STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
HUNG CHENG A/K/A HOLLY CHENG AND NEW ASIAN SUPERMARKET, INC.,	:	
Petitioners,	:	DOCKET NO. PR 12-028
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law and an Order Under Articles 6 and 19 of the Labor Law, both dated December 8, 2011,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Margaret Chen, for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Jake A. Ebers of counsel), for respondent.

WITNESSES

Hung Cheng, for petitioners.

Senior Labor Standards Investigator Fabio Escudero, for respondent.

WHEREAS:

This proceeding commenced with the filing a petition with the New York State Industrial Board of Appeals (Board) on January 30, 2012, pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR Part 66) seeking review of orders issued by respondent Commissioner of Labor dated December 8, 2011, against New Asian Supermarket, Inc. (NAS) and Hung Cheng a/k/a Holly Cheng. Respondent filed an answer on March 8, 2012. On September 12, 2014, we deemed the petition amended consistent with Cheng's assertions made during a prehearing conference held on July 23, 2014, that she was a shareholder in NAS, but not an employer. On October 20, 2014, respondent moved to dismiss the amended petition for failure to allege a basis the orders could be found invalid or unreasonable as required by Labor Law § 101 (a). On January 15, 2014, finding Cheng raised a

valid basis on which to seek review, the Board's associate counsel denied the motion. We affirm the decision denying respondent's motion to dismiss.

Upon notice to the parties, a hearing was held on July 14, 2015, in New York, New York, before Board Chairperson Vilda Vera Mayuga, the designated hearing officer in this matter. The parties were 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 (wage order) directs petitioners to pay the Commissioner for unpaid wages due and owing to five claimants employed by petitioners in the total amount of $61,182.56 for the time period from July 22, 2008 to July 7, 2009, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $28,861.79. The order also finds due and owing liquidated damages in the amount of 25% of the wages due totaling $15,295.72 and a civil penalty of $122,365.12, for a total of $227,705.19.

The order under Articles 6 and 19 (penalty order) assesses a $1,000.00 civil penalty against petitioners for each of the following violations for the period of July 22, 2008 through July 7, 2009: (1) failure to pay wages to manual workers not later than seven calendar days after the end of the week in which the wages were earned by each claimant; (2) failure to keep or furnish true and accurate payroll records for each employee; and (3) failure to give each employee a complete wage statement with every payment of wages. The penalty order also includes a $1,000.00 civil penalty for failure to provide employees, in writing, at the time of hiring, a notice containing the employee's rate or rates of pay and bases thereof and the regular payday designated in advance by the employer, or by failing to obtain written acknowledgement from the employees of receipt of such notice, for the period of July 22, 2008 through January 6, 2009, for a total amount of $4,000.00.

The amended petition alleges that petitioner Cheng is a shareholder in NAS and, therefore, not an employer.

SUMMARY OF EVIDENCE

Testimony of Petitioner Hung Cheng

Petitioner Hung Cheng testified that five investors, including herself, owned shares in NAS. Cheng invested $80,000.00 and each of the remaining four shareholders invested approximately $130,000.00. Cheng acknowledged signing the partnership agreement entered into by NAS's partners which provides: "All Partners shall have the right, power and such authority to act on behalf of the Partnership," including a list of nine enumerated powers which includes the power to "hire and employ accountants, legal and business consultants, attorneys and any and all other agents and assistants, both professional and non-professional, which may include the partners, and to compensate them reasonably for services rendered." The unsigned partnership agreement Cheng entered into evidence is dated February 1, 2008. Cheng confirmed that she signed a version of the agreement in Mandarin though did not produce the executed, Mandarin version at the hearing. Because she was a minority shareholder, however, Cheng testified that she and her partners entered into a separate written agreement that precluded her from making

hiring decisions. Thus, Cheng did not hire department heads nor did she determine their salary; these decisions were made by the four managing shareholders.

