STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
SATURNINA SERRANO (T/A TELETRONIC RADIO & T.V. CO.),	:	
Petitioners,	:	DOCKET NO. PR 12-152
To Review Under Section 101 of the Labor Law: An Order to Comply With Article 19 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated August 17, 2012,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Robert T. Anker, Esq., for petitioner.

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

WITNESSES

Former Labor Standards Investigator Tiffany Infantes, Faustino Cabrera, Jacques Michaane, Adrian Serrano, Warren Serrano, Saturnina Serrano, Darien Serrano, and [redacted] for petitioner.

[redacted] Fernanda Santos, and Rafael Jimenez for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on October 30, 2012, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) on August 17, 2012 against petitioner Saturnina Serrano (T/A Teletronic Radio & T.V. Co.). An amended petition was filed on November 31, 2012. Respondent filed an answer on December 4, 2012. Petitioner filed a reply to the answer on December 14, 2012.

Upon notice to the parties hearings were held in this matter on November 18, 2014, December 19, 2014, April 16, 2015, April 17, 2015, and May 11, 2015, in New York, New York, before Devin A. Rice, then Associate Counsel to the Board, now Deputy Counsel, 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, make statements relevant to the issues, and to file legal briefs.

The order to comply with Article 19 of the Labor Law under review (wage order) directs compliance with Article 19 and payment to the Commissioner for unpaid minimum wages due and owing to claimant [redacted] in the amount of $48,280.74 for the period from November 12, 2005 to September 30, 2006, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $45,460.62, liquidated damages in the amount of $48,280.74, and assesses a civil penalty in the amount of $96,561,48, for a total amount due of $238,583.58.

The order under Article 19 of the Labor Law under review (penalty order) assesses a $47,000.00 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 from the period from on or about September 5, 2005 through September 30, 2006, and a $47,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages for the time period from on or about September 5, 2005 through September 30, 2006, for a total civil penalty of $94,000.00.

The amended petition alleges in relevant part that the orders are unreasonable or invalid, because petitioner was not claimant's employer during the relevant time period, claimant was paid for all time worked for Teletronic Radio and T.V. Co., which was owned and managed by Lucio Serrano, and his death extinguished all claims related to Teletronic Radio and T.V. Co.

I. SUMMARY OF EVIDENCE

A. Introduction

This matter arises out of a claim filed by [redacted] against petitioner, Saturnina Serrano. [redacted] is Saturnina Serrano's niece,[1] who Saturnina Serrano and her late husband, Lucio Serrano, assisted in immigrating to the United States. [redacted] lived in her own room in the Serranos' residence in Brooklyn, New York, and alleged in her claim to DOL that she worked 18 ¼ hours per day for Saturnina Serrano from July 1998 to September 2006 as a domestic employee, a porter in several residential apartment buildings owned by the Serranos, and at a television repair shop operated by Lucio Serrano. [redacted] alleged petitioner paid her $50.00 or $100.00 a week in wages during the period from March 2004 to September 2006. [redacted] alleged she stopped working for petitioner in September 2006, when she was thrown out of the Serranos' home by petitioner. Lucio Serrano passed away on February 23, 2011, and [redacted] filed her claim with DOL on November 30, 2011.

[1] The daughter of Saturnina Serrano's sister.

B. Petitioner's Evidence

1. *Claim of* [redacted]

[redacted] appeared at DOL's offices in New York, New York, on November 30, 2011, accompanied by two representatives from South Brooklyn Legal Services[2], and filed a claim with then Labor Standards Investigator Tiffany Infantes. Infantes testified that she spent over an hour with [redacted] asking her various questions. Infantes filled out a claim form based on [redacted] answers to her questions, and attached her handwritten notes of the interview.

[redacted] claim alleges that petitioner Saturnina Serrano employed her from July 1995 to September 2006 at various locations as a domestic worker, building porter, and retail store laborer, for a final wage rate of $100.00 per week. The claim states petitioner terminated claimant's employment when she became ill and petitioner told her she "caused too many problems."

Infantes' handwritten notes attached to the claim indicate [redacted] worked each day from 4:30 a.m. to 11:00 p.m., and describes her schedule as:

- Cleaning four residential buildings from 5:00 a.m. to 7:30 a.m.;
- Working in the electronics store from 8:00 a.m. to 8:00 p.m., which included inventory, dismantling electronics, and cleaning; and
- Domestic work from 9:00 p.m. to 11:00 p.m., which included cleaning the kitchen, bathroom, and basement.

Infantes' notes also indicate that [redacted] alleged that after she closed the store at 8:00 p.m. she returned to the residential buildings to empty the garbage and replace the bags.

Infantes testified that [redacted] claimed to work 18 ¼ hours per day for a long period of time, but that due to the delay between the time worked and when the claim was filed, DOL could only investigate a time period of "less than a year" because of the statute of limitations for wage claims. Infantes found [redacted] credible, and explained that [redacted] told her story as she recalled it, which did not seem rehearsed. DOL determined that [redacted] worked 128 ½ hours per week based on the total of the work performed at the home, residential buildings, and electronics store.

