STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: FELIPE DIAB, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, An Order to Comply with Article 19, and an Order under Articles 5 and 19 of the Labor Law, all dated November 9, 2016, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 17-122 RESOLUTION OF DECISION

APPEARANCES

Law Offices of Charles Zolot, Jackson Heights (*Charles Zolot* of counsel), for petitioner.

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

WITNESSES

Felipe Diab for petitioner.

Luis Rodus and Labor Standards Investigator Dmitriy Elkind for respondent.

WHEREAS:

On August 2, 2017, petitioner Felipe Diab (hereinafter "Diab") filed a petition with the Industrial Board of Appeals pursuant to Labor Law § 101 seeking review of three orders issued against him and Medallo Restaurant Lounge Corp. (T/A Medallo) by respondent Commissioner of Labor, on November 9, 2016.[1] Medallo Restaurant Lounge Corp. did not file a petition before the Board appealing the November 9, 2016 orders. Respondent filed her answer on April 6, 2018. Upon notice to the parties, a hearing was held in New York, New York, on October 18, 2018, before Gloribelle J. Perez, member of the Board and designated Hearing Officer in the proceeding.

[1] Respondent initially moved to dismiss the petition as untimely. On March 1, 2018, the Board denied respondent's motion and directed respondent to file an answer in the matter.

Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The order to comply with Article 19 (minimum wage order) directs petitioner and Medallo Restaurant Lounge Corp. to pay wages in the amount of $31,904.51 due and owing to Alfredo Mata (hereinafter "Mata") and Pablo Raimondi (hereinafter "Raimondi") for the period from May 16, 2015 through August 15, 2015, and December 6, 2014 through September 12, 2015, respectively. The minimum wage order also directs Diab and Medallo Restaurant Lounge Corp. to pay $6,084.26 in interest at the rate of 16% calculated to the date of the order, 100% in liquidated damages in the amount of $31,904.51, and 100% in civil penalties in the amount of $31,904.51, for a total due of $101,797.79.

The order to comply with Article 6 (unpaid wages order) directs petitioner and Medallo Restaurant Lounge Corp. to pay wages in the amount of $9,085.59 due and owing to Mata and Raimondi for the period from May 16, 2015 through August 15, 2015, and December 6, 2014 through September 12, 2015, respectively. The unpaid wages order also directs petitioner and Medallo Restaurant Lounge Corp. to pay $1,720.77 in interest at the rate of 16% calculated to the date of the order, 100% in liquidated damages in the amount of $9,085.59, and 100% in civil penalties in the amount of $9,085.59, for a total due of $28,977.54.

The order under Articles 5 and 19 (penalty order) directs petitioner and Medallo Restaurant Lounge Corp. to pay civil penalties in the amount of: $800.00 for failure to keep and/or furnish true and accurate payroll records, in violation of Labor Law § 661 and 12 NYCRR 146-2.1, for the time period from June 20, 2014 through November 23, 2015; $800.00 for failure to provide each employee with a complete wage statement with each payment of wages, in violation of Labor Law § 661 and 12 NYCRR 146-2.3, for the time period from June 20, 2014 through November 23, 2015; $800.00 for failure to pay employees an hourly rate of pay, in violation of Labor Law § 661 and 12 NYCRR 146-2.5, for the time period from June 20, 2014 through November 23, 2015; and $800.00 for failure to provide at least 24 consecutive hours of rest in any calendar week, in violation of Labor Law § 161, for the period from May 13, 2015 through August 12, 2015.

The petition alleges that Diab was not the claimants' employer. At the conclusion of petitioner's case, respondent moved for a directed verdict on the grounds that petitioner did not satisfy his burden. At hearing, the hearing officer reserved ruling on respondent's motion. We now deny the motion for a directed verdict. We find that petitioner met his burden of proof to establish that respondent's determination that Diab was claimants' employer was not reasonable.

SUMMARY OF EVIDENCE

Petitioner's Evidence

Testimony of petitioner Felipe Diab

Diab worked at Medallo Restaurant ("the restaurant") as a manager. He was hired by Jorge Miguel Espinal (hereinafter "Espinal"), the restaurant's owner, in 2015 a month or two before the restaurant opened to work as a manager at a rate of $100.00 per day, paid in cash, working 10 hours per day, for six days a week.

Diab worked at the restaurant for approximately one and a half to two years. As manager, Diab was responsible for opening the restaurant six days a week at 11:00 a.m., welcoming customers, making sure food and service were acceptable, and sometimes maintaining food and liquor inventory. Diab would teach waiters how to set the tables, call employees who did not timely arrive for work and tell Espinal when employees did not report to work at all or on time. When an employee missed a shift, Diab called that employee to inquire what happened.

