STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
CUI WU LI A/K/A "MELISSA" AND CHINESE-AMERICAN PLANNING COUNCIL HOME ATTENDANT PROGRAM, INC.,	
Petitioners,	DOCKET NO. PR 17-130
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and an Order Under Article 19 of the Labor Law, both dated July 20, 2017,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Ling Ma, Chief Program Officer, New York, for petitioners.

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

WITNESSES

Ling Ma and Erik Chen, for petitioners.

Claimant and Senior Labor Standards Investigator Joseph Ryan, for respondent.

WHEREAS:

Petitioners Cui Wu Li and Chinese-American Planning Council Home Attendant Program, Inc. filed a petition in this matter on August 28, 2017, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor on July 20, 2017. Respondent filed her answer to the petition on October 13, 2017.

Upon notice to the parties a hearing was held in this matter on February 27, 2018, in New York, New York, before Molly Doherty, Board Member, 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 of the Labor Law (unpaid wages order) under review directs compliance with Article 6 and payment to respondent for unpaid wages to one claimant in the amount of $2,720.00 for the time period from November 3, 2014 to December 18, 2014, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $1,126.75, liquidated damages in the amount of $2,720.00, and assesses a civil penalty in the amount of $2,720.00, for a total amount due of $9,286.75.

The order under Article 19 of the Labor Law (penalty order) assesses a $500.00 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 from on or about November 3, 2014 through December 18, 2014.

Petitioners allege that the orders are invalid and unreasonable because they did not hire claimant, therefore petitioners were not her employers under the Labor Law. Petitioners further allege that they maintain true and accurate payroll records on all their employees but since claimant was not an employee they do not have records for her.

SUMMARY OF EVIDENCE

Wage Claim

On February 3, 2015, claimant filed a claim against petitioners alleging that she was owed a total of $2,720.00 in unpaid wages from November 3, 2014 to December 18, 2014. Claimant was a home health care worker and in her employ by petitioners, she cared for a woman five days per week, eight hours per day. Her agreed upon hourly wage was $10.00. Claimant alleged that she was not paid for the 39 days that she worked between November 3 and December 18, 2014.

Petitioners' Evidence

Petitioner Chinese-American Planning Council Home Attendant Program, Inc. (hereinafter "the agency") is a home care agency that, in part, hires and manages home health workers. Petitioner Cui Wu Li was employed by the agency as a personnel specialist during the relevant time. Li was claimant's primary contact at the agency. Li resigned from her position there at some point prior to the hearing. Ling Ma, Chief Program Officer for the agency was the designated representative for both petitioners. Li did not testify or personally appear at the hearing.

Ma testified as to the general hiring and staffing methods of the agency, and that she met claimant for the first time at a compliance conference held at respondent's offices in November 2015.

Erik Chen is employed by the agency and was Li's immediate supervisor. He met claimant one time on November 3, 2014, when he saw that her work authorization was expired and told her that they could not hire her unless she renewed it. He testified that he never received a renewed work authorization from claimant, so she was never hired. Chen also testified about the time reporting system that home health aides use to report their time and get paid. They call in and out from a consumer's phone and enter their social security number so that their work hours are recorded via an electronic verification system. Claimant was provided an employee handbook and

the information on how to use the electronic verification system, but Chen testified that claimant did not submit any time and attendance records via this system. Chen testified that it was possible that Li instructed claimant to commence work or that the consumer's health insurance company instructed claimant to commence work.

Petitioners submitted payroll records for more than 3,500 home care workers employed by the agency during the relevant time. These records show, for each employee, the date of pay, pay period, total hours worked weekly during the pay period and the weekly gross and net pay, as well as deductions. Chen testified that there were no payroll records for claimant included in the records of more than 3,500 home care workers.

Respondent's Evidence

Claimant testified that she first met Li on November 3, 2014, to obtain the necessary paperwork to begin working as a home care worker for the agency. Li provided her with information such as a guide on how to report her time via an electronic verification system. Claimant testified that Li told her she could begin working immediately. Claimant started working immediately and returned to meet with Li about a week later to submit required documents. She continued working until six weeks after she commenced work when Li and Chen first told her that she could not work without a valid employment authorization. This was the first time anyone told her this and it was also the first time she met Chen. Claimant testified that she never received any pay from the agency despite requesting it and that the hours stated in her Claim for Unpaid Wages were accurate.

Senior Labor Standards Investigator Joseph Ryan testified that the Department of Labor received claimant's Claim for Unpaid Wages and sent letters to petitioners regarding the wage claim but never received any specific information from petitioners showing that they did not owe claimant wages, nor did they send payment. Ryan testified that the payroll records submitted into evidence at the hearing were insufficient because they did not contain the hours each employee worked daily. Ryan testified that the agency had a prior history of not paying wages and he considered that along with how long they had been in business and their limited cooperation with respondent to determine that 100% liquidated damages and a 100% civil penalty should be issued.

