STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: LUCHIA MCSWEENEY, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, and an Order Under Article 19 of the Labor Law, both dated August 31, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 11-298 RESOLUTION OF DECISION

APPEARANCES

Luchia McSweeney, petitioner *pro se*.

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

WITNESSES

Luchia McSweeney, for petitioner.

Jairo Wilches, Albeiro Jarces, and Leo Lewkowitz, Labor Standards Investigator, for respondent.

WHEREAS:

On September 21, 2011, petitioner Luchia McSweeney filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued against her by the Commissioner of Labor (Commissioner) on August 31, 2011. The Commissioner filed an answer on December 5, 2011.

Upon notice to the parties, a hearing was held on March 11, 2014 in New York, New York before Board member and designated hearing officer J. Christopher Meagher, Esq. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (wage order) demands compliance with Article 6 of the Labor Law and payment to the Commissioner of $1,967.28 in wages due and owing to claimant employees Jairo Wilches and Albeiro Garces for the period from April 23, 2010 to October 21, 2010, interest at the rate of 16% calculated to the date of the order in the amount of $338.48, liquidated damages in the amount of $491.82, and a civil penalty in the amount of $1,967.28, for a total amount of $4,764.86.

The second order (penalty order) under Article 19 of the Labor Law assesses petitioner a civil penalty of $500.00 for failure to keep and/or furnish true and accurate payroll records during the period from April 23, 2010 through October 21, 2010.

The petition alleges that petitioner hired Wilches as a contractor to renovate a bathroom at her apartment in Queens, New York for an agreed price of $1,200.00. She paid him $700.00 for the work he performed and owes him no further compensation because he abandoned the job before it was complete.

SUMMARY OF EVIDENCE

The Wage Claims

On October 22, 2010, claimants Jairo Wilches and Albeiro Garces filed claims with the Department of Labor (DOL) stating that they were employed by petitioner as day laborers at the rate of $130.00 per day and were owed unpaid wages for work performed installing ceramic tile at her residence during the period September 23, 2010 to October 24, 2010.

Wilches stated that he worked 32 hours over four days and was paid $100.00 for the payroll week ending September 26, 2010; 60 hours and $450.00 over six days for the week ending October 3, 2010; and 44 hours over four days and no wages for the week ending October 24, 2010. He was owed a balance of $1,423.64 for the period of his claim.

Garces stated that he worked 44 hours over four days and was paid no wages for the week ending October 24, 2010. He was owed a balance of $543.64 for the period of his claim.

Petitioner's Testimony

Petitioner Luchia McSweeney testified that in September 2010, she went to a local Home Depot to look for people she could hire to remodel the bathroom in her apartment. Claimant Wilches was in the store and overheard the conversation she was having with another person. Claimant approached her, told her that he owned his own business, and gave her his business card. The parties met at her apartment a week later and petitioner showed him the work she wanted done. They negotiated an agreement where claimant agreed to perform the work for a price of $1,200.00, including demolition and removal of the old tile, installation of new tile, painting the ceiling, and installation of a new door and bath fixtures (soap dishes).

Petitioner explained that Wilches demolished and removed the old tile over the next couple of weeks and then left while a plumber and electrician named Javier put in the plumbing and electrical work. When claimant returned a second time, he installed the new tile on the walls

and floor but complained that the job was too big and he needed more money to finish. Petitioner offered him another $200.00 but refused to pay more because they had agreed on a set price. Claimant then picked up his tools and left without completing the job. Petitioner said she had to pay another person $500.00 to finish the work.

Petitioner acknowledged that she did not have a written contract with Wilches and knew he was not licensed. Claimant brought his own tools to the job but petitioner provided all the materials and told him that he could work each day until 5:00 or 6:00 p.m. Asked whether she supervised claimant's work, petitioner replied that she told him "what he had to do."

Petitioner testified that she never met claimant Garces and did not hire or make an agreement with him. She recalled that when Wilches returned to the job a second time Garces came with him and was taking pictures.