Diab did not hire any employees for the restaurant, and he did not hire the claimants identified in the orders under review. If someone went to the restaurant seeking employment, Diab took their name and phone number and gave it to Espinal. Diab was not an owner of the restaurant in any way. Diab was not in charge of the money for the restaurant, Espinal was. Espinal set the employees' rates of pay. Espinal met with each employee individually to discuss pay. Diab does not know how much other employees earned. Espinal paid employees by calling them, one at a time, down to his basement office. Espinal told each employee the time they had to start and stop working each day. Diab did not set employee schedules, nor was he present when Espinal told other employees about their schedules. Espinal maintained the restaurant's payroll records and signed its tax returns.

Two weeks before the restaurant closed for business, Diab learned that Espinal applied for and obtained a liquor license for the restaurant in Diab's name. Diab subsequently filed a police report and an identity theft claim. Diab also learned that Espinal falsified his signature on other documents.

Respondent's Evidence

Testimony of Luis Rodus

Luis Rodus (hereinafter "Rodus") has known Diab for approximately 20 years. Diab introduced Rodus to Espinal and recommended that he be hired to be a cook for the restaurant. Espinal hired Rodus to work as a chef at the restaurant from February 2015 to August 2015. Diab was the manager of the restaurant, but Espinal set Rodus' work hours and rate of pay. Espinal told Rodus at what time he should arrive for work and at what time he could leave work. Sometimes, if Rodus was late, Diab would call him. Rodus used a punch card when he started and stopped working each day and testified that he does not know who would take his weekly punch cards. Espinal paid Rodus in cash. During the time that Rodus worked at the restaurant, he was not aware of Diab ever hiring or firing an employee as those decisions were made by Espinal. Rodus testified that he is not aware of Diab ever disciplining an employee. Rodus testified that Diab's supervision consisted of "just check[ing] the employees," and telling them "to be on time and to work well, and be clean."

Testimony of Labor Standards Investigator Dmitriy Elkind

Dmitriy Elkind (hereinafter "Elkind") is a Labor Standards Investigator and he has worked for the New York State Department of Labor for about four years. Elkind reviewed the claims that were filed by claimants and made an initial site visit to the restaurant in November 2015. Mata's and Raimondi's claims state that they were hired by Espinal and paid by Espinal. Both claims also state that Diab was a supervisor. Raimondi's claim states that Espinal and Diab were responsible for the business. During the November 2015 site visit, Elkind spoke to a person who identified

himself as "Mr. Miguel" and as the manager of the restaurant. Elkind requested documents from "Mr. Miguel". Elkind never received the documents that he requested. As such, Elkind used the information provided by claimants to calculate the wages owed. Elkind testified that in his meeting with Rodus, Rodus stated that he was sometimes paid by Espinal and other times by Diab, and that some of the restaurant's employees were hired by Diab. Elkind documented the conversation with Rodus in a narrative report dated May 12, 2016.

Elkind testified that when he interviewed Espinal during the investigation, Espinal identified himself as the restaurant's manager. Elkind testified that he no longer believes that to be true and "based on interviews that we've had, [Espinal] would be the one responsible," rather than Diab. Elkind testified that during the investigation, the Department of Labor could not identify Espinal as the party responsible and did not send Espinal correspondence because they did not have his address, nor did they see his name on any of the business' legal documents, such as the liquor license. Elkind testified that Diab was determined to be the restaurant owner because his name was on the liquor license. During the investigation, Elkind never spoke with Diab, Mata, or Raimondi.

ANALYSIS

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

Burden of Proof

Petitioner's burden of proof in this matter is 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 Dep't 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 (*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]).

For the reasons stated below, we find that Diab met his burden of proof to show that the orders issued by respondent are invalid or unreasonable.

Diab Was Not an Employer

As used in Article 19 of the Labor Law, "employer" means any "individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer," and in Article 6, "employer" is defined as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law §§ 651 [6], 190 [3]). "'Employed' includes permitted or suffered to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA), like the New York Labor Law, 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 used for analyzing employer status under the FLSA (*Crawford v Coram Fire Dist.,* 2015 U.S. Dist. LEXIS 57997, *24 [ED NY, May 4, 2015, No. 12-3850] *citing Chu Chung v The New Silver Palace Restaurant*, 272 F. Supp. 2d 314, 319 n 6 [SD NY 2003] ("Section 190 of N.Y. Labor Law defines 'employer' as 'any person, corporation or association employing any individual in any occupation, industry, trade, business or service.' Most courts agree that the test for determining whether an entity or person is an 'employer' under New York Labor Law is the same as the test set forth in *Herman* for analyzing employer status under the Fair Labor Standards Act.").

In *Herman v RSR Sec. Servs. Ltd.,* (172 F3d 132, 139 [2d Cir 1999]), the Second Circuit Court of Appeals 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 include 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 as the purpose of examining them is to determine the economic reality based on a "totality of circumstances" (*id.*). Applying the *Herman* test to determine Diab's employer status, we find that Diab was not an employer.

