STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: JOCELYNE WILDENSTEIN, Petitioner, To Review Under Section 101 of the Labor Law: Two Orders to Comply With Article 6 the Labor Law, and an Order Under Article 19 of the Labor Law, all dated January 29, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 15-269 RESOLUTION OF DECISION

APPEARANCES

The DeIorio Law Group, PLCC (Vincent Gelardi of counsel), for petitioner.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (John-Raphael Pichardo), for respondent.

WITNESSES

John Henriques for petitioner.

Geeta Rampersaud and Labor Standards Investigator Carla Valencia for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on September 3, 2015, and seeks review of three orders issued by respondent Commissioner of Labor on January 29, 2014 against petitioner Jocelyne Wildenstein. Respondent filed an answer on October 13, 2015.

Upon notice to the parties a hearing was held in this matter on May 12, 2016, in New York, New York, before Devin A. Rice, Counsel to the Board, 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 make statements relevant to the issues. Respondent moved to dismiss the petition after petitioner rested on the ground that petitioner

failed to meet her burden of proof. The motion is denied. Petitioner presented evidence, albeit minimal, that created a question of fact as to whether claimant worked at petitioner's residence.

The first 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 due and owing to claimant Geeta Rampersaud in the amount of $12,666.25 for the time period from July 1, 2012 to February 15, 2013, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $1,932.21, liquidated damages in the amount of $3,166.56, and assesses a civil penalty in the amount of $12,666.25, for a total amount due of $30,431.27.

The second order to comply with Article 6 of the Labor Law (supplemental wage order) under review directs compliance with Article 6 and payment to respondent for unpaid supplemental wages (expenses) due and owing to claimant in the amount of $1,286.06 for the time period from July 1, 2012 to February 15, 2013, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $196.19, liquidated damages in the amount of $321.52, and assesses a civil penalty in the amount of $1,286.06, for a total amount due of $3,089.83.

The order under Article 19 of the Labor Law (penalty order) assesses a $1,000.00 civil penalty against petitioner 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 for the period from on or about July 1, 2012 through February 15, 2013.

The petition alleges petitioner did not employ claimant. For the reasons set forth below, we affirm the orders except that the civil penalties are revoked from the unpaid wages and supplemental wage orders.

SUMMARY OF EVIDENCE

Claimant Geeta "Grace" Rampersaud testified that she worked as a personal assistant for petitioner Jocelyne Wildenstein at petitioner's residence in New York, New York, from May 2012 to November 2012, and for 2 ½ weeks in February 2013. Claimant testified she worked for a family in the same building as petitioner and was referred to petitioner by the building's concierge because petitioner was seeking a personal assistant.

Claimant testified she met petitioner in May 2012 and started to work for her within a week. Claimant's work included personal care, shopping, cleaning, preparing food, refilling prescriptions, and other errands. Claimant worked primarily in petitioner's apartment. Although the work schedule was irregular, claimant estimated she worked 3 to 5 days a week for 12 hours on an average day. Petitioner promised to pay claimant $35.00 an hour by check, but actually paid her in cash. Petitioner did not give claimant a receipt with her wages. Claimant purchased certain items for petitioner from her own funds that petitioner did not reimburse. At hearing claimant produced receipts for these items. Petitioner also failed to pay claimant wages from July to November 2012, except for two payments of $2,000.00 and $3,000.00 respectively made in January 2013. Claimant stopped working for petitioner in February 2013 because she was fed up with not being paid.

Claimant testified she entered petitioner's building "[b]y either signing in or if someone was already in the apartment, a signature would not be required, because someone would already have a key to the apartment." When claimant was required to sign in at the concierge desk, she used the name "Grace" Rampersaud.

Claimant testified that petitioner was out of the country from July 13, 2012 through November 2012. Claimant continued to work at petitioner's residence during that time, performing tasks petitioner had asked her to complete. Claimant testified that she had a "specific" agreement with petitioner to work in petitioner's apartment when she was on vacation because maintenance of the apartment was required even when petitioner was on vacation. Claimant testified that her work while petitioner was gone included oiling petitioner's wooden furniture, keeping fresh food in the apartment, meeting with workers and contractors at the apartment, and general cleaning, because "even while she was not there, she wanted everything to be up to date the moment that she comes there." Claimant explained that petitioner would sometimes return from vacation without notice.

Claimant had no communication with petitioner when petitioner was away, but explained petitioner "had communication with the front desk, at the beginning of every week at the [residence] they had me wait and double check . . . to see if I am still allowed to go into the apartment." Petitioner promised claimant that her accountant would pay her when she was out of the country, but, according to claimant, this never happened. Claimant continued to work although she was not being paid, because in the past when petitioner had been late with payments she eventually made them. Claimant filed a claim with DOL on April 10, 2013, setting forth the hours she had worked for petitioner for which she had not been paid and expenses that had not been reimbursed.

John Henriques is the property manager of the building where petitioner resides. Henriques runs the daily operations of a 372 unit building that has a staff of 39 employees. He is in charge of the front desk, security, maintenance, and housekeeping. Henriques testified that he knows petitioner and that she only resides in the building "half of the time."

Henriques testified that when a non-resident enters the building, the owner or tenant leaves a "permission to enter" form which allows the person to take a key from the front desk. Non-residents with permission to enter must sign in at the front desk when they take a key and when it is returned. This information is also stored in the building's computer system. The log books are maintained forever, but the computer records are erased after a year and a half.