Petitioner denied that she ever agreed to pay Wilches by the hour. She paid him in cash but had no proof of the payments other than some notes she made and then crossed out. She explained that she made the notes when she was upset over the dispute and other personal problems and did not know what she wrote.

Responding to DOL's investigation, petitioner explained that she did not reply to DOL's correspondence because she was going through a divorce at the time and went to Ecuador for three months after the bathroom was finished. Her sister later contacted DOL on her behalf and spoke with an attorney.

Testimony of Claimant Jairo Wilches

Claimant Jairo Wilches testified that he is a day laborer. He does not have a business, own a vehicle, advertise other than with a business card, or have workers compensation insurance. In between jobs he goes to a local Home Depot to look for work, "If someone needed any work to be done I will give them my phone number. Claiming any type of odd jobs."

In September 2010, claimant met petitioner at the Home Depot and gave her his card. She called him and inquired what it would cost to renovate her bathroom, including demolition, electricity, and plumbing. Claimant told her what it would probably cost to "go by contract" for an overall renovation job but it would be cheaper to hire him and he would work for her "by the day." Claimant added that he was not an electrician and would charge her $130.00 per day for whatever work he could perform.

Claimant testified that petitioner called him back some days later and accepted his offer. The parties then met at her apartment and went over the work she wanted done. It included demolition and removal of the old tile and retiling of the surfaces with new ceramic tile. It did not include painting or installation of a door. They agreed that claimant would perform the work at a daily rate of $130.00 per day and that petitioner would pay him weekly and supply all the materials.

Claimant authenticated his claim form and testified that he worked four days the first week and six days the second demolishing and removing the old tile. Petitioner was present each day and paid him $500.00. He then left while the plumber and electrician installed the plumbing

and electricity. When he returned to put up sheetrock and install the new tile, petitioner asked him to get another person to help so the work would go faster. Claimant had worked with Garces before and recommended him to petitioner. Garces came to the apartment and made a separate agreement with her to help complete the job.

Wilches testified that he and Garces began installing new tile and were almost finished when petitioner abruptly told them to leave the work site. Petitioner was very upset when they came to work on the last day. When Wilches asked her for the wages he was owed and said, "Please I need my money," petitioner demanded that they leave the apartment and told them that her son or ex-husband was a police officer. To avoid any further confrontation claimants left and went to DOL to file claims for their back wages. Wilches said he worked four days during the last week and was paid no further wages beyond the $500.00 he had already received.

Testimony of Claimant Albeiro Garces

Claimant Albeiro Garces testified that he is a day laborer. He does not operate his own business or have workers compensation insurance. He learned from Wilches around October 17, 2010 that petitioner was looking to hire someone to help finish work on her bathroom. He met with them at the apartment the next day. Petitioner showed them the work she wanted done and made a separate agreement with him to install ceramic tile in the bathroom. Petitioner told him that he was to work together with Wilches "as a team" and that she would pay him $130.00 per week.

Garces authenticated his claim form and testified that it accurately states the hours he worked and the wages he was paid during the period of his claim. He worked four days cutting ceramic tile and helping Wilches install it in the bathroom. Petitioner was present each day, monitored their work, and told them how she wanted it done. They were almost finished when he arrived at work on the last day and observed petitioner having an argument with Wilches over money. She told them both to leave the apartment and threatened to call the police. They left and immediately went to DOL to file claims for their unpaid wages.

DOL's Investigation

In response to the claims, DOL issued petitioner collection letters on November 9 and December 1, 2010, advising her of the details and requesting that she either remit payment or submit a statement why the amounts were not due, including "a copy of any payroll record[s], policies, contract, etc. to substantiate your position." No response was received.