[redacted] alleged petitioner was her supervisor, and Infantes testified that based on [redacted] allegations, petitioner had direction, supervision, and control over claimant's domestic work, and "[a]s far as the electronic shop and residential building, my understanding is that Mr. Lucio Serrano, the [petitioner's] husband handled that part." Infantes, however, further testified that DOL determined "that the Serranos were the owners and employers. They were treated as one employer." Infantes also recalled that claimant said Saturnina Serrano "directed her in domestic employment. She would send her to the buildings, and, then her job was to, after cleaning the buildings, go to the store." With respect to the electronics store, claimant informed Infantes that "she worked with the husband in the store. [Petitioner] sent her there. Saturnina is the person who determined what she would do . . . she sent her to the store . . . I don't know if she told her

[2] Attorney Anna Tavis represents claimant and was present at each day of hearing.

to fix this television at this time. I didn't ask her that." With respect to the buildings, "Saturnina told her to go to the buildings. She was directed to clean the floors, change the garbage bags and take the garbage out."

2. *DOL's Investigation*

After taking [redacted] claim, Infantes investigated it by first attempting to make an unannounced inspection of the electronics store on December 22, 2011, which she found was out of business. At the time of the attempted inspection, Infantes was not aware that Lucio Serrano was deceased. Infantes testified that she also attempted to investigate petitioner's residence, but could not gain access. She did not recall whether she provided notice to petitioner that she wanted to inspect the home. Infantes did not attempt to visit the residential buildings [redacted] alleged she worked in as a porter, and never inquired whether the buildings had a superintendent. Nor did Infantes attempt to interview any witnesses who could corroborate [redacted] claim.

On April 20, 2012, DOL sent petitioner a letter advising her of the claim filed against her, identifying the claimant, requesting payroll records, and scheduling a time for petitioner to appear at a meeting at DOL's offices. Petitioner and her son, Warren Serrano, appeared together for the scheduled appointment. Infantes testified that the Serranos were not cooperative at the beginning of the meeting, provided no information, originally denied even knowing the claimant, and later admitted knowing her, and accused her of stealing from them. Infantes testified that the Serranos contradicted themselves numerous times during the interview, whereas the claimant was consistent and credible.

Infantes stated that Warren Serrano referred DOL to an accountant for wage and hour records for claimant, but the few records provided were incomplete. Infantes found claimant more credible than petitioner, and in the absence of required records, claimant's allegations were given more weight than the information provided by the Serranos. Infantes, however, did not discredit all information provided by petitioner. She considered information provided by petitioner that petitioner provided claimant a furnished room in her home. This information was used by DOL to determine petitioner should be given credit for a lodging allowance when determining the wages owed to claimant.

Infantes testified that the ultimate determination that petitioner was an "employer/owner" was made by Senior Labor Standards Investigator Rashid Allen[3]. The determination that petitioner supervised, directed, and controlled claimant was based on information gathered from the claimant, petitioner, and Warren Serrano, although Infantes testified she "did not know" the extent of petitioner's involvement in the electronics store and residential buildings.

3. *Petitioner's Testimony*

Petitioner Saturnina Serrano testified that she provided claimant a furnished room and private bathroom in the Serranos' home at no cost, and that claimant did no domestic work at the home other than cleaning her own room and bathroom. Petitioner took care of the home, not claimant, who petitioner described as a "princess." Petitioner also testified that she prepared

[3] Allen did not testify.

meals for the claimant, which claimant ate with the rest of the family. According to petitioner, claimant woke up each day at 8:00 a.m. and went to bed at 10:00 p.m.

Petitioner testified that claimant worked at the electronics store owned by petitioner's husband, Lucio Serrano. Petitioner did not work at the store, but passed by once in a while. Petitioner denied giving claimant any orders or directions concerning work at the store.

Petitioner testified she had no part in managing the residential buildings owned by her husband, and denied that she ever told claimant to work at the buildings. She further testified that claimant only worked at the store, and did not work at the buildings, which were taken care of by a superintendent, Faustino Cabrera, who worked for Lucio Serrano.

Petitioner testified that claimant went to the store seven days a week at 8:30 a.m. and worked there until 8:00 p.m. each day doing paperwork and receiving televisions from customers. Acknowledging that claimant worked every day of the week with no days off, petitioner stated, "if she wanted to take days off; it's her business. I told her she can take a day off."

4. *Testimony of Warren Serrano*

Warren Serrano, the son of petitioner and Lucio Serrano, testified that the electronics store where claimant worked was owned by his father, and closed in February 2011, the week his father passed away. Warren Serrano testified that at the time the store closed, he disposed of his father's business records. He does not know the contents of the records.

Warren Serrano never worked at the store, only infrequently making "social visits" to the store about three times a month. On those occasions he saw claimant working in the store doing paperwork and other tasks. He testified that petitioner played no role in managing the electronics store or the residential buildings, and denied that claimant worked as a porter. Warren Serrano testified that Faustino Cabrera took care of the residential buildings. He further testified that he went to his parents' home every night for dinner and ate with his parents. He saw the claimant there but did not see her doing any general housework or cleaning.

5. *Testimony of Adrian Serrano*

Adrian Serrano is petitioner's grandson, and the son of Warren Serrano. He testified that he helped his grandfather, Lucio Serrano, take care of the residential buildings every Saturday or whenever he had time between 1998, when he was 11 years old, until 2010. Faustino Cabrera was the superintendent of the residential buildings and was responsible for collecting the garbage and making any needed repairs to the properties. Adrian Serrano believes Lucio Serrano, not petitioner, owned the buildings. He stated that the claimant did not work in the residential buildings or do much work at the Serranos' home other than taking care of herself and cleaning her own bathroom. According to Adrian Serrano, Petitioner did the domestic work herself.

