STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ERNEST A. ZURITA II A/K/A ERNESTO ZURITO, Petitioner, To Review Under Section 101 of the Labor Law: Orders to Comply with Article 6 and 19 of the Labor Law, and an Order Under Article 19 of the Labor Law, all dated November 20, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 17-029 RESOLUTION OF DECISION

APPEARANCES

Glenn H. Ripa, Esq., New York, for petitioner.

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

WITNESSES

Ernesto Zurita and Juan Apuparo, for petitioner.

Elsa Beracochea-Sosa, Josefina Vazquez, Supervising Labor Standards Investigator Emy Bautista, and Senior Labor Standards Investigator Jose Medina, for respondent.

WHEREAS:

Petitioner Ernest Zurita filed a petition in this matter on March 13, 2017,[1] pursuant to Labor Law § 101, seeking review of orders issued against him by respondent Commissioner of Labor on November 20, 2014.[2] Respondent filed her answer to the petition on May 22, 2017.

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[1] While ordinarily, a petition filed more than sixty days after the date of the issuance of an order to comply would be dismissed as untimely under Labor Law § 101 (1), here, respondent consented to the petition being filed after the statute of limitations in a court-ordered stipulation dated February 10, 2017. The stipulation provides that petitioner had to file a petition within 60 days of the filing of the stipulation by the clerk of the court, which petitioner did.

[2] The orders to comply also named Silvia Apuparo and Fama Fashion as employers but they did not file petitions appealing the orders to comply.

Upon notice to the parties, a hearing was held in this matter on January 22, 2018, and February 12, 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, to make statements relevant to the issues, and to file post-hearing briefs.

The order to comply with Article 19 of the Labor Law (minimum wage order) under review directs compliance with Article 19 and payment to respondent for unpaid overtime wages to four claimants in the amount of $31,272.77 for the period from June 15, 2007 to May 9, 2011, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $26,075.38, and liquidated damages in the amount of $7,818.20, and assesses a civil penalty in the amount of $31,272.77, for a total amount due of $96,439.12.

The order to comply with Article 6 (unpaid wages order) under review directs compliance with Article 6 and payment to respondent for unpaid wages to two claimants in the amount of $3,684.73 for the period from June 15, 2007 to October 6, 2009, and interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $3,091.79, and assesses a civil penalty in the amount of $3,684.73, for a total amount due of $10,461.25.

The order under Article 19 (penalty order) assesses a $1,000.00 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 June 15, 2007 through May 9, 2011. It also assesses a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to issue complete wage statements to employees from on or about June 15, 2007 through May 9, 2011.

Petitioner alleges that the orders are invalid and unreasonable because he was not an employer of claimants, and therefore, is not individually liable for the wages, interest, and penalties respondent determined he owes.

SUMMARY OF EVIDENCE

Wage Claim

In 2009, three claimants filed claims with respondent alleging they were owed unpaid wages. Claimants worked in a garment factory operating sewing machines. One of the claimants remained anonymous. The other two claimants, Elsa Beracochea-Sosa and Josefina Vazquez, identified themselves in the claim forms and testified at the hearing. The claim form for Beracochea-Sosa includes the name Solzur and the name Fama Fashion as the name of who the claim is against. Vazquez's claim form includes the name Solsur and the name Fama Fashion as the name of the company.

Petitioner's Evidence

Petitioner Ernest Zurita worked in the garment business for at least ten years bringing cut materials from cutting rooms to garment factories, such as the factory at issue in this hearing, where the cut materials were sewn by employees of the factory to make a garment. During the

