exculpate Razzaq from individual liability as a worker can have more than one employer (*Ansoumana v Gristede's Operating Corp.*, 255 F Supp 2d 184, 189 [SDNY 2003]). An individual may be held liable as an employer if that individual had the power to control employees, even if that control is only exercised occasionally (*See Moon v Kwan*, 248 F Supp 2d 201, 237 [SDNY 2002]; *Matter of Jagtar Singh*, Docket No. PR 14-245, at p. 8 [May 3, 2017]; *see also Herman*, 172 F3d at 139). Even if Razzaq was not the owner in fact of the auto repair shop during the relevant period, he maintained his supervisory role over Serrate and continued to act like Serrate's employer (*See Matter of Jagtar Singh*, Docket No. PR 14-245, at p. 8). We find that, under the totality of the circumstances, Razzaq employed Serrate as a matter of economic reality because Razzaq hired Serrate and paid him wages (*Herman*, 172 F3d at 139). We find Razzaq failed to meet his burden to prove that he was not Serrate's employer. As such, the Board affirms the respondent's finding that Razzaq was an employer.

Petitioners' Failure to Maintain Payroll Records

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] § 142-2.1 [a]). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law §§ 661 and 662 [2]; Department of Labor Regulations [12 NYCRR] § 142-2.1 [e]). In the absence of required payroll 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 if results may be merely approximate (*Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901, 901-902 [2d Dept 2013]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 [3d Dept 1989]).

Petitioners neglected to offer the legally required records of the days and hours that Serrate worked and the wages paid to him either at the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner's determination that petitioners failed to maintain legally required payroll records was reasonable and valid.

The Wage Order Is Affirmed

Article 19 of the Labor Law, entitled "Minimum Wage Act," provides that every employer must pay each of its non-exempt employees a minimum hourly wage for each hour of work (Labor Law § 652 [1]), and one and one-half of their regularly hourly wage rate for hours worked over 40 in a week (Department of Labor Regulations [12 NYCRR] § 142-2.2).

In the absence of wage and hour records for the relevant period, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Garcia v Heady*, 46 AD3d at 1090; *Matter of Angello,* 1 AD3d at 854). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, (156 AD2d at 821), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer." Therefore, the petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimant worked and that he was paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24). The petitioners failed to meet their burden of proof to demonstrate that the calculations made by the respondent were unreasonable.

Razzaq did not offer any evidence to challenge the amount of wages respondent determined were owed to claimant as he only asserted in the petition that claimant was paid in full for 40 hours of work per week and he did not offer any evidence regarding hours work or wages paid at the hearing. We find that it was reasonable for the Commissioner to determine that claimant is owed unpaid wages and we affirm the Commissioner's wage calculation in the 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 Serrate was not paid all wages owed and petitioners did not offer any evidence to challenge the imposition of interest. As such, we affirm the interest in the wage orders.

Liquidated Damages

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. Here, respondent correctly determined that Serrate was not paid all wages and petitioners failed to offer any evidence challenging the imposition of liquidated damages. As such we affirm the liquidated damages in the minimum wage order.

The Civil Penalty is Affirmed

The minimum wage order includes a 100% civil penalty. 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."

Petitioners did not introduce any evidence to challenge the civil penalty. Additionally, Magloire testified that petitioners had a prior history of Labor Law violations. As such, we affirm the civil penalty in the wage orders.

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 $2,000.00 penalty against petitioners for failure to keep and/or furnish true and accurate payroll records for each employee from on or about December 4, 2010 through November 16, 2013 and respondent documented in its records that petitioners had a history of violations. Petitioners did not challenge the penalty order. We affirm the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply is and penalty order are affirmed;

2. The petition for review is denied.

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Date and signed by the Members
of the Industrial Board of Appeals
in New York, New York,
on May 29, 2019.