STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
RAFAEL ALMONTE AND D'ALMONTE ENTERPRISES PARKING GARAGE INC.,	:	
Petitioners,	:	DOCKET NO. PR 12-040
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Article 19 of the Labor Law, both dated January 9, 2012,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Sanford B. Goldberg, Esq. (Donald Vogelman of counsel), for petitioners.

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

WITNESSES

Rafael Almonte and Santos Soto, for petitioners.

Rafael Baez, Jose Ramirez, and Leo Lewkowitz, Labor Standards Investigator, for respondent.

WHEREAS:

On February 6, 2012, petitioners Rafael Almonte and D'Almonte Enterprises Parking Garage, Inc. filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued against them by the Commissioner of Labor (Commissioner) on January 9, 2012. The Commissioner filed an answer on May 22, 2012.

Upon notice to the parties, a hearing was held on September 9, 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) directs that petitioners comply with Article 19 of the Labor Law and pay the Commissioner minimum wages owed to claimant employee Rafael Baez in the amount of $17,244.83 for the period December 21, 2007 through April 19, 2009, together with interest continuing thereon at the rate of 16% to the date of the order in the amount of $9,401.98, liquidated damages in the amount of $4,311.21, and a civil penalty in the amount of $17,244.83. The total amount due is $48,202.85.

The second order (penalty order) under Article 19 of the Labor Law directs that petitioners pay a civil penalty of $1,000.00 for failure to maintain and/or furnish true and accurate payroll records for each employee, and $1,000.00 for failure to provide each employee a complete wage statement with each payment of wages, during the period from December 21, 2001 through April 19, 2009. The total amount due is $2,000.00.

The petition alleges that the orders should be revoked because petitioners never employed the claimant during the period of his claim.

SUMMARY OF EVIDENCE

The Wage Claim

On April 23, 2009, claimant Rafael Baez filed a claim for unpaid minimum wages with the Department of Labor (DOL) stating that he was employed by petitioners as a parking attendant at 2080 Jerome Avenue, Bronx, New York during the period from December 21, 2007 to April 21, 2009 and was not paid overtime for the hours he worked over 40 per week. Claimant alleged that he worked six days per week, from 7:00 p.m. to 7:00 a.m. each day, with a half-hour break for meals. He was paid in cash at the rate of $390.00 per week and did not receive a wage statement.

Petitioners' Evidence

Testimony of petitioner Rafael Almonte

Petitioner Rafael Almonte is the owner and operator of a parking garage business known as "D'Almonte Enterprises Parking Garage, Inc." located at 2080 Jerome Avenue (2080 Jerome) in Bronx, New York. The company was registered as an active corporation with the Department of State on October 7, 2008, with petitioner as its chairman and chief executive officer.

Petitioner testified that he filed papers to incorporate the company, signed a lease, and started his business at the site in October 2008. During the period from December 2007 through October 2008 he was working as a parking attendant at another garage[1] and did not operate any business at 2080 Jerome. Petitioner asserted that he never employed the claimant during the period of his claim, or at anytime, and had never even seen him before the date of the hearing.

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[1] That garage was located at 2102 Jerome Avenue.

Petitioner recalled that an investigator visited him at his business during DOL's investigation, requested payroll records, and asked him whether there was another person working with him. He referred the investigator to his accountant for the records and told him that he worked with another person named Sergio Almarante. He also told him that the garage was open at that time from 6:00 a.m. to 11:00 p.m. The accountant later called when the investigator was present at his office and petitioner told them he did not know anyone named Rafael Baez.

On cross-examination, petitioner testified that he had employed Almarante continuously from the date he entered his lease for the garage on October 1, 2008 through the present. He also employed another person named Jose Rivas for a short period of time but could not recall the dates. The investigator advised him to get a time clock to keep track of employee hours and petitioner did so right away. Before that time he did not keep a record of their daily hours but would report their names and work schedules to his accountant who maintained all his records.

As evidence of his rental of the property, petitioner submitted a copy of a lease for the premises at 2080 Jerome between petitioner and "2080 Jerome Avenue Realty Corp." for the period from October 1, 2008 to September 30, 2013 and identified his signature on the lease.

