STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
KAMY NETRAM AKA KAMYLAWATEE NETRAM AND ALL IN ONE CONSTRUCTION LLC,	:	
Petitioners,	:	DOCKET NO. PR 13-033
To review under Section 101 of the New York Labor Law: Two Orders to Comply with Article 6, and an Order under Article 19 of the Labor Law, each dated February 6, 2013,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Hacker Murphy, LLP (Ryan M. Finn of counsel) for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Larissa Bates of counsel) for respondent.

WITNESSES

Kamy Netram, Holden Ryan, and Jennie Schleimer, Supervising Labor Standards Investigator, for petitioners.

Jennie Schleimer, Supervising Labor Standards Investigator, for respondent.

WHEREAS:

The petition was filed with the Industrial Board of Appeals (Board) on April 1, 2013, and seeks review of three orders issued against petitioners by the Commissioner of the Department of Labor (Commissioner or respondent) on February 6, 2013. On May 13, 2013, the Commissioner filed an answer. Upon notice to the parties, a hearing was held in Albany, New York on May 8, 2014 before Wendell P. Russell, Jr., Counsel to the Board and designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements to the issues and file legal briefs.

The first order (wage order) demands compliance with Article 6 of the Labor Law and finds that Kamy Netram aka Kamylawatee Netram and All in One Construction LLC (petitioners) were employers as defined in New York Labor Law § 190 (3), having employed Jose Fuentes as a laborer from October 26, 2010 to November 7, 2010, Jose Eugenio Rojas as a carpenter from October 25, 2010 to November 7, 2010, and Rufino Luis Velazquez as a driver/laborer from October 25, 2010 to December 8, 2010 (together, claimants), and failed to pay claimants wages. The order seeks payment of $7,940.00 in unpaid wages, $2,833.29 in interest, $1,985.00 in liquidated damages, and $7,940.00 in civil penalties, for a total due of $20,698.29.

The second order (supplemental wage order) finds that petitioners failed to pay claimant Velazquez supplemental wages in the amount of $235.00 and seeks payment of $235.00 in supplemental wages, $81.48 in interest, $58.75 in liquidated damages, and $235.00 in civil penalties, for a total due of $610.23.

The third order (penalty order) assesses petitioners a civil penalty of $250.00 each for one count of failure to keep and/or furnish true and accurate payroll records and one count of failure to provide complete wage statements to employees, for a total due of $500.00.

The petition asserts that there is insufficient proof to show petitioners employed claimants, and that petitioners had inadequate notice of the "scope of the hearing or the charges against her."

SUMMARY OF EVIDENCE

The Wage Claims

Claimants submitted to respondent claims for unpaid wages and wage supplements. On July 26, 2011, Rufino Luis Velazquez filed a claim for unpaid supplemental wages in the amount of $235.00 and a claim for unpaid wages in the amount of $2,040.00 for work as a driver/laborer for the period of October 25, 2010 to November 7, 2010 at a pay rate of $120.00 per day. On May 24, 2011 and January 17, 2012, Jose Eugenio Rojas filed claims for unpaid supplemental wages in the amount of $500.00 and $700.00, respectively, and claims for unpaid wages in the amount of $3,200.00 and $3,600.00, respectively, for work as a carpenter for the period of October 25, 2010 to November 7, 2010, at a pay rate of $200.00 per day, having "worked 12 hours per day but the agreement was $200.00 per each day worked no matter how many hours."[1] On August 22, 2012, Jose Fuentes filed a claim for unpaid wages in the amount of $1,500.00 for work as a laborer for the period of October 25, 2010 to November 7, 2010.

Testimony of petitioner Kamy Netram

Netram testified that she is the President of All in One Construction LLC, a New York State limited liability corporation. She was the general contractor for a residential rehab construction project in Port Jervis, New York, and "managed the subcontractors." One of those subcontractors was Express Repair owned by Alberto Camacho, from which she accepted a

[1] Respondent did not include Rojas's supplemental wage claims in its supplemental wage order.

September 30, 2010 estimate for framing, insulating and sheet rocking in the amount of $12,000.00 "for labor only." Express Repair stopped work on October 12, 2010 although some of the work was incomplete. The property owners paid Express Repair $12,000.00 by check dated October 12, 2010, and on that same date, Express Repair and Netram executed a Lien Waiver that set out that "all laborers and subcontractors . . . ha[d] been paid." Netram testified that she had expected Express Repair to return to complete work on the project.

