

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X
In the Matter of the Petition of:

RICARDO ENRIQUE BARBA AND GLOBAL
SERVICE CONSTRUCTION CORP.,

Petitioners,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Articles 6 and 19 of the
Labor Law dated February 4, 2019,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

DOCKET NO. PR 19-028

RESOLUTION OF DECISION

APPEARANCES

Ricardo E. Barba, petitioner pro se.

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

WITNESSES

Ricardo Enrique Barba, for petitioners.

Luis Tamay, Juan Tamay, Hector Tamay, and Senior Labor Standards Investigator Shaun Abrilz, for respondent.

WHEREAS:

Petitioners Ricardo Enrique Barba (hereinafter “Barba”) and Global Service Construction Corp. (hereinafter “Global Service”) filed a petition in this matter on February 25, 2019, pursuant to Labor Law § 101, seeking review of an order issued against them by respondent Commissioner of Labor (hereinafter “DOL”) on February 4, 2019. Respondent filed her answer to the petition on May 10, 2019.

Upon notice to the parties, a hearing was held on September 17, 2019 in Garden City, New York, before Administrative Law Judge Jean Grumet, the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to

examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

The order to comply (hereinafter “order”) directs compliance with Articles 6 and 19 of the Labor Law and payment to respondent for unpaid wages to Hector Tamay, Juan Tamay and Luis Tamay in the amount of \$2,100.00 for each claimant for the time period from February 16, 2018 to February 22, 2018 for a total of \$6,300.00 in unpaid wages; 16% interest calculated to the date of the order in the amount of \$958.29; 100% liquidated damages in the amount of \$6,300.00; a 50% civil penalty of \$3,150.00, and a \$500.00 civil penalty for violating Labor Law § 661 and Department of Labor Regulations (12 NYCRR) § 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee for the period February 12, 2018 through February 25, 2018.

The petition alleges that the orders are invalid and unreasonable because: (1) Barba was not an employer; (2) Global Service was out of business since August 2017; and (3) Barba has never met the claimants and did not hire them. Petitioners also contested the civil penalties, interest, and liquidated damages in the orders.

SUMMARY OF EVIDENCE

Petitioners’ Evidence

Testimony of Petitioner Ricardo Enrique Barba

Petitioner Ricardo Enrique Barba testified that he incorporated Global Service on May 24, 2016. Global Service, which had no employees and was operated by Barba with help on paperwork from his wife, was insured and licensed solely for interior carpentry construction work in Suffolk County. Barba is employed full-time as a quality control lab engineer for Universal Phototonics, a Central Islip manufacturer of liquid polishers, and worked full time, 40 hours per week during the relevant period, as confirmed by pay stubs for the weeks ending January 28, 2018 through April 4, 2018 which he offered in evidence. He performed Global Service’s work on weekends, successfully during 2016 and the first half of 2017. After a family tragedy in July 2017, he was unable to continue Global Service, and he closed the business by fall 2017. Because New York does not permit dissolution of a corporation with legal obligations, Barba could not formally dissolve Global Service until it paid some outstanding monies owed to New York State, which he accomplished towards the end of 2017, and more recently because of the present case with the DOL, but Global Service has done no business since, at the latest, November 2017. Its NYS-45 Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return for the first quarter of 2018, which Petitioners offered in evidence, lists no employees and lists August 31, 2017 as the date of final payroll. Barba does not know the claimants, and never saw them before the hearing. He never contacted them nor did they contact him, and they never worked for him or Global Service.

Barba learned of the DOL investigation when he received its May 25, 2018 letter stating that unpaid wages were owed to the claimants. This was the only letter Barba received from the DOL. He telephoned the DOL in Albany in response, although he does not recall exactly whom he spoke with and was told to send a letter explaining his position, which Barba testified he did in

June 2018. According to Barba, his letter to the DOL stated that he did not know the claimants, neither he nor Global Services ever employed them, and Barba himself was not employed by Global Service after 2017.

Barba testified that a phone number listed on the complaint forms which claimants filed with DOL is one he obtained for Global Service in 2016 and stopped using in the fall of 2017, thereafter, using only a personal cell phone number and a land-line fax number. Barba's father, Roger Barba, had no involvement in Global Service or with Barba's business, and in 2018 was "self-employed doing his own thing" Barba testified that he was not aware of what his father was doing: "his main thing is contracting, but he was not doing business with me." Roger Barba lives in Bay Shore, and Barba and his wife live in Selden. The van shown in a photograph which Respondent offered in evidence looks like one Barba has seen his father drive; Barba has no knowledge of other photos introduced as evidence by respondent. Barba is not aware of any business name used by his father, that his father has any middle name, or that his father ever goes by the name Royal. Barba does not associate much with his father and does not know if he continues to do construction work.