On July 19, 2011, DOL issued petitioner a third notice reiterating the details and advising her that since she had failed to respond or submit documentary proof that claimants had been paid the wages due, the matter would be referred for issuance of orders to comply, entailing additional interest, liquidated damages, and civil penalties. No response was received. Labor Standards Investigator Leo Lewkowitz testified that a review of the "contact log" showed that petitioner did not ever respond to DOL's correspondence, either by telephone or letter, throughout the course of the investigation.

In the absence of accurate payroll records demonstrating that claimants were paid the wages due, DOL issued the orders under review on August 31, 2011. In support of the penalty

assessed in the wage order, Lewkowitz testified that it was reasonable because petitioner failed to respond to any of DOL's correspondence requesting payroll records. Furthermore, petitioner testified that she was refusing to pay wages because she was unhappy with the work that was performed, which would be an insufficient basis to withhold wages. The records penalty was reasonable because petitioner failed to submit any payroll records for the periods that claimants were employed.

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 the statute (Labor Law § 101 [1]). It also provides that a Commissioner's order shall be presumed "valid" (*Id.* § 103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify it (*Id.* § 101 [3]).

A petition filed with the Board 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" (*Id.* § 101 [2]). The Board's Rules provide that the "burden of proof" of every allegation in a proceeding shall be upon the person asserting it (12 NYCRR § 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306 [1]).

Definition of "Employee" Under Article 6 of the Labor Law

An "employer" is defined in Article 6 of the Labor Law as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" is defined as "permitted or suffered to work" (*Id.* § 2 [7]). The Federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). Because the statutory language is identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoumana v Gristede's Operating Corp.*, 255 F Supp2d 184, 189 [SDNY 2003]).

Several factors are relevant in determining whether an individual is an employee under the Labor Law, or an independent contractor outside its wage and hour protections, and are known as the "economic reality test". They include (1) the degree of control exercised by the employer over the worker; (2) the worker's opportunity for profit or loss and his investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship, and; (5) the extent to which the work is an integral part of the employer's business (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2nd Cir 1988]). No one factor is dispositive; rather, the test is based on the totality of circumstances. "The ultimate concern is whether, as a matter of economic reality the workers depend upon someone else's business for the opportunity to render service or are in business for themselves (*Id.* at 1059; *Matter of Tomasz Wojtowicz,* PR 10-102 at pp. 7-10 [June 12, 2013]).

The existence and degree of each of these factors is a question of fact, and the legal conclusion to be drawn from these facts is a question of law (*Brock v Superior Care, Inc.* at 1059). 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 v RSR Security Services, Ltd.*, 172 F3d 132, 139 [2d Cir 1999]).

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 65.30 (12 NYCRR § 65.39).

Claimants Were "Employees" of Petitioner and not Independent Contractors

We find that claimants were petitioner's "employees" and not independent contractors as a "matter of economic reality" under the applicable five-part test.

As to the degree of control exercised by the employer, Wilches credibly testified that he is a day laborer and between jobs goes to the Home Depot to look for work. In September 2010, he met petitioner there and gave her his card. Petitioner called him and inquired what it would cost to renovate an entire bathroom, including demolition, plumbing, and electricity. Wilches advised her of what it would probably cost to "go by contract" for an overall renovation job but it would be cheaper to hire him and he would work for her "by the day." He further advised her that he was not an electrician and would charge her $130.00 per day for whatever work he could perform. Petitioner called him back, accepted his offer, and arranged to meet him at the apartment. After petitioner showed him the work she wanted done, she hired him to remove the old tile and install new tile in the bathroom at the rate of $130.00 per day.

Wilches further testified that he demolished and removed the old tile and then left while the plumbing and electricity was put in. When he returned to the job the second time, petitioner requested that he get another person to help so they could both work faster. Garces credibly testified that he learned from Wilches around October 17, 2010, that petitioner was looking for a second person and went to the apartment the next day. Petitioner showed them the work she wanted done and then hired him to work "as a team" with Wilches to install new tile in the bathroom at the rate of $130.00 per day. Both claimants testified that they worked together for four days the last week and were almost finished when petitioner abruptly demanded that they leave the work site.