Adrian Serrano also helped his grandfather at the electronics store, where claimant worked as a secretary. Lucio Serrano ran the store, gave directions, and paid the store's employees. Petitioner only came to the store from time to time to check on claimant, and see if everything was all right. She did not give claimant directions concerning her work at the store.

He further testified that claimant worked at the store from 8:00 a.m. or 8:30 a.m. until 6:00 p.m. Claimant sometimes returned to the store at 8:00 p.m. because petitioner "would get nervous and ask [claimant] if she could accompany my grandfather to the store to close it." Adrian Serrano testified that claimant did not work at the store on weekends.

6. *Testimony of Darien Serrano*

Darien Serrano is also petitioner's grandson, and the son of Warren Serrano. Darien Serrano testified that he sometimes went to the residential buildings owned by Lucio Serrano to help his grandfather with whatever work he needed done. He also went to the electronics store after school approximately three times a week and every Saturday and Sunday from when he was 8 years old until he was 15, where he helped his grandfather by calling customers. His brother, Adrian Serrano, also helped at the store two days a week. Darien Serrano explained that claimant worked in the back of the store as a bookkeeper. He never saw petitioner at the electronics store.

Darien Serrano testified that he went to petitioner's home every day after school, where he saw claimant, "always with my grandmother . . . watching TV." He further testified that he saw claimant at the house in the afternoons, and that she ate all her meals with the family. Darien Serrano never saw the claimant cleaning the house except for her own bathroom, nor ever heard petitioner give claimant directions to clean in the house, or to go work at the electronics store or residential buildings.

7. *Testimony of Faustino Cabrera*

Faustino Cabrera testified that he worked as a superintendent and handyman in nine buildings in Brooklyn, New York, owned by Lucio Serrano. Cabrera testified that he did "everything" in the buildings, including plumbing, painting, and taking out the garbage, and that his sons and his daughter's mother helped him.[4] Cabrera was adamant, however, that he was not responsible for cleaning the floors. Lucio Serrano supervised Cabrera. Petitioner never gave Cabrera instructions concerning his work in the buildings. Cabrera testified that he also worked in the electronics store, and was "in charge" after 5:00 p.m. of unloading and delivering televisions.

Cabrera testified that he knows the claimant, who lived in the Serranos' home and worked with him at the electronics store. He never saw claimant doing domestic work in the home, and testified that she did not work in the residential buildings. Cabrera explained that claimant worked in the electronics store, which she cleaned, but that she did not clean the residential buildings. He sometimes visited the Serranos' home for meals. He would see claimant there when he visited, but never saw her working in the home.

8. *Testimony of Jacques Michaane*

Jacques Michaane testified that he managed several residential properties owned by Lucio Serrano from 2000 or 2001 until he passed away in 2011. He testified that he went to the buildings with Lucio Serrano three to four times a week, but would not visit all the buildings in

[4] Cabrera did not provide the names of his sons or that of his daughter's mother.

the same week. He went wherever there was a specific issue that needed to be addressed, and had no specific time or schedule for visiting the buildings.

Michaane testified that he only saw Faustino Cabrera, Lucio Serrano, or "a few other guys" doing maintenance work at the buildings. Cabrera took care of the garbage so the buildings would not receive violations from the Department of Sanitation. He further testified that Cabrera, Lucio Serrano, and Lucio Serrano's grandchildren, took care of the garbage in the buildings.

Michaane knows the claimant and testified that he only saw her at the electronics store. He never saw her working in the residential buildings. He further testified that he visited the Serranos' home two to three times a week in the afternoons or early evenings. The claimant was not home when he was there.

C. Respondent's Evidence

1. Claimant's Testimony

Claimant [redacted] testified that she is petitioner's niece. Petitioner brought [redacted] to the United States in order to work, and told her she would be a "governess," which she understood to mean she would accompany petitioner wherever she went. Petitioner promised to pay [redacted] $430.00 a week. Petitioner and her husband, Lucio Serrano, prepared and paid for [redacted]s immigration paperwork,[5] and [redacted] arrived in the United States in 1995. [redacted] testified that she lived in the Serranos' home in Brooklyn, New York, from 1995 to 2006, and worked that entire time for the Serranos cleaning the home, the residential buildings they owned, and working in the electronics store operated by Lucio Serrano. [redacted] left the Serranos' home in 2006, when she became ill and petitioner told her to leave because she was no longer physically able to work. Claimant explained that the delay from her last day of work to the date she filed her claim with DOL was because the Serranos had "brainwashed" her into mistrusting the police.

a. Domestic Work

[redacted] testified that she worked as a domestic employee in the Serranos' home, where she also lived and had her own bedroom. [redacted] testified that she did the general cleaning in the home, including mopping, sweeping, and washing dishes. She did this work mainly at night when she was required to clean the entire kitchen. On Saturdays and Sundays she cleaned the carpets. [redacted] testified that she also did the Serranos' laundry. [redacted] testified that nobody else did domestic work in the Serranos' home.

b. Residential Buildings Porter

[redacted] also testified that she worked as a porter at various buildings owned by the Serranos from 5:00 a.m.[6] to 8:00 a.m. each day. [redacted] testified she was required to clean form

[5] There was testimony that the costs for preparing the immigration paperwork was deducted from claimant's wages, however, these deductions took place outside of the statute of limitations for illegal deductions from wages under Labor Law § 193.