Netram testified that she submitted to respondent a sworn letter dated August 22, 2012 from Joseph Pagan, "Project Manager/Supervisor" at the job site. Netram had asked Pagan to give her any information about his role in the project and that of others. Netram testified that the Pagan document showed that prior to leaving the state, Express Repair met with its "employees" and instructed them to do certain work on the project.

Netram testified that she had not hired claimants. She also testified that she had hired claimant Fuentes in December to "help with the garbage" and paid him for the work with three checks from All in One. Netram also testified that one of the checks was issued to pay claimant Fuentes for work performed in "November or December."

Netram testified that she did not have wage or time records; she also testified that she did have certain time records, but had not brought them to the hearing.

Finally, she also testified that prior to the hearing, she had met with investigators, had attended a compliance conference and spoken on the telephone with investigators.

Testimony of Supervising Labor Standards Investigator Jennie Schleimer

Petitioners called Supervising Labor Standards Investigator Jennie Schleimer, who testified that the matter had been investigated in accordance with respondent's requirements by other Labor Standards Investigators who were unavailable to testify due to leave or retirement. She noted that in the week prior to the hearing, she had reviewed the entire file to familiarize herself with relevant details.

Schleimer testified that Rojas and Velazquez had worked for Express Repair and, when its owner left the state, claimants had become petitioners' employees. "They were hired by this Express Repair initially, because [it] was the subcontractor. But at the point in time [that] he left . . . they continued to work on the job for All in One and Kamy Netram." She testified that petitioners became claimants' employers when Express Repair left the state and work at the site continued. She also testified that while claimants had previously worked for Camacho, once he left the state, Netram "took over direction and control" and Camacho "never had any involvement with [claimants] as an employer again."

Schleimer testified that after a preliminary investigation, respondent had considered closing the file, which then was sent to a supervisor for final review. The supervisor, noting that the investigator had not been able to reach Velazquez, contacted Rojas, who reported that Netram had paid him in cash. Schleimer testified that, having been paid in cash, there was no way for Rojas and Velazquez to offer proof of their employment by petitioners, beyond what they had written in their claims. She also testified that as a result of the supervisory investigation, the case was not closed.

She testified that the amount of wages owing was calculated based on claimants having worked a 12-hour day, requiring, as a result, payment of more than base salary, rather than the daily rate promised by Netram, and that the method of calculation used here was a standard method used by respondent, one that also went through respondent's "review process." She also testified, with regard to penalty amounts, that the respondent had considered, as it does typically, a number of factors, including petitioners' lack of willful or malicious intent, "size of business, the number of employees, the cooperation with the Department of Labor, and the [petitioners'] understanding of the law and whether or not it's been followed" and that petitioners had no prior Labor Law violations on record. She testified that respondent's penalty amounts had been determined based on requisite factors and had been reviewed at the supervisory level. She also testified that when setting civil penalty amounts, respondent considers whether respondent has explained the law repeatedly and an employer has or has not then worked with respondent "to fix their error," to "fix what happened." She also testified that the highest penalty amount possible was 200%.

Schleimer also testified that in spite of numerous requests, at no time did petitioners provide the requisite wage or time records. At the compliance conference that Netram attended prior to the issuance of the orders, respondent explained that, based on the testimony of Netram and claimants on that day, Netram was the claimants' employer after Camacho left and would be issued an order to comply if she did not arrange to pay claimants wages they were owed.

Testimony of Holden Ryan

Petitioners called Holden Ryan, who testified that he was familiar with the job site as a place where he "used to hang out." Ryan had seen claimants, prior to Express Repair leaving the area, working at the job site, some days until late into the night. He also testified that he was not at the site or in the area of the site some days, and that after Express Repair left, no one seemed to be supervising work at the site, testifying that he was "sure they did some things . . . but it wasn't like when Camacho was there." Ryan also testified that he does not speak Spanish or understand Spanish.