We credit claimants' testimony that they were hired by petitioner to perform work at the rate of $130.00 per day, as it was specific, consistent, and corroborated by their claim forms filed with DOL immediately after the dispute. While petitioner claimed that her agreement with Wilches was for a set price of $1,200.00, she admitted that she had no written contract with him and submitted no other credible evidence corroborating the agreement. She testified that she never met claimant Garces, did not hire or make an agreement with him, and vaguely stated that when Wilches returned to the job, Garces came with him and was taking pictures. We credit the claimants' specific and detailed testimony concerning Garces' employment over petitioner's vague and general denials.

Petitioner acknowledged that she supplied all the materials for the job, told Wilches he could work each day up to 6:00 p.m., and supervised his work by telling him what he had to do. Garces confirmed that petitioner was present each day while they were installing the tile, monitored their work, and told them how she wanted it done.

We find the evidence establishes that petitioner hired the claimants, set the wages and hours for their work, and directed and supervised the work that they performed. Such pervasive control is evidence of their status as employees (*Brock v Superior Care, Inc.,* at 1060 [employer setting of wages, hours, and review of work performance are indicia of supervision and control consistent with employment]; *Matter of Double R. Entertainment, LLC (T/A Rick's Tally-Ho,* PR 08-156 at pp. 12-14 [June 7, 2011] [control exercised by dance club over work of exotic dancers is evidence of status as employees].

As to the second factor, claimants testified that they are both day laborers and have no business of their own or workers compensation insurance. Petitioner admitted that she knew Wilches was not a licensed contractor. While claimant brought his own tools, petitioner supplied all the materials. Claimants thereby had no investment in the business and no opportunity for any profit or loss from their work other than from their own labor. The absence of such investment or return from their work is further evidence that they are employees (*United States v Silk,* 331 US 704, 717-18 [1947] [finding coal yard workers to be employees and not contractors where "[t]hey had no opportunity to gain or lose except from the work of their hands and [their] simple tools"]; *Brock v Mr. W. Fireworks, Inc.,* 814 F2d 1042, 1050-51 [5th Cir 1987], *cert. denied,* 484 US 924 [1987] [where employee's sole opportunity for return is from his own labor, he cannot be said to have the opportunity for profit or loss that exists for an independent contractor]).

As to the third factor, while claimants may have experience and skill as construction laborers, their work on petitioner's bathroom did not require any independent initiative. As discussed above, neither one of the claimants operated their own business. The record shows that petitioner determined what work she wanted done and controlled the terms and conditions for how it would be performed. Simply put, petitioner assigned the work and claimants did it. Such dependence on an employer to provide the opportunities for work does not reflect the skill or independent initiative of a bona fide independent contractor (*Brock v Superior Care,* 840 F2d at 1060 [where skilled nurses did not use technical skills in any independent way to obtain work opportunities, but instead depended on employer for job assignments that employer controlled the terms and conditions of, economic reality reflects employment]).

Finally, with respect to the permanence of the working relationship, the record reflects that as day laborers claimants perform odd jobs for short periods of time and are a transient work force. Nevertheless, even where workers are transient, they have been deemed employees where the lack of permanence is due to operational characteristics intrinsic to the industry they work in rather than to their own business initiative (*Brock v Mr. W. Fireworks, Inc.,* 814 F2d at 1053-54 [firework stand operators deemed employees notwithstanding 80% turnover because of seasonal nature of their work]). The fact that claimants work day to day reflects the nature of short-term labor common in the construction industry and not their success in marketing their skills independently (*Brock v Superior Care, Inc.,* 840 F2d at 1061 [fact that temporary health care nurses are transient work force does not make them independent contractors]).