[6] She also testified later that she started working in the buildings at 4:00 a.m.

upstairs to downstairs with a broom and collect the garbage every day. In addition, she mopped the floors on Saturdays and placed the garbage on the curb for Sanitation on Thursdays.

[redacted] testified that petitioner brought her to the buildings and told her to work there. She testified that "twice [she] showed me how to do it" and told her "various times" what to do. Petitioner advised [redacted] that "everything has to be very clean because she was going to check on that because she doesn't want to have any tickets [from Department of Sanitation]." [redacted] explained that petitioner visited her every other day in the buildings, and sometimes on Saturdays, to check how they had been cleaned.

c. The Electronics Store

[redacted] testified that in addition to her domestic and porter work, petitioner employed her at an electronics repair store operated by Lucio Serrano. [redacted] testified that "the following day that I arrived in the United States, [petitioner] told me that you are going to work in the store for my husband as well." [redacted] worked at the store Monday to Saturday, and sometimes Sunday, from 8:30 a.m. to 8:00 p.m. She explained that her work consisted of "administering all the things having to do with the televisions," such as putting price tags on the sets and disassembling them. She also kept the books for the store and paid the staff based on Lucio Serrano's directions for how much to pay each employee.

[redacted] testified that petitioner told her what to do at the electronics store, "that I have to do everything that [Lucio Serrano] tells [me] to do." Petitioner sometimes went to the store to "investigate" whether [redacted] was there, and occasionally gave [redacted] instructions such as "do not be seated at work." [redacted] testified that she considered petitioner to be her boss "because she was the one who gave me orders." [redacted] further testified that petitioner did not work at the store, but went there to see what was going on, and told employees they cannot talk and must be working. [redacted] further testified that her entire salary for all work performed during the week was $50.00. When she asked petitioner for additional pay, petitioner said "not for now."

2. Testimony of Rafael Jimenez

Rafael Jimenez testified that he worked at Teletronic, the electronics store operated by Lucio Serrano, from 1992 to 2010. He testified that Lucio Serrano and petitioner were the "bosses" at the store, and that he worked with claimant, who was the secretary and did the cleaning. Jimenez testified that claimant worked at the store Monday to Saturday and that "I would arrive at 8, 9, or 10, and she'll always be there," she worked "until the time I would leave, 8:00 at night." Jimenez explained that petitioner was at the store three or four days a week. Petitioner checked to make sure claimant was working and gave directions to the employees. Jimenez testified that petitioner gave claimant "orders for everything."

Jimenez testified that Lucio Serrano and petitioner gave orders at the store. Jimenez was originally hired by Lucio Serrano's brother, who is deceased. Jimenez discussed issues at the store with Lucio Serrano, and Lucio Serrano, not petitioner, determined his wage rate, which was paid to him by claimant. Petitioner, however, set claimant's pay rate and work schedule. Jimenez testified that he does not know why petitioner supervised claimant whereas Lucio Serrano supervised the other employees.

Jimenez testified that claimant also worked cleaning residential buildings in the mornings. Jimenez did not personally see the claimant working as a porter, but explained that "when I will arrive at work she was coming from cleaning those places," and had her cleaning tools with her, which she left in the store's bathroom and did not take home with her when she left the store. The claimant told Jimenez that she woke up in the middle of the night to go clean the buildings. Jimenez later testified that he worked on the boilers in the buildings and saw claimant in the buildings cleaning on numerous occasions when he was working on the boilers.

Jimenez testified that the claimant lived with the Serranos and that "during the period of time that [he] would visit the house it was in the daytime and [claimant] would be at the store." However, he also explained that on a few occasions when he visited the Serranos' home he saw claimant doing cleaning work and taking Lucio Serrano's clothes to the laundromat.

3. Testimony of Fernanda Santos

Fernanda Santos testified that she lived on 49th Street in Brooklyn, New York, during the relevant time period, and is familiar with Teletronic because she lived nearby and was familiar with "all the neighborhood." The store was located two and a half blocks from her apartment. She knew who Lucio Serrano was, and testified she knew he owned the store and various residential buildings in the area.

Santos testified that she knows claimant, because she always saw her "throwing out garbage in the morning" at a building on 48th Street and 4th Avenue when she passed by on her way to work or when she took her children to school. She left for work at 4:00 a.m., and later at 5:00 a.m. or 6:00 a.m. Santos testified the building where she saw claimant taking out garbage was owned by Lucio Serrano, which she knew because a friend of hers who lived across the street told her Lucio Serrano owned it. She also explained that at the time she worked for a union and would often have to go to work early in the morning. She added that she passed the electronics store during the week and also saw claimant taking out garbage.

D. Petitioner's Rebuttal Evidence

1. Adrian Serrano's Testimony

Adrian Serrano, testifying as a rebuttal witness, stated that he worked after school at the electronics store Monday through Friday, and that "when my grandfather needed me I was there every day.[7]" He testified that Rafael Jimenez was a technician who repaired VCRs, and did not work on boilers in the residential buildings owned by Lucio Serrano and petitioner. According to Adrian Serrano, petitioner did not come to the store often, and when she did visit the store, it was to see him and her husband. Adrian Serrano never heard petitioner give instructions to the store's employees, other than to tell him and claimant "go eat."

Adrian Serrano testified that there were only two sets of keys for the residential buildings. Lucio Serrano had one copy of the keys, and Faustino Cabrera had the other. He never saw his grandfather give a copy of the keys to the claimant, and believes she could not have entered the buildings without keys.