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that "any person . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner under the provisions of this chapter" (Labor Law § 101 [1]). It also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (Labor Law § 101 [3]). A petition that challenges the validity or reasonableness of an order issued by the Commissioner shall "state . . . in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). Board Rules provide that "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR 65.30); the burden is met by a preponderance of evidence (State Administrative Procedure Act § 306 [1]).

Definition of "Employer" under Articles 6 and 19 of the Labor Law

"Employer," as defined in Articles 6 and 19 of the Labor Law, includes any person or corporation "employing an individual in any on industry, trade, or service" (Labor Law §§ 190 [3] and 651 [6]; see also *Matter of Yick Wing Chan v New York Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act defines "employ" to include "suffer or permit to work" (29 U.S.C. § 203 [g]), and it is well settled that "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) (*see also Matter of Chan v Industrial Bd of Appeals*, 120 AD3d 1120 [1st Dept 2014]), the Second Circuit Court of Appeals set out the test for determining employer status, explaining that:

> "[b]ecause 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 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).

When applying the economic reality 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]).

The existence and degree of each of these factors is a question of fact, while the legal conclusion to be drawn is a question of law (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1059 [2nd Cir 1988]). In applying the factors, the reviewing court is to be mindful that "the remedial nature of the statute . . . warrants an expansive interpretation of its provisions so they will have the widest possible impact in the national economy (citation omitted)" (*Herman*, at 139).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Claimants Were Employees of Petitioners

We find that petitioners did not meet their burden of proof in showing that respondent's determination that claimants were employees of petitioners was invalid or unreasonable.

We credit the testimony of Senior Labor Standards Investigator Schleimer, who outlined respondent's investigation, as well as petitioners' failure to produce required wage and hour records. We also concur with respondent's reliance on claimants' statements in their claim forms to the effect that Netram, after meeting with them to engage their services during Camacho's absence, set the method of payment (cash) and rate of pay ($120.00 and $200.00 per day, plus reimbursement for purchase of materials and use of a personal truck to remove debris and transport construction material and workers), controlled the place of work and instructed two claimants to bring on a third worker, that she failed to pay them, citing a lack of money, and that she had the receipts for materials purchased by Rojas.

While we credit Netram's testimony that framing work was incomplete when Camacho left, and note that immediately prior to his departure, she executed a lien waiver in which Camacho warranted that all his workers had been paid, her testimony and petitioners' documentary evidence were, on the whole, irrelevant, incomplete and/or not creditable. Petitioners did not present adequate or necessary evidence to meet their burden by a preponderance of evidence. Netram offered conflicting testimony, testifying that she did not have requisite wage and time records because claimants were not her employees, but also testifying that she had hired Fuentes at an unspecified time either during or shortly after the claim period, and that she had some employment records, yet failed to produce them before or at the hearing. Netram submitted documents showing she hired subcontractors for work at the job site, which documents are irrelevant, and the front of three checks paid to Fuentes, which contributed to the conclusion that her testimony was unreliable in that she testified that she had hired Fuentes in December 2010, but one of the checks to him was for work in November and December 2010.

The economic reality of the relationship between claimants and petitioners is that of an employer/employee relationship. Petitioners suffered or permitted their work and took no steps to prevent their presence at the workplace. "An employer who has knowledge that an employee is working and who does not desire that work to be done has a duty to prevent its performance" (*Chao v Gotham Registry, Inc.*, 514 F3d 280, 288 [2d Cir 2008]). On the record before us, we find that petitioners were the claimants' employer during the period covered by the wage order.

The Wage Order and the Supplemental Wage Order Are Affirmed

Petitioners did not meet their burden in showing the wage order and the supplemental wage order to be unreasonable or invalid. Netram testified that she had not hired claimants, but also testified that she had hired, and paid, Fuentes. She did not provide proof of payment, wage and hour records or any other documentation to support or verify her testimony. In contrast, Schleimer testified creditably as to the method and detail of respondent's investigation, and her testimony was supported by documentary evidence, including detailed claim forms from the three laborers hired first by Camacho and then by Netram.

