STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
MICHAEL CARL WHITE AND HAMPTON BEVERAGE WORX CORP. T/A MONTAUK BEVERAGE WORKS,	
Petitioners,	DOCKET NO. PR 17-150
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated September 25, 2017,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Michael Carl White, petitioner pro se, and for Hampton Beverage Worx Corp.

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

WITNESSES

Michael Carl White for petitioners.

Mark Bowman and Senior Labor Standards Investigator Joseph Ryan for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on October 12, 2017, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) on September 25, 2017, against petitioners Michael Carl White and Hampton Beverage Worx Corp. The Commissioner filed an answer to the petition on December 7, 2017.

Upon notice to the parties a hearing was held on May 30, 2018, in Garden City, 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 to make statements relevant to the issues.

The order to comply with Article 6 (unpaid wages order) directs compliance with Article 6 of the Labor Law and payment to the Commissioner for unpaid wages due and owing Mark Bowman in the amount of $1,040.00 for the time period from October 24, 2016 to November 11, 2016, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $149.53, and assesses liquidated damages in the amount of $1,040.00 and a civil penalty in the amount of $260.00, for a total amount due of $2,489.53.

The order under Article 19 (penalty order) assesses a $500.00 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 October 24, 2016 through November 1, 2016.

The petition alleges that petitioners never employed Bowman. For the reasons set forth below, we find petitioners did employ Bowman and the orders are affirmed.

SUMMARY OF EVIDENCE

On December 27, 2016, Mark A. Bowman filed a claim for unpaid wages with respondent alleging he worked 48 hours for petitioners doing phone sales, was promised a salary of $160.00 per day, and was never paid. Senior Labor Standards Investigator Joseph Ryan was assigned by respondent to investigate the claim. Ryan testified that respondent noticed petitioners of the claim by letter dated January 27, 2017, and that petitioners replied on January 31, 2017, disputing the claim. Petitioners' reply, signed by Andrew L. Schwab, Senior Vice President, states that Bowman "was hired as an independent contractor salesperson/consultant who was able to make his own full-time hours and work either on our premises, from home or on the road." Petitioners further explained in their reply that Bowman never appeared on petitioners' payroll, and that "[d]uring the period in question, Mr. Bowman showed up at our office on one occasion and allegedly worked from home a couple of other days," and continues to explain that Bowman was "notified of his termination" and his request for pay was "refused as he never produced any evidence of work actually performed" for petitioners. After receiving this letter, Ryan sent a letter to petitioners directing them to send documentation that Bowman was an independent contractor or pay the claimed wages. Ryan testified that he spoke to Schwab and petitioner Michael Carl White on September 12, 2017. According to Ryan, they stated that Bowman came to their office for an interview and did some phone calls for them, but they never hired him. Ryan informed petitioners that if he did any work for them, such as phone calls, that is work that needs to be paid. Because petitioners never provided Ryan with any further information documenting that Bowman was an independent contractor, nor did they pay the wages, respondent issued orders against petitioners based on the information in Bowman's claim. Ryan never spoke to Bowman during the investigation and testified the only evidence Bowman was petitioners' employee was the claim form.

Petitioner Michael Carl White testified that in October 2016, he placed an ad on the internet seeking salespeople to sell ice tea for his beverage manufacturing company located in Southampton. White testified that Bowman responded to the ad and came to petitioners' offices

for an interview. During the interview, according to White, Bowman said he did not realize traffic between his home and the office was so bad and that he was only interested in the position if he could work from home as an independent contractor. White testified that he turned Bowman's offer to work from home down, did not hire him, and never heard from him again until several months later when he called claiming petitioners owed him a paycheck for one week's work making sales calls. White testified that he expects employees to report their progress when working from home and that he never received any reports from Bowman or he would have paid him.