Respondent's Evidence

Testimony of Claimant Luis Tamay

Claimant Luis Tamay testified that Royal Barba met him and the other two claimants at a site in Queens where workers seek employment on a date that he did not recall and offered them a job doing stucco work at a games arcade in Coney Island. This was the first time Luis Tamay met Royal Barba. Royal Barba told the claimants he would pay them \$300.00 per day¹ to install stucco on the outside of a game arcade in Coney Island, and would pay them at the end of the week, after the whole job was completed. Royal Barba drove them to the Coney Island work site each day in the van shown in a photo which respondent offered in evidence that sported the initials "G.C.C.P." and a phone number not otherwise associated with this case; gave them instructions about the job; and drove them back to Queens at the end of the day. The van was left at the work site during the day but Royal Barba, after staying at the job site for two or three hours, would be picked up and taken elsewhere in another car, returning at day's end to drive the claimants back to Queens.

After Luis Tamay and the other claimants worked seven days straight, Royal Barba said he did not have money to pay them, and after a month passed, claimants complained to the DOL. Luis Tamay requested and received help filling out the DOL's Claim for Unpaid Wages form, which he signed on March 21, 2018. The form, which is not in Luis Tamay's handwriting except for the signature, states that "Ricardo Barba" or "Roger/Ricardo Barba" of Global Service hired Luis Tamay on February 16, 2018 for \$300.00 per day; that he worked from February 16, 2018 through February 22, 2018 when he was laid off because there was "no job/no payment;" and that the employer, when asked for payment on "3/2/2018 & after," refused. The form lists "Ricardo Barba" as the responsible person of the firm and the person to whom claimant's request that wages be paid was made, and "Roger/Ricardo Barba" as the person who hired him and of the "superintendent, manager or foreman." The form lists as the employer's phone number the one which Barba testified that he had obtained for Global Service but did not use after the fall of 2017.

¹ Luis Tamay initially stated Royal offered \$35.00 per hour, but later testified the Claim for Unpaid Wages he filed stating the offer had been \$300.00 per day was accurate, that a "person who works concrete or cement gets paid \$300.00 a day," and that Royal told him his pay would be \$300.00 per day.

Luis Tamay testified that Royal Barba “used to tell us the name of the company and tell us many things about it.” He also testified that when he googled the phone number given to him by Royal Barba, the names Global Service and “Mr. Barba” popped up, and that he believed Ricardo Barba owned the company because Royal Barba “used to converse with me telling me how he structure[d] the company,” with Royal Barba “bring[ing] the workers to the jobs.” Asked by the hearing officer what Royal Barba told him about the company, Luis Tamay answered: “that he has multiple jobs pending,” and that “the company’s been open for a long time In other words, I have ongoing work.”

Testimony of Claimant Juan Tamay

Claimant Juan Tamay testified that the claimants were at a site in Queens where workers seek employment and “Royal Barba” offered them \$300.00 a day to do stucco work. Asked by respondent’s counsel whether Royal Barba’s name “[b]y chance, would . . . have been Roger,” Juan Tamay testified, “Yeah, something like that.” Juan Tamay testified that the claimants worked for “Roger” at Luna Park in Coney Island from February 16 to February 22, 2018, with “Roger” driving them from Queens to the Coney Island worksite. The claimants did not get paid for their work, and when they phoned “Roger” he did not pick up and after a time, apparently blocked their numbers since the phone no longer even rang.

Juan Tamay identified photos of the van in which “Roger” drove them, and of Luis Tamay and Juan Tamay working in an amusement park and on a high wall using a forklift. Juan Tamay testified the photos were taken by claimant Hector Tamay. Like Luis Tamay, Juan Tamay testified that “Roger” gave the claimants instructions and then left the work site after about two hours, returning in the afternoon to drive them back to Queens.

Juan Tamay identified the DOL’s Claim for Unpaid Wages form which he signed on March 21, 2018, which is identical to and completed in the same handwriting as Luis Tamay’s form. Asked by respondent’s counsel whether “Roger” mentioned the name Ricardo Barba, Juan Tamay testified: “[w]e ask[ed] to call him by his name and he mentioned something like Ricardo Barba” When asked if “Roger” indicated who Ricardo Barba was, Juan Tamay replied, “[h]e had mentioned that that was the head of the company that we were working for.” Juan Tamay never saw Ricardo Barba before the hearing but testified that “Roger” “used to tell us that the company is under my son’s name.”