Henriques testified that at the request of petitioner's counsel he reviewed the records for the building and found no indication that claimant had entered the building, taken keys to petitioner's apartment, or that petitioner had asked him to allow her in. Henriques did not know whether petitioner may have asked somebody else to let claimant in. Henriques further testified that he found no permission to enter forms for claimant, although Henriques conceded he reviewed the records for the name given to him by petitioner's counsel, not for "Grace."

Labor Standards Investigator Carla Valencia testified she reviewed DOL's file prior to hearing but was not otherwise involved in this matter. She testified that no DOL investigator visited petitioner. She does not know how the civil penalty in this matter was determined because she was not involved in making the determination. She testified that the usual procedure for

determining liquidated damages at the time was to "automatically" include 25 % liquidated damages in the order. Valencia testified that, based on her review of the file, DOL determined that petitioner was "not compliant" because there is no record petitioner responded to DOL's correspondence.

ANALYSIS

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

Burden of Proof

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; 12 NYCRR 65.30). Petitioners failed to meet her burden of proof that the unpaid wages and supplemental wage orders are unreasonable or invalid, except with respect to the civil penalties, and met her burden to show the penalty order is unreasonable.

Petitioner employed claimant

"Employer" as used in Articles 6 and 19 of the Labor Law 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 "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, 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 . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 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 stated the test used for determining employer status by explaining that:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the 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 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).

When applying this test, "no one of the four factors standing alone is dispositive. Instead the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive." (*Id.* [internal citations omitted]). Petitioner failed to meet her burden of proof to show she was not claimant's employer. We credit claimant's unrebutted testimony that petitioner hired her to work as personal assistant, supervised her work, including leaving instructions for work to be performed when she was out of the county, promised to pay her $35.00 an hour, and that work was performed. Petitioner's only evidence -- the testimony of her building's property manager – did not prove claimant did not work for her. The property manager's review of records was based on a search for claimant's full name, whereas claimant credibly testified she signed into the building using her nickname. Furthermore, the property manager testified he did not know whether petitioner may have asked somebody else to allow claimant into the building. The property manager's speculative testimony is insufficient to meet petitioner's burden of proof where claimant provided detailed and credible testimony of how she entered the building and the work she performed for petitioner. We find respondent's determination petitioner was claimant's employer is reasonable and valid.

The penalty order is affirmed

The penalty order assesses a $1,000.00 civil penalty against petitioner 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 for the period from on or about July 1, 2012 through February 15, 2013. Petitioner, who argued claimant did not work for her, produced no evidence that any records were kept, as required by Article 19 of the Labor Law, of the hours claimant worked or the wages paid to her. The penalty order, therefore, is affirmed.

The unpaid wages and supplemental wage orders are affirmed

Article 6 of the Labor Law, entitled "payment of wages," requires employers to pay manual workers, such as claimant, wages weekly and no later than seven days after the last day of the week in which the wages were earned (Labor Law § 191 [1]). Article 6 also requires employers to reimburse employees for expenses (Labor Law § 198-c). Petitioner denied claimant worked for her and produced no records of the hours claimant worked or wages paid to her, or any evidence concerning the expenses claimant alleged had not been reimbursed (*see* Labor Law §§ 195 and 661 [recordkeeping requirements]). In the absence of required records, petitioner had the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett,* 156 AD2d 818, 821 [3d Dept 1989], "[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 calculation to the employer."

Petitioner, therefore, had the burden of showing that the Commissioner's orders are invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimant worked and that she was paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011]). Where no records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of

underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378 [1st Dept 1996], *citing Mid-Hudson Pam Corp.*). In this case, respondent used the best available evidence, the information provided by claimant in her claim, which was corroborated at hearing by claimant's credible and detailed testimony of the hours she worked, the amounts petitioner failed to pay, and expenses that were not reimbursed. Based on the record, respondent's determination that petitioner failed to pay claimant $12,666.25 in wages and $1,286.06 in expenses is reasonable.

Liquidated Damages

Labor Law § 218 (1) requires respondent to include liquidated damages of 100 % of the wages found due with the order. Liquidated damages must be paid by the employer unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law."[1] Respondent included liquidated damages of 25 % of the wages found due in the unpaid wages and supplemental wage orders. We affirm respondent's imposition of 25% liquidated damages in the orders because petitioner failed to prove a good faith basis to believe that the underpayment was in compliance with the law.

Civil penalty

The unpaid wages and supplemental wage orders both assess a 100 % civil penalty. The Commissioner must impose an "appropriate civil penalty" where she determines that a violation is not willful or egregious and there is no history of prior wage and hour violations (Labor Law § 218 [1]). The Commissioner in assessing the civil penalty applicable in this case was required to "give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and . . . the failure to comply with recordkeeping or other non-wage requirements" (*id.*). The civil penalties are revoked because Labor Standards Investigator Valencia was unable to testify how respondent assessed the civil penalty because she was not involved in DOL's investigation of petitioner.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment 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." We affirm the assessment of interest which was determined by respondent as required by statute.

//////////

/////////

/////

//

[1] While Labor Law § 218 requires the Commissioner to include 100 % liquidated damages in her orders to comply, Labor Law § 198 provides that liquidated damages shall be calculated by the Commissioner as "no more than" 100 % of the underpayments found due.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The civil penalty assessed by the unpaid wages order is revoked, and the order is otherwise affirmed; and

2. The civil penalty assessed by the supplemental wage order is revoked, and the order is otherwise affirmed; and

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, granted in part and denied in part consistent with this decision.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York on
October 26, 2016.