[7] He would have been approximately 16 years old during the relevant time period.

2. *Petitioner's Testimony*

Petitioner testified that she did not go by the store three or four times per week, and did not tell claimant to watch everybody to ensure they worked hard and did what they were supposed to do. Petitioner also denied that claimant cleaned in petitioner's home or washed clothes for petitioner, explaining that claimant only washed her own clothes.

3. *Warren Serrano's Testimony*

Warren Serrano testified that after Lucio Serrano passed away he told Rafael Jimenez "we don't need your services. You can take what you want and I will close the store." Warren Serrano further testified that Jimenez did take items from the store and opened his own store nearby. Warren Serrano once overheard a conversation between Lucio Serrano and Jimenez in which Jimenez was proposing to have more authority at the store. Warren Serrano testified that he "occasionally" saw Jimenez fixing boilers in the residential buildings.

Warren Serrano testified that there were three keys for each residential building. He stated that Lucio Serrano had a copy of the keys. He explained that claimant could not have gotten into the building without the keys, and did not know whether she had them.

4. *Claimant's Testimony*

Claimant testified that petitioner gave her a set of keys so she could enter the residential buildings to clean them. Petitioner put the keys in a bag and gave them to claimant every morning when she sent her to clean. Claimant returned the keys to petitioner each day at 8:00 a.m. upon arriving home from cleaning the buildings. Lucio Serrano and Faustino Cabrera also had keys to the properties. Claimant testified that after cleaning the buildings, she returned to the home she shared with petitioner, left the cleaning equipment in the basement, changed, showered if she had time, and then went to work at the electronics store. One time she brought her cleaning supplies with her to the store. She ate breakfast when Rafael Jimenez arrived at the store at 11:30 a.m. or Noon. He seldom arrived earlier than that, because he had to deliver televisions in the mornings. She also testified that she has seen Jimenez repairing boilers.

II. ANALYSIS

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

A. Burden of Proof

The petitioner's burden of proof in this matter was to establish by a preponderance of the 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; *Matter of RAM Hotels Inc. [T/A Rodwway Inn]*, PR 08-078 [October 11, 2011]). For the reasons set forth below we find petitioner did not meet her burden of proof, and we affirm the order with modifications.

B. "Employer" Status under the Minimum Wage Act

Petitioner alleges she was not claimant's employer during the relevant time period, because she did not own, operate, or manage the electronics store, and claimant performed no domestic work at petitioner's home, nor did she work as a porter at the residential buildings owned by petitioner and her late husband, Lucio Serrano.

"Employer" as used in Article 19 of the Labor Law means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 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 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), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

> "Because 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 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 this 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]).

When applying this 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]).

1. Domestic work

Petitioner denied that claimant worked in her home as a domestic employee, and while several other family members who testified for petitioner also stated in broad terms that claimant did no work in the home, we find claimant's detailed and specific testimony more credible than petitioner's general denial. Claimant provided detailed testimony of the work she did at the home, which was consistent with the statement she provided to DOL. We find that petitioner

worked as a domestic employee in the petitioner's home, and that petitioner was claimant's employer with respect to the domestic work, where, as discussed below, she hired claimant, fired claimant, supervised claimant's work, and set claimant's wage rate and method of payment.

Claimant testified that petitioner, her aunt, brought her to the United States in order to work, and that she began working in petitioner's home upon arriving in the U.S. Claimant's specific testimony concerning the manner in which she was brought to the U.S. and her detailed recollection of conversations with petitioner were not rebutted by petitioner other than a general denial that claimant did no domestic work and was a "princess," a characterization we find particularly hard to accept considering petitioner's own admission that claimant worked seven days a week at the electronics store. Based on the credible evidence, we find petitioner hired claimant at the time she agreed to bring her to the U.S. to work as claimant testified as a governess. We also credit claimant's testimony that petitioner terminated the employment relationship by throwing her out of the family home when she was no longer physically able to work. Claimant provided detailed testimony of the work she did at the home, which was consistent with the statement she provided to DOL, and her testimony that petitioner "gave [her] orders" demonstrates that petitioner supervised and controlled claimant's domestic work. We also credit claimant's detailed and specific testimony that petitioner upon hiring claimant promised to pay her $430.00 a week, although she actually only paid her $50.00 or $100.00 a week during the relevant time period, which is evidence that petitioner determined claimant's pay rate and the method of payment, which is further supported by claimant's testimony that when she asked petitioner for more money, petitioner refused to increase her pay. We give weight as well to the testimony of respondent's investigator that claimant was more credible than petitioner. Based on the credible evidence, we find as matter or economic reality, that petitioner was claimant's employer with respect to the domestic work.

2. Porter

Claimant alleged, and DOL determined, that claimant worked as a porter in several residential buildings owned by petitioner and her late husband, Lucio Serrano. Claimant provided a detailed description to DOL of the work she performed at the buildings, and testified consistent with her statement to DOL. She testified about the amount of time she worked in the buildings each day and week, the locations of the buildings to the best of her recollection, and the specific work she performed, which included cleaning and mopping floors and collecting garbage. Her testimony was corroborated by Rafael Jimenez, who worked with her in the electronics store and sometimes repaired boilers in the residential buildings. He testified that claimant told him she worked in the buildings and that he saw her coming to the electronics store with her cleaning tools after working in the buildings. He also testified that he saw her working in the buildings, cleaning the floors, "quite a few times," when he was present in the buildings working on boilers. We credit Jimenez's testimony, which was candid, despite the minor inconsistency between his testimony that claimant brought her cleaning supplies to the store and claimants' testimony that she only did so once, and his lack of clarity on how often and what times he visited the Serranos' home and where claimant was at those times.