Testimony of Claimant Hector Tamay

Claimant Hector Tamay (“Hector”) testified that “Roger” asked the claimants if they wanted to work for him and took them to the job site after they accepted his offer of \$300.00 per day for stucco work. Ricardo Barba “never appeared at the job site. Only Roger.” Although Hector Tamay tried repeatedly to reach “Roger” for payment after working from February 16 to 22, 2018, he could not get through, and never saw “Roger” again after the job’s completion. Hector Tamay took photos of the van and of Luis Tamay and Juan Tamay working but did not photograph “Roger,” lest he think Hector Tamay was playing with his phone instead of working. Hector Tamay identified the DOL’s Claim for Unpaid Wages form which he signed on March 21, 2018, which is identical to and completed in the same handwriting as Luis Tamay’s and Juan Tamay’s forms.

Testimony of Senior Labor Standards Investigator Shaun Abrilz

Senior Labor Standards Investigator Shaun Abrilz (hereinafter “Abrilz”) completed the DOL’s investigation in this case and introduced the DOL investigative file into the record. Abrilz testified that as a Senior Labor Standards Investigator, he reviews claim forms for accuracy, aims to do “an accurate search on the responsible party, the employer and the business,” and then mails a collection letter. Abrilz signed the DOL’s May 25, 2018 letter to “Global Service Construction Corp, Attn: Ricardo Enrique Barba”, which states that it constitutes “final notice to you before we take action to collect the unpaid wages.”²

Abrilz testified that before the issuance of the order, he telephoned the number given in the complaint forms the claimants had filed. According to the contact log, on October 17, 2018³ Abrilz called “ER through interpreter . . . He stated he would respond and call back . . . I advised he has until 10/27/2018 to provide a response or OTC will be referred.” Abrilz testified he used a Spanish interpreter because one was requested by the person who answered the phone, whose identity Abrilz does not recall and who is not named in the contact log. Abrilz stated that no response from the employer was received and the October 17, 2018 conversation was the only actual contact with the employer during the DOL investigation. In the absence of contrary information or employer records, the DOL issued the order based on information provided by the claimants, including imposing a \$500.00 penalty for failure to provide payroll records and a 50% civil penalty for failure to pay wages, which Abrilz described as “a baseline first penalty” although the statute permits penalties up to 200%.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the Board Rules of Procedure and Practice (hereinafter “Board Rules”), (12 NYCRR) § 65.39. For the reasons discussed below, we find that Barba and Global Service were not the employer, and we revoke the order.

Standard of Review and Burden of Proof

Petitioners’ burden of proof in this matter was to establish by a preponderance of the evidence that the order issued by the Commissioner is invalid or unreasonable (State Administrative Procedure Act § 306; Labor Law §§ 101, 103; Board Rules [12 NYCRR] 66.30; *Matter of Garcia v Hedy*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc. (T/A Rodeway Inn)*, Docket No. PR 08-078, at p. 24 [Oct. 11, 2011]). A petition must state “in what respects ‘the order on review’ is claimed to be invalid or unreasonable,” and any objections not raised shall be deemed waived (Labor Law § 101 [2]). The Labor Law provides that an order of the commissioner shall be presumed valid (*id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]).

² Respondent also offered in evidence an earlier, April 11, 2018, letter to Global Service, signed by a different investigator, but Abrilz testified that letter was returned in the mail to DOL by the post office.

³ Although the contact log also includes an identical entry dated January 17, 2018, Abrilz testified that entry was a mistake and should be disregarded.

Petitioners Were Not the Claimants' Employer

“Employer” as defined in Labor Law Article 6 means “any person, corporation, limited liability company, or association” (Labor Law § 190 [3]; *see also* Labor Law § 2 [6]). “Employed” means “permitted or suffered to work” (Labor Law § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (hereinafter (“FLSA”) defines “employ” to include “suffer or permit to work” (29 USC § 203 [g]), and the test historically used 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 Maria Lasso and Jaime M. Correa Sr. and Exceed Contracting Corp.*, Docket No. PR 10-182, at pp. 6-7 [Apr. 29, 2013], *affd sub nom. Matter of Exceed Contracting Corp. v Industrial Bd. of Appeals*, 126 AD3d 575, 576 [1st Dept 2015]); *Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 635 [1st Dept 2013]; *see also Matter of Netram v New York State Indus. Bd. of Appeals*, 162 AD3d 1362 [3d Dept 2018]; *Chung v New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n 6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), citing *Carter v Dutchess Community College*, 735 F2d 8, 12 (2d Cir 1984) and *Goldberg v Whitaker House Cooperative, Inc.*, 366 US 28, 33 (1961), the Second Circuit 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).