Petitioners also entered into evidence the notarized letter from Joseph Pagan in order to show, among other things, claimants were working for Camacho in his absence, as well as the purportedly lax manner in which claimants had worked at the job site. We give the letter little weight, noting that Pagan was not made available as a witness. Pagan, the self-described "Project Manager/Supervisor," was Netram's employee and presumably reported site conditions to her with some regularity. Holden's testimony, which was offered to show that claimants' work at the site after Camacho left was of poor quality, was neither creditable, nor pertinent; we note, for

example, that he testified that he does not understand or speak Spanish, yet was able to overhear and understand claimants' conversations in Spanish. Other inconsistencies and irrelevant statements contributed to the unreliability of his testimony. We give it no weight, but note that it confirms claimants' work at the jobsite after Camacho's company had been relieved from the job.

Considering the totality of the circumstances, we find that petitioners did not meet their burden of proof in showing to be unreasonable or invalid respondent's determination that Netram hired claimants to work as laborers, set their wages and hours of their work, directed and supervised them, promised to pay them in cash by the day, and ended their work after refusing to pay them the wages they had earned or to reimburse expenditures for material and transportation costs. Petitioners did not offer relevant and convincing evidence to refute specific and credible evidence offered by respondent regarding claimants' place of work, job duties, hours, rates of pay, and hiring and supervision by Netram. In sum, petitioners having failed to meet their burden of proof to show by a preponderance of evidence that the orders were invalid or unreasonable, we affirm the wage order and the supplemental wage order.

Liquidated Damages

Where the Commissioner determines an employee has not been paid all wages owed, Labor Law § 198 requires him to assess liquidated damages in an amount not to exceed 100% of the amount of unpaid wages unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law. Petitioners offered no evidence to challenge the Commissioner's determination to assess liquidated damages in the wage order or the supplemental wage order. Thus, we affirm the determinations as valid and reasonable in all respects.

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." Petitioners offered no evidence to challenge the interest assessed in the wage order and the supplemental wage order; we find that the computations made by the Commissioner in assessing interest in the orders are valid and reasonable in all respects.

The Civil Penalties in the Wage, Wage-Supplement and Penalty Orders Are Affirmed

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Articles 6 or 19, he must issue an order directing payment of any wages and wage supplements found to be due, "plus the appropriate civil penalty." The wage order and the supplemental wage order each assess a 100% civil penalty. The Commissioner must impose an "appropriate civil penalty" where he 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.*). We credit Schleimer's testimony that those were the factors respondent considered in determining to recommend a 100% civil penalty. We also credit her testimony that she was familiar with respondent's method for calculating penalty amounts and with the amounts in the orders and that respondent's customary process had been observed; she testified as to the specifics of certain calculations and repeated that they had been handled in the same manner as any other case and that her review of the file identified nothing missing or absent. Petitioners did not present sufficient evidence to meet their burden of proof in challenging the validity or reasonableness of the Commissioner's determination. In contrast, respondent submitted creditable testimonial and substantial documentary evidence that supports its determination of a 100% civil penalty for both the wage order and the supplemental wage order.

Respondent also imposed a $500.00 civil penalty against petitioners for violating Labor Law § 661 and 12 NYCRR §§ 142-2.6 and 142-2.7 by failing to keep and/or furnish true and accurate payroll records for, and wage statements to, claimants. Netram testified that she had certain wage and hour records, but failed to produce them before or at the hearing; the checks she produced at hearing were insufficient to comply with the requirements of 12 NYCRR 142. As at no time did petitioners submit documentation to show maintenance of accurate payroll records or provision of wage statements, petitioners presented no creditable testimonial or documentary evidence that they had complied with statutory and regulatory recordkeeping requirements.

In light of the record as a whole, we find that the considerations and computations the Commissioner was required to make in connection with the penalties assessed in the wage, supplemental wage and penalty orders are valid and reasonable in all respects.

Finally, petitioners allege that they did not receive adequate notice of the scope of the investigation that led to the order. Although the Labor Law does not require respondent to issue any specific notice to petitioners prior to issuing an order, we note that petitioners' allegation is without merit. Schleimer testified in detail about the extent of respondent's investigation and its many attempts to resolve the claims with petitioners prior to issuing an order to comply. Respondent's investigation, which included several conversations and meetings with petitioners, site visits by an investigator and a compliance conference, was fully outlined in respondent's documentary evidence.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed;

2. The supplemental wage order is affirmed;

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, otherwise dismissed.

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
at New York, New York, on
September 16, 2015.