Cheng testified that NAS was the first "company . . . I started to run." She further testified that each department at NAS had a manager, because "[i]f only me to run this business, it would be a miracle, because I don't have such a huge ability." Accordingly, the head of the fish department hired claimant Jian uo Su. The head of the vegetable department hired claimant Wing Sum Lau. Cheng was not familiar with the remaining claimants. Notwithstanding knowledge of certain hiring decisions, Cheng testified that her day-to-day involvement with the business was limited to gathering "invoices for the purchasing," which she forwarded to the accounting department. Additionally, Cheng collected and deposited into NAS's bank account cash generated during each business day, and endorsed checks on behalf of the business, but "[a]ll the important issue[s] ha[d] to be approved by the bigger shareholder[s]." Each day, Cheng spent one-to-two hours at NAS.

Cheng testified that she visited the DOL during the course of the investigation. Although She discussed the orders with one of NAS's managing partners, the partners did not attend the meeting with DOL because Cheng was the sole name listed on "the company payroll." Cheng did not provide DOL with the general partnership agreement during the investigation. Before her involvement with NAS, Cheng was a real estate agent, which was her occupation as of the day of the hearing.

Testimony of Senior Labor Standards Investigator Fabio Escudero

Senior Labor Standards Investigator Fabio Escudero testified that he visited the supermarket on July 14, 2009, and oversaw aspects of DOL's investigation of petitioners. He testified that Cheng was listed as the "responsible person" on the claim form DOL received; that she was listed as NAS's "principal" on a printout from the NYS Liquor Authority's website; that she was listed as the designated officer to receive process from the NYS Department of State on behalf of NAS; and that she was listed on DOL's request for records relating to NAS. Escudero testified that the request would have been "handed to" Cheng, but next to the space for the recipient to affirm the accuracy of the information is handwritten: "refused." Escudero testified that this was likely because Cheng declined to sign the form. Cheng's name is also included on DOL's notice of revisit so that DOL personnel could review payroll records. DOL provides the notice to the "people in charge." DOL's "case contact log"—into which DOL personnel "input everything that happens in the case such as phone calls, visits, reports, [and] anything that has to do with the case" and which cannot be later modified—reflects that Escudero attended a site visit on July 14, 2009. Escudero testified that during the visit, DOL personnel spoke with Cheng who stated that NAS employees were not using a time-card machine because it was broken but that employees' hours were tracked. A number of DOL personnel attended this site visit along with Escudero, including a labor standards investigator who spoke Mandarin.

BURDEN OF PROOF

An aggrieved party may petition the Board to review the "validity and reasonableness" of an order issued by the Commissioner (Labor Law § 101 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable. Any objections . . . not

raised in the [petition] shall be deemed waived" (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner is presumptively valid (*Id.* § 103 [1]). Should the Board find the order or any part thereof invalid or unreasonable, the Board "shall revoke, amend or modify" the order (Labor Law § 101 [3]). The party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act § 306 [1]; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; 12 NYCRR 65.30). Therefore, by a preponderance of the evidence (*Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [2011]), petitioners must prove that the challenged orders are invalid or unreasonable (Labor Law § 101 [1]).

Cheng does not dispute that claimants are owed the minimum wages set out in the wage order. Neither does she challenge the assessment nor computation of interest, liquidated damages, or civil penalties, but she has alleged that "as a shareholder, she is a separate and distinct entity from [NAS] and not subject to [the] liabilities of the corporation." Thus, the sole issue before us is whether Cheng is individually and personally liable as a statutory employer for the failure to pay minimum wages. To the extent that petitioners may have other objections to the orders, they have waived them by failing to raise them in the petition (Labor Law § 101 [2]). It is therefore petitioners' burden to prove by a preponderance of evidence that Cheng was not an employer within the meaning of the Labor Law. Because petitioner New Asian Supermarket, Inc. raised no allegations that the orders are invalid or unreasonable with respect to the corporation, we affirm the order as to petitioner New Asian Supermarket, Inc. (*id.*). For the reasons discussed below, we also affirm the order with respect to petitioner Cheng, because she is an employer within the meaning of Labor Law Articles 6 and 19.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule 65.39 (12 NYCRR 65.39).

Cheng argues she was merely a shareholder of NAS, and not individually liable as an employer for the unpaid wages. However, the definition of "employer" in Articles 6 and 19 of the Labor Law is expansive, and may include shareholders who fit within the broad language of the Labor Law. As used in Labor Law Articles 6 and 19, "employer" 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]). "Employer" is also defined in Labor Law § 2 [6] to include an "agent" which includes a "manager, . . . supervisor or any other person employed acting in such capacity" (Labor Law § 2 [8-a]). "Employed" means "suffered or permitted 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 Wing Chan 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*, 2015 NY App Div LEXIS 2219 [1st Dept Mar. 19, 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]), 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 quotation marks and citations omitted).