Testimony of Santos Soto

Santos Soto testified that his son Heriberto Soto is the owner and "landlord" of the parking garage at 2080 Jerome and that he helps his son manage the property. He identified his son's signature on the lease between petitioner and 2080 Jerome Avenue Realty Corp. that started in October 2008. The garage is a two-story building with a ramp that goes up and down. From 1985 to 2010 Santos owned the building next door at 2100 Jerome Avenue where he operated a wholesale beer and soda business known as "Burnside Beverage Center."

Santos testified that there was a prior tenant that rented the top floor of the garage at 2080 Jerome for four years until the beginning of 2007, after which Santos took the tenant to court and evicted it for non-payment of rent. Until sometime in 2007 Santos used the bottom floor as a warehouse to store beverages for his business. From December 2007 to October 2008 no tenant operated any business at 2080 Jerome and the building "was totally empty."

On cross examination, Santos was presented with a sworn affidavit he signed on July 24, 2014 stating that "I am the landlord of the premises" known as 2080 Jerome Avenue, Bronx, New York. Santos explained that the reason he described his status that way was because "my son and [I] work together." The affidavit further states, "I am president of the landlord 2080 Jerome Avenue Realty Corp." Santos testified that petitioner was currently renting the garage at 2080 Jerome and that he personally was receiving rent from him for the premises. He acknowledged that petitioner was a very good tenant who paid his rent on time and that he did not want to have to find another one.[2]

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[2] The previous five year lease provided for annual rents of $48,000.00 in the first year, $49,220.00 in the second, $51,600.00 in the third, $52,800.00 in the fourth, and $54,000.00 in the fifth year of the lease.

DOL's Evidence

Testimony of claimant Rafael Baez

Claimant Rafel Baez testified that in 2007 he was looking for work and was introduced to petitioner by a person named "Felo." Petitioner hired claimant and Felo in December 2007 to help him open a parking business at 2080 Jerome after he received the property from the landlord because the prior operator had not paid the rent. Claimant identified petitioner at the hearing and testified that he was employed by him as a parking attendant at 2080 Jerome from December 21, 2007 to April 19, 2009, at which time he was let go following a four-day trip he made out of the country. Claimant authenticated his claim form and testified that he filed it with DOL on April 23, 2009, three or four days after he was terminated.

Claimant testified that petitioner scheduled his hours and assigned him to park cars on a shift from 7:00 p.m. to 7:00 a.m. each day while another attendant worked from 7:00 a.m. to 7:00 p.m. Felo worked the day shift for the first 10 months after the business opened and claimant replaced him at night. Claimant also worked with an employee named "Jesus." Petitioner paid him in cash at the rate of $390.00 per week. Claimant further testified that he parked cars on the upper floor of the building, while petitioner sold refrigerators and stoves on the lower floor. Next to the parking garage was a business where the landlord sold beer. Claimant identified Santos Soto at the hearing and said that he and his son worked at the beverage company next door. Claimant often parked his son's car.

Testimony of Jose Ramirez

Jose Ramirez testified that he has been employed for the past nine years making food deliveries for a restaurant called "Liberato Restaurant" on 183rd Street near Jerome Avenue in Bronx, New York. The restaurant is located about four or five blocks from 2080 Jerome Avenue. He first met claimant Rafael Baez around the year 2007 or 2009. During that time period his hours at the restaurant were 6:00 a.m. to 6:00 p.m. He recalled that he made food deliveries to claimant while he was working at the parking garage at 2080 Jerome in the mornings around 7:00 a.m. and in the evenings around 6:00 or 7:00 p.m. While his hourly pay and shift ended at 6:00 p.m. each night, he frequently extended himself later and made extra deliveries so he could make more tips.

Testimony of Labor Standards Investigator Leo Lewkowitz

Labor Standards Investigator Leo Lewkowitz testified concerning the investigation that resulted in the orders under review.