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 (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; *Matter of Angello v. Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dep't 2003]; *Matter of RAM Hotels, Inc.*, PR 08-078 at p 24 [Oct. 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 (*Id.* § 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 were not claimant's employer because they did not hire her. We find, as discussed below, that claimant was an employee of petitioners.

Claimant Was Employed by Petitioners

"Employer" as used in Labor Law Articles 6 and 19 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 "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 Yick Wang Chen v. N.Y. State Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]; *Bonito v. Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]; *Matter of Maria Lasso and Jaime M. Correa Sr. and Exceed Contracting Corp.*, PR 10-182 [Apr. 29, 2013], *aff'd sub nom. Matter of Exceed Contracting Corp. v. Indus. Bd. of Appeals*, 126 AD3d 575 [1st 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] *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 economic reality based on a "totality of circumstances" (*Id.*).

Claimant credibly testified that she was told to start working immediately after her first meeting with Li on November 3, 2014, and that she had repeated phone communications with Li throughout the six weeks that she worked. She also credibly testified that she used the electronic verification system each day that she worked, describing the process she followed to use it. It was not until approximately six weeks after her start date that claimant met Chen for the first time and it was then that Li and Chen told claimant for the first time that she could not work because of an expired work authorization. Petitioners neglected to offer sufficient evidence to meet their burden in this case and to counter claimant's credible testimony. Petitioners did not offer any testimony from Li, who was claimant's primary contact and who claimant credibly testified directed her to commence work immediately after their first meeting. Even Chen testified that it was possible that Li told claimant to begin working immediately. Petitioners also did not present any documentary evidence to counter claimant's testimony or to support Chen's claim that he told claimant she could

not work on November 3, 2014. Chen's personal knowledge of claimant's interactions with petitioners was limited in scope and thus, we give claimant's testimony more weight than we give Chen's testimony. Ma had no personal knowledge of any relevant facts and, thus, we do not credit her testimony as to the pertinent facts in this case.

Applying the economic reality test to determine employer status to the record in the present case, we find that it was reasonable and valid to deem petitioners to be statutory employers who in economic reality were responsible for claimant's wages. The record shows that petitioners controlled the conditions of employment for all home care workers in the agency. Petitioners made the administrative determinations regarding hiring and firing, issued employment handbooks, including procedures for entering time worked, maintained employment records, and controlled payment of wages. Evidence in the record shows that petitioners did suffer or permit claimant to work for the period in the claim form.

Petitioners' Failure to Maintain Payroll Records

Article 6 of the Labor Law requires that an employer pay wages to its employees (Labor Law § 191). Labor Law § 190 (1) defines "wages" as the "earnings of an employee for labor or services rendered." Articles 6 and 19 of the Labor Law also require employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law §§ 195 [4] and 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.*). 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]). 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 (*Ramirez v. Commissioner of Labor*, 110 AD3d 901, 901-02 [2d Dep't 2013]; *Matter of Mid-Hudson Pam Corp.* v. *Hartnett*, 156 AD2d 818, 820-21 [3d Dep't 1989]; *see also* Labor Law § 196-a [where no records kept the burden is on employer to prove wages properly paid]).

Petitioners admittedly had no payroll records for claimant and the absence of records for claimant is not evidence that she did not work for them in light of her credible testimony that she did. Having determined that petitioners employed claimant, they were obligated as an employer to maintain and/or produce records showing the daily and weekly hours that claimant worked and the wages that she was paid (Labor Law §§ 195 [4] and 661). Payroll records for approximately 3,500 employees were admitted into evidence on consent but those payroll records did not contain all the requisite information under the Labor Law (*Id.*). The records did not contain information about daily hours worked by each employee, thus there was no information about when employees clocked in and when they clocked out of work (*Id.*). As such, the Commissioner correctly relied on the claim form to calculate the wages due.

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 claimant was not paid all wages owed and petitioners did not offer any evidence to challenge the imposition of interest. We affirm the interest imposed in the unpaid wages order.

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 claimant was not paid all wages and petitioners failed to offer any evidence challenging the imposition of liquidated damages. We affirm the liquidated damages imposed in the unpaid wages order.

The Civil Penalty is Affirmed

The unpaid wages 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 6 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. We affirm the civil penalty imposed in the unpaid wages 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 $500.00 penalty against petitioners for failure to keep and/or furnish true and accurate payroll records for each employee from on or about November 3, 2014 through December 18, 2014; a violation of Labor Law § 661 and 12 NYCRR 142-2.6. As set forth in more detail above, petitioners did not introduce any evidence to show it maintained payroll records for claimant and the payroll records for other employees that were introduced as evidence were insufficient to comply with the Labor Law. We affirm the penalty order.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The unpaid wages order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and it hereby is, denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Absent
Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
June 6, 2018.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The unpaid wages order is affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and it hereby is, denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Absent
Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Utica, New York, on
June 6, 2018.