Based on the totality of circumstances, we find that claimants were as "a matter of economic reality" dependent on petitioner to render service and that an employment relationship existed between claimants and petitioner. Petitioner is thereby liable for any wages owed them under Article 6 of the Labor Law. [1]

The Commissioner's Calculation of Wages Is Affirmed

The Labor Law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rate, and gross and net wages paid (Labor Law §§ 195 and 661, 12 NYCRR § 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative.

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 820-21 [3d Dept. 1989]; *Ramirez v Commissioner of Labor,* 110 AD3d 901 [2d Dept. 2013]).

Petitioner did not submit any evidence challenging the Commissioner's calculation of wages owed claimant Wilches aside from notes she made and crossed out. She admitted that the notes were unreliable. She submitted no proof of any payment to Garces. The Commissioner was thereby entitled to use "the best available evidence" drawn from the claims filed by the claimants in this case in calculating the wages they were due and we affirm the determination as valid and reasonable in all respects.[2]

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, 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."

Petitioner did not challenge the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2) ("Any objections to the . . . order not raised in such appeal shall be deemed waived"). We find that the computations made by the Commissioner in assessing interest in the order are valid and reasonable in all respects.

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[1] We need not resolve the factual dispute between the parties over the scope of the job they had agreed to, i.e. whether it included painting a ceiling or installation of a door and bath fixtures, as claimants were "permitted or suffered to work" by petitioner at her apartment throughout the period of their claims and were thereby "employed." It is impermissible for an employer to withhold wages based on dissatisfaction over how the work was performed (Labor Law § 193; *Guepet v International TAO Systems, Inc.*, 110 Misc 2d 940, 941 ["Nowhere does [Section 193] permit an employer to make . . . deductions from wages because an employee failed to perform properly."]

[2] While Wilches claimed that he received only $500.00 for his work, his claim form states that he received a total of $550.00. As the claim was filed with DOL immediately following the dispute, we credit the form and decline to modify the order.

Liquidated Damages

Labor Law § 198 (1-a) provides that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment "and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." Such damages shall not exceed one hundred per cent of the total amount of wages found to be due.

Petitioner did not challenge the Commissioner's determination to assess liquidated damages in the wage orders. The issue is thereby waived pursuant to Labor Law § 101 (2) and we affirm the determination as valid and reasonable in all respects.

The Civil Penalties in the Wage 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 found to be due, "plus the appropriate civil penalty."

If a violation involves a willful or egregious failure to pay wages, or an employer who has previously been found in violation, the penalty "shall" be "in an amount equal to double the total amount . . . found to be due" (*Id.*). For all other types of violations, the amount of the penalty is discretionary. Where the violations involve "a reason other than the employer's failure to pay wages," the amount shall not exceed $1,000.00 for a first violation and $1,500.00 for a subsequent one (*Id.*). In applying his discretion, the statute directs the Commissioner 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, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements" (*Id.*).

Petitioner claimed that she did not respond to DOL's correspondence during the investigation because she was going through a divorce and left the country for three months after the bathroom was finished. Her sister later contacted DOL on her behalf and spoke with an attorney.

The record reveals, however, that DOL issued petitioner some three separate collection letters on November 9, 2010, December 1, 2010, and July 19, 2011 advising her of the details of the claims and that if she disagreed with them she should submit payroll records or other proof substantiating her reasons. Investigator Lewkowitz testified that a review of the contact log in the file indicated that petitioner never responded to any of DOL's correspondence, either by telephone or letter, throughout the course of its nine-month investigation. He further testified that the 100% penalty in the wage order was reasonable because petitioner failed to respond to any of DOL's correspondence requesting payroll records. The records penalty was reasonable because petitioner failed to submit any payroll records for the periods that claimants were employed.

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 and penalty orders are valid and reasonable in all respects.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

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

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Absent
Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York on
March 11, 2015.

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 and penalty orders are valid and reasonable in all respects.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

3. 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

Frances P. Abriola

Frances P. Abriola, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Utica, New York, on
March 11, 2015.