In follow up to the claim, Lewkowitz obtained a report from the NYC Department of Consumer Affairs showing that a 24 hour parking license was issued petitioner on November 6, 2008. On April 11, 2011, he performed a field visit to petitioner's premises where he spoke with him and requested payroll records. Petitioner informed him that the parking garage operated from 6:00 a.m. to 11:00 p.m. or midnight and referred him to his accountant for payroll records. Lewkowitz left a Notice of Revisit requesting the information and sent the accountant a letter stating that he should provide records of all employees' hours worked and wages paid from January 1, 2008 to the present, including daily time records, payroll registers, NYS 45 quarterly

tax records, and a list of all employees' names, addresses, and length of employment.

On May 23, 2011, Lewkowitz reviewed petitioner's payroll records at the accountant's office. The accountant indicated that petitioner started the business in the fourth quarter of 2008. At Lewkowitz' request, he called petitioner and asked him if he knew the claimant. Petitioner replied that he did not know anyone by the name of Rafael Baez. No daily time records were produced. NYS 45 quarterly tax forms showed that petitioner Rafael Almonte was the only employee of the business starting with the fourth quarter of 2008 through the first quarter of 2010. Payroll registers showed that he worked exactly 40 hours per week during that period. Additional tax records showed that petitioner and Jose Rivas were the employees of the company from the second quarter of 2010 through the fourth quarter of 2010. Starting with the first quarter of 2011, an employee named Horacio Almerante had replaced Jose Rivas.

Lewkowitz requested that claimant respond to the employer's contentions and provide witness statements verifying his employment. Claimant submitted statements from customers substantiating that he had worked at the parking garage during the entire period of his claim, including the earlier period that petitioner said his business was not in operation. In a phone call with claimant on December 15, 2011, claimant indicated that during this earlier time period petitioner had operated the business under another person's name. Based on the written claim, the witness statements, the lack of credibility of petitioner's payroll records, and DOL's investigation, Lewkowitz determined that claimant had been employed by petitioner and was owed back wages. Petitioner's records were deemed suspect because they showed he was working a 40 hour week during much of the time period that claimant said he was employed, with no other employees, yet was operating a 24 hour garage.

Based on DOL's investigation and the absence of accurate payroll records establishing that claimant was paid the wages due, the Commissioner issued the orders under review on January 9, 2012.

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).

Claimant Was "Employed" by Petitioner Under the Labor Law

Petitioners' burden of proof in this case was to establish by a preponderance of evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

Labor Law § 651 (6) defines the term "employer" as including "any individual, partnership, association, corporation, limited liability company, business trust, legal representative, or any organized group of persons acting as employer." An "employee" is described as "any individual employed or permitted to work by an employer in any occupation." (*Id.* § 651 [5]). "Employed" means that a person is "permitted or suffered to work" (*Id.* § 2 [7]).

We credit claimant's testimony and find that petitioner failed to meet his burden of proof to establish by credible evidence that he did not employ claimant during the period of his claim. Claimant credibly testified that in 2007 he was looking for work and was introduced to petitioner by his co-worker named Felo. Petitioner then hired claimant and Felo in December 2007 to help him open a parking business at 2080 Jerome after he had received the property from the landlord because the prior operator had not paid the rent. From December 21, 2007 to April 19, 2009 claimant worked under petitioner's direction and control as a parking attendant until he was let go following a four-day trip he took out of the country. Claimant filed his claim with DOL four days later.

Claimant further testified in detail that petitioner scheduled his hours, assigned his duties, and directed him to park cars on the night shift from 7:00 p.m. to 7:00 a.m. Felo worked the day shift from 7:00 a.m. to 7:00 p.m. Felo left the job after 10 months and claimant worked with another employee named Jesus. Petitioner set claimant's rate of pay and paid him in cash at a salary of $390.00 per week. Claimant described the various business operations at the site, explaining that he was assigned to park cars on the upper floor of the two-story building, while petitioner sold refrigerators and stoves on the lower floor. Next to the garage was a building where the landlord Santos Soto and his son operated a beverage company. Claimant added that he often parked the son's car.