Petitioner Did Not Hire or Fire Employees

Diab credibly testified that he was not responsible for decisions with respect to hiring and firing employees and made no such decisions while employed at the restaurant. If an individual went to the restaurant seeking employment, Diab took their name and phone number and gave it to Espinal. Diab did testify that he recommended Rodus as a cook but did not ultimately make any decisions on behalf of the restaurant. Respondent did not produce sufficient or credible evidence that Diab possessed or wielded such authority. Both Mata's and Raimondi's claims state that they were hired by Espinal and paid by Espinal. While Elkind's May 12, 2016, narrative report contains statements by Rodus that Diab hired other employees at the restaurant, this statement is contradicted by Rodus's testimony at hearing that Espinal was responsible for hiring and firing. Rodus testified that he himself was hired by Espinal and that he was not aware of Diab ever hiring or firing an employee as those decisions were made by Espinal. We find on the weight of the credible evidence that petitioner did not hire or fire the claimants identified in the orders under review, nor did he have the authority to do so.

Petitioner Did Not Supervise or Control Employee Work Schedules or Conditions of Employment

Diab credibly testified that his role was limited to managing the restaurant. As manager, Diab was responsible for opening the restaurant, welcoming customers, training waiters how to set tables, ensuring food and service was acceptable, and sometimes maintaining the restaurant's food

and liquor inventory. Diab did not set employee schedules nor was he present when their schedules were set. These decisions were made by Espinal. When an employee missed a shift, Diab would call that employee to inquire about what happened but his involvement was limited to reporting employee absences to Espinal. Respondent did not produce sufficient or credible evidence that Diab possessed or wielded such authority to constitute supervising or controlling employee schedules or conditions of employment. Rodus testified that Diab may have monitored employee absences and would sometimes, if Rodus was late, call him and inquire about the absence but unambiguously testified that Diab did not set his schedule. Rodus testified that Diab's supervision consisted simply of "just check[ing] the employees," and telling them "to be on time and to work well, and be clean." We find that this limited supervisory role does not rise to the requisite level of supervising or controlling employee schedules or other conditions of employment sufficient to find Diab to be an employer.

Petitioner Did Not Determine Employees' Rates and Methods of Payment

Diab credibly testified that he had no knowledge of the restaurant's employees' rates of pay. Respondent did not refute Diab's testimony that Espinal set employee rates of pay and personally met with each employee to discuss their pay and to provide them with their wages in Espinal's basement office. Rodus's testimony corroborated Diab's account, stating that Diab was only the manager of the restaurant and that Espinal set Rodus's rate of pay.

Petitioner Did Not Maintain Employment Records

Diab credibly testified that Espinal maintained the restaurant's payroll records and signed the restaurant's tax returns. Respondent failed to produce sufficient or credible evidence to rebut Diab's assertions and there is no evidence in the record that petitioner maintained any employment records in this matter.

Petitioner Is Not Individually Liable As An Employer

Applying the *Herman* test to the present matter, we find Diab did not possess the requisite authority over the claimants' employment to be deemed an employer under the Labor Law (*Herman v RSR Sec. Servs. Ltd.,* 172 F3d at 139; *see also Salinas v Starjem Restaurant Corp.*, 123 FSupp3d 442, 463-65 [SDNY 2015]). To the extent respondent determined petitioner was an employer based on Diab's name being present on the restaurant's liquor license, Diab credibly testified without contradiction and supported with documentation, that Espinal, unbeknownst to Diab, used Diab's identity to falsely obtain the liquor license for the restaurant. Respondent's determination was based on claim forms that identified Diab as a responsible person and supervisor, but without more, these are insufficient to refute petitioner's credible evidence that he was not an employer as defined in the Labor Law (*Matter of Woronoff and Katz's Furniture Corp. [T/A La-Z-Boy]*, Docket No. PR 09-208, at p. 4 [December 14, 2012]). In fact, respondent's own investigator concluded during examination that Diab did not appear to be the claimants' employer under the circumstances.

We find, therefore, based on the totality of the circumstances of the record before us, that respondent's determination that petitioner is individually liable as an employer in the minimum wage order under Article 19 and unpaid wages order under Article 6 was unreasonable. Because we find petitioner was not an employer, the orders are revoked with respect to petitioner only.

The Penalty Order is Revoked as to Diab

Since, as discussed above, we found Diab was not an employer and revoked the wage orders as to Diab, we revoke the penalty order against him, but it remains in full force and effect as to Medallo Restaurant Lounge Corp.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage and unpaid wage orders are revoked as to Diab and remain in full force and effect as to Medallo Restaurant Lounge Corp.; and
2. The penalty order is revoked as to Diab and remains in full force and effect as to Medallo Restaurant Lounge Corp.; and
3. The petition be, and the same hereby is, granted.

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
March 6, 2019.

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Dated and signed by a Member
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in Utica, New York, on
March 6, 2019.