Petitioner denied that claimant worked in the residential buildings. We do not credit petitioner's testimony or that of her witnesses. Petitioner testified that she at least occasionally went to the buildings to check to make sure they were clean, and if they were not clean, she would call Faustino Cabrera. Cabrera testified that he worked in the buildings with the

assistance of his sons and his daughter's mother, and said he was not responsible for cleaning the floors. Michaane testified that Cabrera, Lucio Serrano, and Lucio Serrano's grandchildren took care of the buildings, along with some other guys, but did not mention Cabrera's sons or Cabrera's daughter's mother. That none of petitioner's witnesses identified anyone who regularly cleaned the floors supports claimant's testimony that she cleaned the floors in the residential buildings. Petitioner's witnesses' testimony was also inconsistent on other matters related to the residential buildings. Adrian Serrano denied Jimenez's testimony that he repaired boilers in the residential buildings. Darien Serrano, however, testified that he occasionally saw Jimenez working on the boilers in the residential buildings, which bolsters Jimenez's credibility. We credit claimant's detailed testimony of the work she did in the residential buildings over the vague and inconsistent testimony offered by petitioner and her witnesses. We also give weight, as discussed above, to respondent's investigator's testimony that claimant's statement was more credible than petitioner's.

Having found that claimant worked as a porter in residential buildings, we also find that petitioner was claimant's employer. Claimant credibly testified that petitioner brought her to the buildings and told her to work there, twice showed her how to do the cleaning work, and told her various times what to do. Claimant also credibly testified that petitioner advised her that "everything has to be very clean because [petitioner] was going to check on that because she doesn't want to have any tickets," and that petitioner went to the buildings often to ensure that they had been cleaned. This testimony, although petitioner denied that she had any role in managing the buildings or that claimant worked there, is supported by petitioner's own testimony that she checked to see if the buildings were clean and called Faustino Cabrera when they were not. Based on the credible evidence, including petitioner's admissions, we find petitioner hired claimant, supervised her work, and fired her, and that petitioner was claimant's employer as a matter of economic reality with respect to the residential buildings. That petitioner did not supervise claimant on a daily basis does not remove her from the definition of employer (*see e.g. Matter of Chan et al.*, PR 08-174 at p 8 [October 17, 2012] *affirmed by Chan v Industrial Board of Appeals*, 120 AD3d 1120 [1st Dept 2014]), nor does the fact that Lucio Serrano may also have been claimant's employer (*see e.g. Matter of Franbilt et al.*, PR 07-019 at p5 [July 30, 2008] [employee may have more than one employer]; *Matter of Frank Bova et al.*, PR 06-024 [November 28, 2007] [same]).

3. Electronics store

The parties do not dispute whether claimant worked at Teletronic, the electronics store operated by Lucio Serrano. Petitioner admitted that claimant worked there seven days a week from 8:30 a.m. to until 8:00 p.m. Petitioner, however, denies she was claimant's employer, alleging her late husband, Lucio Serrano, ran the store, and she had no authority there.

Claimant testified that the day after she arrived in the United States, petitioner told her she was going to work for Lucio Serrano at the store. She further testified that petitioner instructed her to do everything Lucio Serrano told her to do, and that petitioner sometimes went to the store to see if she was there and occasionally gave her instructions on how to conduct herself while working in the store and asked her to keep an eye on Jimenez to make sure he was not stealing. Claimant considered petitioner her boss "because she was the one who gave me orders."

Rafael Jimenez testified petitioner was at the store three or four times a week, and that she checked to make sure claimant was working and gave instructions to the employees. According to Jimenez, petitioner gave claimant "orders for everything." Jimenez further testified that petitioner and Lucio Serrano gave directions to the employees at the store. Jimenez, who was originally hired by Lucio Serrano's brother, discussed issues at the store with Lucio Serrano. Lucio Serrano determined Jimenez's pay rate. Petitioner, however, determined claimant's pay rate and work schedule. Jimenez testified that he does not know why petitioner supervised claimant while Lucio Serrano supervised the other employees.

Petitioner denied that she ever told claimant to go to the store, and testified that she did not go to the store three to four times a week and states she never instructed claimant what to do in the store. Petitioner also testified that she did not go into the store, and only passed by it on the street, but admitted that if claimant wanted a day off from working in the store, "I told her she can take a day off." Petitioner's witnesses were inconsistent on her role at the store. Petitioner testified she only passed by the store, whereas Adrian Serrano testified that she came in to check on claimant, but did not give her instructions. He also testified that petitioner sometimes sent claimant to the store to help Lucio Serrano close it when she was worried about her husband. Darien Serrano testified that he never saw the petitioner there.