Mark Bowman testified that he responded to petitioners' internet ad seeking to hire salespeople and was interviewed by White and another person. Bowman testified that because of the distance he lived from the office, White agreed that he could work every Monday in the office, and from home on the other days. Bowman testified that he was supposed to be paid $800.00 a week to make sales calls to bottling companies, that he worked six days for petitioners, and that he started work at the office on a Monday, worked the rest of the week from home, then went back to the office the following Monday. Bowman further testified that the next day, which was Tuesday, petitioners' controller called him to tell him it was not working out and that they were letting him go. Bowman testified that he worked 9:00 a.m. to 5:00 p.m. from home each day calling bottling and beverage companies from a list he generated himself from the internet. Bowman found a couple of possible sales leads from the calls he made, but when he turned his notes into petitioners, he understood they were dissatisfied with his productivity. Bowman explained that he claimed $960.00 in unpaid wages because he worked one week at $800.00 plus an extra day.

SCOPE OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (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 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 the same (*Id.* § 101 [3]). Pursuant to Board Rules of Procedure and Practice 65.30 (12 NYCRR 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the petitioner to prove by a preponderance of the evidence that the orders are not valid or reasonable. (*See also* State Administrative Procedures Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

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).

"Employer" as used in Labor Law Articles 6 and 19 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]). Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 U.S.C. § 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]).

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).

Not one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*Id.*).

We find petitioners failed to meet their burden of proof to show they were not Bowman's employer. Bowman provided detailed and credible testimony that he was hired by petitioners for a telephone sales position at a salary of $800.00 per week to work one day per week in petitioners' office and four days from home. Bowman also provided detailed and credible testimony of the efforts he made, on behalf of petitioners, attempting to generate sales and the number of days and hours he worked and that he provided reports of his progress to petitioners. We do not credit petitioners' evidence. White testified that petitioners never hired Bowman, never agreed that he could work from home, and were unaware he had done any work for petitioners. However, petitioners' letter of January 31, 2017, replying to respondent's investigation, admits that Bowman was hired and could work from petitioners' premises, from home or from the road, and that petitioners terminated Bowman. We find petitioners were Bowman's employer as a matter of economic reality where they hired and fired him and determined his rate of pay, and supervised or controlled his work schedule and conditions of employment by requiring him to work one day in the office and expecting that he would report his progress to petitioners. That petitioners did not supervise Bowman's daily work does not indicate they did not employ him (*Herman v. RSR Sec. Servs. Ltd.*, 172 F3d at 139). We find respondent's determination that petitioners were Bowman's employer is reasonable and reject petitioners' claim that he was an independent contractor. An independent contractor is somebody who is in business for themselves and is not dependent upon someone else's business to render services (*Brock v Superior Care Inc.*, 840 F2d 1054, 1059 [2d Cir 1988]). Petitioners presented no evidence that Bowman was in business for himself, rather the record indicates for the short period he worked for petitioners he was dependent on their business to make sales calls in an effort to sell their products. That petitioners labelled Bowman an independent contractor is not controlling (*Id.*).

The unpaid wages order is affirmed

Having found that petitioners employed respondent, petitioners produced no evidence to meet their burden to prove Bowman did not work the hours he claimed (Labor Law § 196-a).

Respondent's determination of wages owed, which was based on Bowman's claim form, is reasonable (*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 2010]). However, the record shows petitioners owe Bowman $960.00, not $1,040.00[1], and the order is modified accordingly. We also affirm the civil penalties, liquidated damages, and interest, which were not specifically challenged by the petition and were thereby waived (Labor Law § Labor Law § 101 [2]), and which the record shows were within the amounts allowed by statute (Labor Law § 218 [1] [liquidated damages and civil penalties]; Labor Law § 219 [1] [interest]). The civil penalties, liquidated, damages, and interest, however, must be recalculated based on the modified amount of wages owed.

Penalty Order

The penalty order assesses a $500.00 civil penalty against petitioners for failing to keep and/or furnish true and accurate payroll records for Bowman in violation of Labor Law § 661 and 12 NYCRR 142-2.6. There is no dispute that petitioners failed to maintain employment records for Bowman. The penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The unpaid wages order is modified to reduce the wages due and owing to $960.00 with liquidated damages, civil penalties, and interest, reduced proportionally, and respondent is directed to issue a modified order consistent with our decision; and

2. The penalty order is affirmed; and

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

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York,
on August 8, 2018

[1] Bowman testified consistent with his claim form that his salary was $800.00 a week and that he worked six days, or $160.00 per day, for a total due of $960.00, which is the amount he claimed in his claim form.

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