No one of these factors alone is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*Id.*). Under the broad New York and FLSA definitions, more than one entity or person can be found to be a worker's employer (*Matter of Holm and RSI, Inc.*, PR 08-025 [Dec. 17, 2008]).

In *Matter of Fenske* (PR 07-031 [Dec. 14, 2011]), we applied this test and found an owner was liable as an employer because he was a signatory on the corporate bank accounts, signed paychecks, and was aware of and responsible for company financing, demonstrating that he controlled conditions of employment, even if that authority was never exercised (*id.* at 5 [citing *Matter of Franbilt, Inc.*, PR 07-019 (July 30, 2008) (deciding that an owner was aware of the financial difficulties facing the company, and who had ultimate authority to hire and fire employees, even if unexercised, was liable as an employer where petitioner seeking funds to keep his factory open demonstrated that he controlled the conditions of employment)]).

As in *Fenske* and *Franbilt*, Cheng exercised control over the day-to-day affairs and financial operations of the company demonstrating she controlled conditions of employment (*see Irizarry v Catsimatidis*, 722 F3d 99, 117 [2d Cir 2013]). It is undisputed that Cheng is an owner and shareholder in NAS. By her own admission, she facilitated payment of invoices from vendors, was the sole name on the company payroll, managed company monies including making deposits into the corporate bank account and signed checks on behalf of NAS. She was at the supermarket on a daily basis sufficient to develop personal knowledge of which of several managers hired certain employees, represented to DOL during a site visit that employment records were kept even though the timecard machine was broken, and testified that NAS was the first "company . . . I started to run." Moreover, she is the sole individual associated with NAS in several public records. As such, Cheng raised no credible evidence to discharge her burden of proof that she was not a statutory employer. As in *Fenske* and *Franbilt*, we find that it was reasonable and valid for respondent to determine Cheng was an employer as a matter of economic reality during the relevant time period.

Cheng sought to characterize her involvement with NAS as merely passive. We are not persuaded. Cheng claimed that all "important issues" had to be approved by NAS's "bigger shareholder[s]," and also asserted that she played no role in hiring personnel or establishing the terms and conditions of employment. Cheng, however, acknowledged signing a partnership agreement that by its terms granted her the authority to act on behalf of the partnership and authorized her to hire and fire employees. While Cheng testified that these powers were curtailed

by a separate written agreement, she failed to produce the document at the hearing or at any point during DOL's investigation. Other than Cheng's testimony, the record contains no evidence to support her claim that as a minority shareholder she was contractually precluded from controlling conditions of employment.

To the contrary, based on the totality of the circumstances, Cheng's own testimony tends to show that she was closely and consistently involved with NAS's daily operations sufficient to bring her within the meaning of "employer" under the Labor Law (*see Donovan*, 552 F Supp at 1027; *Catsimatidis*, 722 F3d at 117). Cheng testified that hiring decisions were delegated to NAS's department managers. It does not follow that her failure to exercise this power is evidence that she did not possess it. That Cheng did not supervise claimants on a daily basis does not lessen her status as an employer under the Labor Law (*see, e.g.*, *Matter of Chan et al.*, PR 08-174 at 8 [October 17, 2012] *affirmed by Chan v Industrial Board of Appeals*, 120 AD3d 1120 [1st Dept 2014]).

Based on the record before us, we find that Cheng did not meet her burden of proof to show she was not individually and personally liable as claimants' employer under Articles 6 and 19 of the Labor Law.

Because petitioners did not specifically challenge the amount of wages the Commissioner found due and owing, the civil penalty and liquidated damages assessed in the wage order, or the interest imposed we affirm the wage order in its entirety (Labor Law § 101 [2]; *Matter of Liang*, PR 11-184, at p5 [August 7, 2014]). We also affirm the penalty order, which was not challenged by petitioners (*id*).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition be, and the same hereby is, denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
in New York, New York
on December 9, 2015.