period in question, Zurita testified that he worked with many cutting rooms and garment factories, including Fama Fashion, owned by Silvia Apuparo. He did not testify specifically about any garment factories that he worked with other than Fama Fashion. Zurita also owned his own company, Solzur Sportswear, and he used the same address as Fama Fashion for Solzur Sportswear. Zurita paid Fama Fashion for the sewing and he was paid by the cutting room. He documented the amount of work that was done and the payments he made to Silvia Apuparo, in a notebook. Zurita's earnings were the difference between what he was paid by the cutting room and what he paid to Silvia Apuparo. Zurita paid Silvia Apuparo per piece sewn. Zurita was at Fama Fashion each weekday from about 7:00 or 7:30 a.m. until about 2:00 p.m. He went to Fama Fashion to deliver the cut materials and to pick up the final product. He also showed the workers a sample of what the final product should look like and gave instructions about how to sew the garment. He also checked on the progress of the work while there. Zurita testified that other than greeting the employees and showing them a sample of what the final garment should look like after it was sewn, he only communicated about the work with Silvia Apuparo. Zurita testified that he had no ownership rights in Fama Fashion and that he did not provide any supervision to the employees or have anything to do with their pay.

Juan Apuparo testified that his sister, Silvia Apuparo, owned Fama Fashion and that she died in September 2016. Apuparo further testified that he helped at the factory, and that Zurita brought material to the garment factory to be sewn. Apuparo testified that boxes would come to the factory with the name Solzur Sportswear on them.

Respondent's Evidence

Elsa Beracochea-Sosa and Josefina Vazquez testified that the hours stated in their claim forms were accurate. They also testified that Zurita did not supervise them in any way or have anything to do with their pay. Beracochea-Sosa testified that Zurita would bring the materials and a sample and explain "what he wanted or what to be done." Claimant Josefina Vazquez testified that she was fired from her position by Juan Apuparo.

Senior Labor Standards Investigator Jose Medina testified that he reviewed the wage claims filed by Beracochea-Sosa and Vazquez, that he spoke with Beracochea-Sosa on the phone and that he visited the factory and spoke to other individuals in person. None of the employees that he spoke with told Medina that Zurita hired, paid, supervised or employed them but only said Silvia or Juan Apuparo hired, paid, supervised or employed them. Medina also spoke to Juan Apuparo who told him that he was the manager of the factory and that Zurita had the payroll records because he maintained the books for the factory. Medina testified that another investigator for respondent spoke to Zurita and during that conversation he identified himself as the business owner to that investigator, which was documented in a written report.

Respondent introduced several documents in support of her assertion that Zurita was claimants' employer. An Application for Apparel Industry Certificate of Registration was filed for Fama Fashion in March 2009 with respondent and it states that Zurita is a 50% owner of the company. A copy of Zurita's New York State driver's license is attached to that application. An investigator who is no longer employed by respondent and who did not testify at the hearing wrote a report in March 2009, in which she said that during an in person visit to the factory, Silvia Apuparo told her that she was the manager of Fama Fashion and that Zurita told her via phone that he was the owner of Fama Fashion.

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.

Petitioner's 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]). Petitioner argues that respondent's determination that he was the employer of claimants was invalid or unreasonable and, thus, he should not be held individually liable for the wage or penalties. We find, as discussed below, that petitioner is liable as a joint employer of claimants and, thus, affirm the orders.

Petitioner is Liable for the Wages and Penalties as a Joint Employer

"Employer" as used in Labor Law Articles 6 and 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]; *see also* Labor Law § 190 [3]). "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.*). Furthermore, it is well settled that an employee may have more than one employer (*Matter of Franbilt Inc. et al.,* PR 07-019 [July 30, 2008]).

An individual or entity may be the joint employer where such individual or entity exercises functional control over another employer's employees. In *Zheng v. Liberty Apparel Co.*, 355 F3d 61 (2d Cir 2003), the Second Circuit Court of Appeals determined that a garment manufacturer who hired contractors to sew the clothing was a joint employer of the contractor's employees. Following the Second Circuit's determination in *Zheng*, we apply the following factors, in no particular order, to determine Zurita's liability as a joint employer:

1. Whether Zurita's premises and equipment are used for the employees' work;
2. Whether Fama Fashion has a business that can or does shift as a unit from one putative joint employer to another;
3. The extent to which the employees perform a discrete line-job that is integral to Zurita's process of production;
4. Whether responsibility under a contract between Fama Fashion and Zurita could pass from one subcontractor to another without material change;
5. The degree to which Zurita supervises the employees' work; and
6. Whether the employees work exclusively or predominantly for Zurita.