We credit claimant's testimony as it was detailed and specific, credible, and corroborated by another witness who worked in the neighborhood and served food to the claimant while he was working at the garage. Jose Ramirez testified that he had been employed for the past nine years making food deliveries for a restaurant located about four or five blocks from 2080 Jerome Avenue. He first met claimant around 2007 or 2009. He recalled that he made food deliveries to claimant while he was working at the parking garage in the mornings around 7:00 a.m. and in the evenings around 6:00 or 7:00 p.m. We credit Ramirez' testimony as it was credible and not rebutted by petitioner.

Petitioner's testimony concerning claimant's employment was general, inconsistent, and not credible. Petitioner generally denied that he employed the claimant and asserted that he had never even seen him before the date of the hearing. Petitioner claimed that he worked as a parking attendant at another parking garage during the first portion of the claim period from December 2007 to October 2008 and did not operate any business at 2080 Jerome. He did not submit employment or tax records substantiating this prior employment to DOL during its investigation, however, and did not do so at hearing.

Petitioner testified that he signed a lease and started his business in October 2008 and employed at least one parking attendant named Rafael Almerante from that date forward all the way through the present. He did not maintain daily time records but reported the names and work schedules of his employees to his accountant. Quarterly tax filings submitted by his accountant to DOL during its investigation showed, however, that petitioner was the *only* employee of the company from the third quarter of 2008 through the first quarter of 2010, a period of some 18 months. Payroll registers showed that petitioner worked exactly 40 hours a week during that period. Petitioner's lack of candor concerning his employees and his records undermines the credibility of his testimony that he never employed the claimant and had never seen him before. We credit claimant's specific testimony over his general denials.

We do not credit the testimony of Santos Soto as it was evasive and undercut by his admission of a substantial economic relationship with the petitioner. Santos testified that he evicted the prior tenant of the parking garage for non-payment of rent in 2007 and from December 2007 to October 2008 the building "was totally empty."

On cross-examination, Santos admitted that he signed a sworn affidavit in July 2014 stating that "I am the landlord of the premises" and "I am president of the landlord 2080 Jerome Avenue Realty Corp." Santos acknowledged that petitioner is currently renting the parking garage and that he personally is receiving rent from him. Because petitioner is a good tenant he certainly did not want to lose him and have to find another. In light of Santos' direct and substantial economic relationship with petitioner that may be affected by the litigation, he was not an independent witness.

We find the record evidence establishes that claimant was hired by petitioner Rafael Almonte and "permitted and suffered to work" as a parking attendant during the period of his claim. An employment relationship thereby existed between petitioner and claimant and he is responsible for any wages owed under the Labor Law (*Matter of Rafael Martinez,* PR 13-055 [December 17, 2014]; *Matter of Haull 4 PFS, Inc.*, PR 10-329 [July 22, 2015]). Since the corporate entity "D'Almonte Enterprises Parking Garages, Inc." was not registered with the State until October 7, 2008, that entity is responsible as an employer for any wages from that date forward. We modify the wage order accordingly.

Interest

Petitioners did not challenge the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). The order is modified to reduce the amount of wages owed by petitioner D'Almone Enterprises Parking Garage, Inc. and the interest shall be reduced proportionally.

Liquidated Damages

Petitioners did not challenge the Commissioner's determination to assess liquidated damages in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). The order is modified as to the total amount of wages owed by petitioner D'Almonte Enterprises Parking Garage, Inc. and the liquidated damages shall be reduced proportionally.

Civil Penalty

Petitioners did not challenge the civil penalty assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). The order is modified as to the total amount of wages owed by petitioner D'Almonte Enterprises Parking Garage, Inc. and the civil penalty shall be reduced proportionately.

Penalty Order

Petitioners did not challenge the civil penalties assessed in the penalty order and the issue is thereby waived pursuant to Labor Law § 101(2).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed against petitioner Rafael Almonte but modified to reduce the wages owed by petitioner D'Almonte Enterprise Parking Garage, Inc. to the period from October 7, 2008 to April 19, 2009, with interest, liquidated damages, and civil penalty reduced proportionally, and is otherwise affirmed; and

2. The Commissioner is directed to issue an amended wage order consistent with this decision; and

3. The penalty order is affirmed; and

4. The petition 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
December 9, 2015.