Petitioner did not meet her burden of proof to show she was not claimant's employer at the electronics store. Petitioner alleges she could not have been claimant's employer at the store, because her late husband owned and operated it. It is well settled, however, that employees may have more than one employer (*see e.g. Matter of Franbilt, Inc., supra.; Matter of Bova, supra.*). Claimant credibly testified that petitioner sent her to work at the store, went to the store to make sure she was working there, and sometimes gave her instructions. This testimony was corroborated by Rafael Jimenez, who explained that petitioner was often present at the store and supervised claimant. Petitioner, herself, testified that she had authority to allow claimant to take days off, and Adrian Serrano testified that petitioner sometimes sent claimant to the store to help Lucio Serrano close it. We credit claimant's specific and consistent testimony, and find as a matter of economic reality that petitioner was claimant's employer at the electronics store. She hired claimant when she brought her to the United States and told her the very next day to go work for her husband at the store, sometimes gave her instructions, had authority over claimant's work schedule at least to the extent that had authority to give her days off, and terminated claimant when she forced her out of the family home. This is sufficient evidence of an employment relationship to support respondent's determination.

C. Wage Order

Article 19 of the Labor Law requires employers such as petitioner to maintain certain records of the hours worked by each employee and wages paid (*see* Labor Law § 661; 12 NYCRR 142-2.6). Petitioner produced no records of the hours worked by claimant or the wages paid. To the extent that any records may have existed of the hours she worked or wages she was paid at the store, those records were allegedly discarded upon Lucio Serrano's death instead of maintained for six years as required by law. In the absence of these required records, having found above that petitioner was an employer under Article 19, she had the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett,* 156 AD2d 818, 821 [3d Dept 1989],

"[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculation to the employer" (*see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013]). Petitioner, therefore, has the burden of showing that respondent's determination of wages owed is invalid or unreasonable by a preponderance of the evidence of the specific hours that claimant worked and that she was paid for those hours (*Matter of Ram Hotels, Inc.* PR 08-078 [October 11, 2011]). Where no records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378, [(1st Dept 1996] *see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571).

The wage order finds that petitioner failed to pay claimant $48,280.74 in minimum wages from November 12, 2005 to September 30, 2006. DOL determined that claimant worked 128 ½ hours per week during the claim period, and received $100.00 a week from December 3, 2005 to December 17, 2005; $50.00 a week from December 24, 2005 to April 15, 2005; and $100.00 a week from April 22, 2005 to September 30, 2006. DOL credited petitioner with an allowance for housing (*see* 12 NYCRR 142-2.5 [a] [ii]; 12 NYCRR 142-2.20), because Infantes' investigation revealed that petitioner provided claimant a furnished room, which was corroborated by the testimony at hearing. An additional one hour's pay at minimum wage was included in the determination of wages owed for each day the claimant worked more than 10 hours (12 NYCRR 142-2.4), which DOL determined to be seven days per week. We find based on the record that the wage order must be modified.

Claimant testified that she worked at the electronics store from 8:30 a.m. to 8:00 p.m. Monday to Saturday and "sometimes" on Sunday, which indicates she did not always work seven days a week at the store as DOL determined. While we are aware that petitioner testified claimant worked seven days a week at the store, she also testified that she allowed her to take days off upon request. We find, therefore, that claimant worked at the store 69 hours per week two weeks out of each month, and 80 ½ hours per week the other two weeks per month, which based on the record is a more reasonable approximation of the hours claimant actually worked.

Claimant testified she worked in the residential buildings from 5:00 a.m. to 8:00 a.m. each day. Based on this testimony, we find she worked 21 hours a week as a porter in the residential buildings.

Claimant did not testify concerning the number of hours per week she toiled in the Serranos' home doing domestic work. DOL determined based on her statement that she worked two hours per day as a domestic employee, which we find reasonable.

We, therefore, find claimant worked 104 hours per week two weeks each month, and 115 ½ hour per week the other two weeks each month, and calculate that she is owed $42,300.56 as follows:

Week	Hours Worked	Wages Paid	Minimum Wage[8] Rate	Overtime Rate[9]	Lodging Allowance[10]	Earned	Owed[11]
11/12/05	104	$100.00	$6.00	$9.00	$17.85	$858.00	$740.15
11/19/05	115.5	$100.00	$6.00	$9.00	$17.85	$961.50	$843.65
11/26/05	104	$100.00	$6.00	$9.00	$17.85	$858.00	$740.15
12/03/05	115.5	$100.00	$6.00	$9.00	$17.85	$961.50	$843.65
12/10/05	104	$100.00	$6.00	$9.00	$17.85	$858.00	$740.15
12/17/05	115.5	$100.00	$6.00	$9.00	$17.85	$961.50	$843.65
12/24/05	104	$100.00	$6.00	$9.00	$17.85	$858.00	$740.15
12/31/05	115.5	$50.00	$6.00	$9.00	$17.85	$961.50	$893.65
01/07/06	104	$50.00	$6.75	$10.13	$20.30	$965.25	$894.95
01/14/06	115.5	$50.00	$6.75	$10.13	$20.30	$1,081.69	$1,011.39
01/21/06	104	$50.00	$6.75	$10.13	$20.30	$965.25	$894.95
01/28/06	115.5	$50.00	$6.75	$10.13	$20.30	$1,081.69	$1,011.39
02/04/06	104	$50.00	$6.75	$10.13	$20.30	$965.25	$894.95
02/11/06	115.5	$50.00	$6.75	$10.13	$20.30	$1,081.69	$1,011.39
02/18/06	104	$50.00	$6.75	$10.13	$20.30	$965.25	$894.95
02/25/06	115.5	$50.00	$6.75	$10.13	$20.30	$1,081.69	$1,011.39
03/04/06	104	$50.00	$6.75	$10.13	$20.30	$965.25	$894.95
03/11/06	115.5	$50.00	$6.75	$10.13	$20.30	$1,081.69	$1,011.39
03/18/06	104	$50.00	$6.75	$10.13	$20.30	$965.25	$894.95
03/25/06	115.5	$50.00	$6.75	$10.13	$20.30	$1,081.69	$1,011.39
04/01/06	104	$50.00	$6.75	$10.13	$20.30	$965.25	$894.95
04/08/06	115.5	$50.00	$6.75	$10.13	$20.30	$1,081.69	$1,011.39
04/15/06	104	$50.00	$6.75	$10.13	$20.30	$965.25	$894.95
04/22/06	115.5	$100.00	$6.75	$10.13	$20.30	$1,081.69	$961.39
04/29/06	104	$100.00	$6.75	$10.13	$20.30	$965.25	$844.95
05/06/06	115.5	$100.00	$6.75	$10.13	$20.30	$1,081.69	$961.39
05/13/06	104	$100.00	$6.75	$10.13	$20.30	$965.25	$844.95
05/20/06	115.5	$100.00	$6.75	$10.13	$20.30	$1,081.69	$961.39
05/27/06	104	$100.00	$6.75	$10.13	$20.30	$965.25	$844.95
06/03/06	115.5	$100.00	$6.75	$10.13	$20.30	$1,081.69	$961.39
06/10/06	104	$100.00	$6.75	$10.13	$20.30	$965.25	$844.95
06/17/06	115.5	$100.00	$6.75	$10.13	$20.30	$1,081.69	$961.39
06/24/06	104	$100.00	$6.75	$10.13	$20.30	$965.25	$844.95
07/01/06	115.5	$100.00	$6.75	$10.13	$20.30	$1,081.69	$961.39
07/08/06	104	$100.00	$6.75	$10.13	$20.30	$965.25	$844.95
07/15/06	115.5	$100.00	$6.75	$10.13	$20.30	$1,081.69	$961.39
07/22/06	104	$100.00	$6.75	$10.13	$20.30	$965.25	$844.95