(*Id.* at 72 *citing Rutherfood Food Corp. v. McComb*, 331 US 722, 724-25, 730 [1947] and *Lopez v. Silverman*, 14 FSupp2d 405, 416-18 [SDNY 1998]). "These particular factors are relevant because, when they weigh in [an employee's] favor, they indicate that an entity has functional control over workers even in the absence of the formal control measured by the *Carter* factors." (*Id.* at 72). The factors set forth above are "nonexclusive and overlapping" (*id.* at 75) and not every factor must be decided in favor of joint employment to find a party is a joint employer. (*Id.* at 77).

There is no evidence in the record indicating that Zurita oversaw hiring or firing employees of Fama Fashion or setting their rate of pay or making other determinations about their pay or hours of work. Thus, Zurita did not have formal control over the employees. (*See Jean-Louis v. Metro. Cable Communs.*, 838 FSupp2d 111, 131 [SDNY 2011]). However, we find that Zurita had functional control over the employees and is therefore liable as a joint employer. In applying the factors set forth in *Zheng*, we find that petitioner did not meet his burden to prove that he was not claimants' joint employer.

Petitioner had the burden to prove that he did not have functional control over the employees at Fama Fashion and, thus, could not be held liable for wage violations as a joint employer (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Matter of Angello*, 1 AD3d at 854; *Matter of RAM Hotels*, PR 08-078 at p 24). Zurita's company, Solzur Sportswear, and Fama Fashion occupied the same premises as the evidence showed that Solzur Sportswear used the same address as Fama Fashion and boxes were received at the factory with the name Solzur Sportwear on it. There is no evidence that either Zurita's business nor Fama Fashion worked with anyone other than each other to conduct their work. Also, Zurita supervised the work according to his own testimony that he was present at the factory daily to check on the progress of work. While Zurita and the claimants all testified that his communication with the workers was limited to greeting them, Zurita and one claimant also testified that he explained to the workers what the final product should look like. He testified that

he was at the factory daily to check on the progress of the work and that he would check every piece before packing it up, which demonstrates his supervision and functional control over the work. Petitioner did not present sufficient evidence to meet his burden to prove that he did not have functional control over the employees at Fama Fashion.

Additionally, respondent presented evidence of Zurita being registered as a 50% owner of Fama Fashion on its Application for Apparel Industry Certificate of Registration that was filed with respondent in March 2009. Zurita presented no evidence to contradict the statement contained in the apparel industry certificate of registration that he was an owner. We find petitioner failed to meet his burden of proof to show that he was not an employer under Articles 6 and 19 of the Labor Law.

Petitioner's 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]).

Petitioner neglected to offer the legally required records of the days claimants worked and the wages paid to them either at the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner correctly determined that petitioner failed to maintain legally required payroll records.

The Wage Orders are Affirmed

Based on the record before us, we find that petitioner did not meet his burden to show that he was not claimants' employer nor did he maintain legally required records. Petitioner also did not introduce any evidence challenging the wages in the orders and the issue is thereby waived pursuant to Labor Law § 101 (2). As such we affirm the wage orders.

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 claimants were not paid all wages owed and petitioner 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 claimants were not paid all wages and petitioner failed to offer any evidence challenging the imposition of liquidated damages. As such we affirm the liquidated damages in the unpaid wages orders.

The Civil Penalty is Affirmed

The unpaid wages order and the minimum wage order include 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 or 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."

Petitioner did not introduce any evidence to challenge the civil penalty. 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 $1,000.00 penalty against petitioner for failure to keep and/or furnish true and accurate payroll records for each employee from on or about June 15, 2007 through May 9, 2011 and a $1,000.00 penalty against petitioner for failure to give each employee a complete wage statement from June 15, 2007 through May 9, 2011. Petitioner did not challenge the penalty order. 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 minimum wages order is affirmed; and

3. The penalty order is affirmed; and

4. 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 minimum wages order is affirmed; and

3. The penalty order is affirmed; and

4. 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.