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a “totality of circumstances” (*id.*) Under the economic reality test, employer status “does not require continuous monitoring of employees, looking over their shoulders at all times, or absolute control of one's employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control do not diminish the significance of its existence” (*id.* at 139) (internal quotation marks omitted). Under the broad New York and FLSA definitions, it is well settled that more than one entity or person can be found to be a worker's employer (*id.*; *Matter of Robert H. Minkel and Millwork Distributors, Inc.*, Docket No. PR 08-158, at p. 8 [January 27, 2010]). The existence and degree of each factor is a question of fact while the legal conclusion to be drawn from those facts is a question of law (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1059 [2d Cir 1988]).

Barba testified, and respondent presented no evidence to dispute, that he does not know the claimants and never saw them before the hearing; that he never contacted them nor did they contact him; that they never worked for him or Global Service; and that Global Service did not operate at all after, at the latest, November 2017. The Commissioner did not submit sufficient evidence establishing that Barba and/or Global Service possessed the requisite authority over claimants'

employment to be deemed an employer under the Labor Law by a preponderance of the evidence. The Commissioner failed to refute petitioners' evidence and her evidence does more to support petitioner's argument than it does to rebut it.

Each claimant testified that "Royal" hired them and promised to pay them \$300.00 per day and failed to do so after they performed seven full days of work; drove them from Queens to the Coney Island worksite each morning and back at the end of the workday; and, supervised and instructed them on how to perform their work (three of the four *Herman* factors) without, so far as the record shows, consulting or needing to consult anyone else. On the record before us, there is no probative evidence that either Barba or Global Service – as distinct from Roger Barba, who was not named in the Order to Comply – had any connection to the claimants or satisfied any of the *Herman* factors for finding an entity or person an employer, let alone "possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts" (*Herman*, 172 F3d at 139). While no records concerning the claimants were kept by anyone, Global Service did file a NYS-45 form for the relevant period, it listed no employees and August 31, 2018 as the date of final payroll, facts tending to support Barba's testimony that Global Service was not even operating at the relevant time (*id.*).

Although the identical Claims for Unpaid Wages forms (completed with help from DOL) which the claimants signed on March 21, 2018 refer to Global Service and — apparently interchangeably — "Ricardo Barba" and "Roger/Ricardo Barba," none of the claimants ever claimed to have dealt with Ricardo Barba. In testimony, Hector Tamay did not refer to Barba or Global Service at all. Luis Tamay testified that Royal "used to tell us the name of the company and . . . many things about it" but when asked what things, he answered: "that he has multiple jobs" and "ongoing work." Testimony that Royal Barba, the only person claimants ever dealt with, said "the company" had multiple jobs or ongoing work is plainly an insufficient basis to find Barba or Global Service the claimants' employer. While Luis Tamay also testified that Royal Barba stated that his role for "the company" was to bring workers to jobs, the photo of the van in which Royal Barba drove claimants to the worksite shows the van bore the initials "G.C.C. P.," not the name Global Service Construction Corp., and bore a phone number otherwise unmentioned in this case, not one associated with Global Service or Barba.

Juan Tamay testified that "Roger" mentioned "something like Ricardo Barba . . . was the head of the company that we were working for . . . and used to tell us that the company is under my son's name." This "vague testimony of an impression," instead of specific testimony of Barba's actual role as an employer is insufficient to show that Barba had the requisite power to control the claimants required to find him individually liable as an employer (*Fen F. Lim a/k/a Diana F. Lim and Kelantan Corp. (T/A Nyonya Malaysian Cuisine)*, Docket Nos. PR 14-049 and PR 14-053, at p. 9 [April 13, 2016]). "Roger's" reported comments are outweighed as evidence by Barba's undisputed testimony that Global Service did not operate after, at the latest, November 2017; that even when it did operate the company did only weekend interior carpentry work in Suffolk County, not seven-day-a-week, exterior masonry work in Coney Island; that "Roger" had no involvement with Global Service or Barba's business; and that Barba has little contact with his father.