[8] Calculated as $6.00 per hour in 2005; $6.75 an hour in 2006 (*see* 12 NYCRR 142-2.1).
[9] Calculated as 1.5 x the applicable minimum wage rate (*see* 12 NYCRR 142-2.2).
[10] Calculated as 7 days x $2.55 in 2005; 7 days x $2.90 in 2006 (*see* 12 NYCRR 142-2.5 [ii]).
[11] Calculated as the amount earned less wages paid plus lodging allowance.

07/29/06	115.5	$100.00	$6.75	$10.13	$20.30	$1,081.69	$961.39
08/05/06	104	$100.00	$6.75	$10.13	$20.30	$965.25	$844.95
08/12/06	115.5	$100.00	$6.75	$10.13	$20.30	$1,081.69	$961.39
08/19/06	104	$100.00	$6.75	$10.13	$20.30	$965.25	$844.95
08/26/06	115.5	$100.00	$6.75	$10.13	$20.30	$1,081.69	$961.39
09/02/06	104	$100.00	$6.75	$10.13	$20.30	$965.25	$844.95
09/09/06	115.5	$100.00	$6.75	$10.13	$20.30	$1,081.69	$961.39
09/16/06	104	$100.00	$6.75	$10.13	$20.30	$965.25	$844.95
09/23/06	115.5	$100.00	$6.75	$10.13	$20.30	$1,081.69	$961.39
09/30/06	104	$100.00	$6.75	$10.13	$20.30	$965.25	$844.95
						Total	**$42,300.56**

We modify the order consistent with these findings.

1. Civil penalty

The wage order assesses a 200% civil penalty. Labor Law § 218 allows the Commissioner to assess a 200% civil penalty where the petitioner's violation was willful or egregious. The 200% civil penalty is affirmed because the amended petition does not specifically object to it (Labor Law § 101 [2] [any objection not raised in the appeal is waived]; *Matter of Liang*, PR 11-184 p 5 [August 7, 2014]), and the amount is reduced to $84,601.12 consistent with our findings of wages owed as described above.

2. Liquidated Damages

Labor Law § 663 empowers the respondent to include liquidated damages of no more than 100% of the wages found due unless the petitioner can show a good faith basis to believe the underpayment was in compliance with the law. The record shows petitioner had a good faith reason to believe she was not claimant's employer with respect to the electronics store and residential buildings, which were operated by Lucio Serrano. There is no evidence, however, that petitioner had a good faith basis to believe she complied with the law with respect to the domestic work performed by claimant. We, therefore, modify the liquidated damages amount to $5,398.89, which reflects 100% of the wages attributable to the domestic work.

3. 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 did not challenge the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2). We affirm the rate of interest imposed in the wage order, which must be reduced according to the new principal amount of wages due.

D. Penalty Order

Pursuant to Labor Law § 218 (1), the penalty order imposes a civil penalty of $47,000.00 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 week during the period from November 12, 2005 to September 30, 2006, and a $47,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give claimant a complete wage statement with every payment of wages for the same time period, for a total civil penalty of $94,000.00. The amended petition did not specifically object to the penalty order or the manner in which it was calculated, and, we affirm the penalty order in its entirety (*see* Labor Law § 101 [2]; *Matter of Liang, supra.*).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to reduce the wages due and owing to $42,300.56, civil penalties to $84,601.12, and liquidated damages to $5,398.89, for a total amount of $132,300.57, with interest recalculated on the new principal; and

2. The penalty order is affirmed; and

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

RECUSED
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.