The sole fact suggesting any connection between "Roger" and Global Service is that "Roger" gave claimants a phone number that Barba testified he obtained for Global Service in 2016 and stopped using in the fall of 2017, thereafter, using only a personal cell phone number and a land-line fax number. Luis Tamay's testimony that when he googled the number, Global

Service's name popped up further suggests that this number led claimants and the DOL to connect their work to Global Service and Barba. We do not find "Roger's" having purportedly given the number to claimants a sufficient basis to establish Global Service's or Barba's liability as employers.

Abrilz testified that on October 17, 2018 he used the number to call the employer through an interpreter and spoke in Spanish with someone whose name he cannot recall. Nothing in the record suggests that it was Barba (who testified in English at the hearing) or anyone else speaking for Global Service, nor did Abrilz recall anything about the conversation to support a finding of employer status for either of them. Respondent never explained its conclusion that Barba and Global Service were claimants' employers, and we find the mere facts that "Roger" purportedly gave claimants a Global Service number and Abrilz later reached an unknown person by calling that number insufficient to show such liability.

The Board in earlier cases has revoked orders to comply where there was evidence of underpayment, but the *Herman* standard did not support finding employer status on the part of a petitioner (*Matter of Lorenzo Mannino and Giulio Mannino and Il Colosseo, LLC*, Docket No. PR 17-120, at p. 6 [Dec. 12, 2018]; *Wah Chan Wong and H.K. Tea and Sushi, Inc.*, Docket No. PR 12-090, at pp. 6-10 [October 26, 2016]; *Elba Arvelo a/k/a Elba Peralta (T/A Restaurant Los Taxistas)*, Docket No. PR 15-171, at pp. 10-11 [May 25, 2016]; *Yolonda D. Braham A/K/A Yolonda D. White*, Docket No. PR 13-064, at pp. 9-12 [June 10, 2015]).

In *Matter of Lorenzo Mannino*, the DOL failed to rebut evidence that during the relevant period one petitioner — the father of another, who was found liable — "had no role in operating the business, managing, directing, or controlling the employees, or determining the wages paid to employees" and therefore was not an employer under the Labor Law (*Matter of Lorenzo Mannino and Giulio Mannino and Il Colosseo, LLC*, Docket No. PR 17-120, at p. 6). Similarly here, respondent did not rebut Barba's testimony that during the relevant period Global Service did not operate and he had no role in directing, controlling or determining the wages of the claimants, with whom he had no contact and of whom he was completely unaware. As *Matter of Lorenzo Mannino* underscores, that a petitioner is related to a person who is an employer (in this case, that Barba is "Roger's" son) does not mean the petitioner is an employer too. Accordingly, as in *Matter of Lorenzo Mannino*, the order to comply with respect to petitioners must be revoked.

We find that the petitioners met their burden of proving that that they, as distinct from Roger Barba to whom no Order to Comply was issued, were not the claimants' employer. We find based on the totality of the circumstances of the record before us, that respondent's determination that Barba is individually liable and that Global Service was an employer under Article 6 of the Labor Law was unreasonable, and we revoke the order, including the civil penalties, liquidated damages and interest imposed therein.

//////////

////////

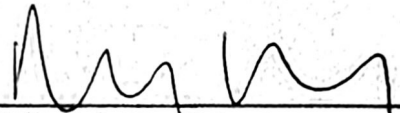
////

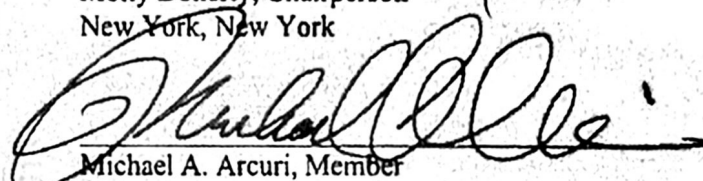
//


NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

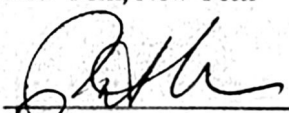
1. The order is revoked as to Ricardo Enrique Barba and Global Service Construction Corp.;
and
2. The petition for review be, and the same is granted.

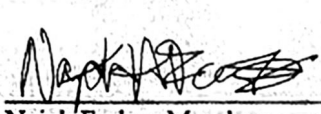
Dated and signed by the Members
of the Industrial Board of Appeals
on June 24, 2020.



Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Gloribelle J. Perez, Member
New York, New York

Patricia Kakalec, Member
Brooklyn, New York

Najah Farley, Member
Brooklyn, New York