STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
JEANETTE FENTI AND CREATIVE THINK TANK AGENCY, INC.,	:	
Petitioners,	:	DOCKET NO. PR 08-107
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and an Order under Article 19 of the Labor Law, both dated May 23, 2008,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Jeanette Fenti, *pro* se for Petitioner.

Maria L. Colavito, Counsel, NYS Department of Labor ("DOL"), Benjamin A. Shaw, of Counsel for Respondent.

WITNESSES

Jeanette Fenti, for Petitioner; Roberto Ulm and Mary Confer, for Respondent.

WHEREAS:

The Petition for review in the above-named case was filed with the Industrial Board of Appeals (Board) on August 1, 2008. Petitioners, Jeanette Fenti (Fenti) and Creative Think Tank Agency, Inc. (together referred to as Petitioner), seek to vacate two Orders that the Commissioner of Labor (Commissioner or Respondent) issued against Petitioners on May 23, 2008.

The Order to Comply with Article 6 (Wage Order) directs Petitioner to pay to the Commissioner unpaid wages owed to employee Robert Ulm (Claimant) in the amount of $302.50, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of $29.70, and a civil penalty in the amount of $303.00, for a total amount due of $635.20. The Order under Article 19 (Penalty Order) directs Petitioner to pay to the

Commissioner $500.00 as a civil penalty for failure to keep and/or furnish payroll records as required by the Labor Law.

The Petition challenges the wages and penalties directed to be paid under both Orders as unreasonable because: 1) Petitioner hired the Claimant as a "freelance designer" or independent contractor, and not as an employee; and 2) the Claimant worked for Petitioner for only one day, a total of 7.5 hours, and not the 12.5 hours set forth in the Wage Order. Petitioner Fenti asserted that she offered to pay Claimant $150 for his work and that this matter is a billing dispute over which the Claimant has improperly filed a complaint with the Department of Labor ("DOL"). The Respondent filed an Answer to the Petition denying its material allegations and interposing as affirmative defenses that the Petition contains insufficient and conclusory allegations and fails to establish that Claimant was an independent contractor.

Upon notice to the parties, a hearing was held on May 12, 2009 before J. Christopher Meagher, Member of the Board and the Board's designated hearing officer in this case. Each party was afforded full opportunity at the hearing to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

SUMMARY OF EVIDENCE

Petitioner, Creative Think Tank Agency, Inc., is an advertising agency located in Webster, New York. Petitioner Fenti, is the owner of the agency and manages its day to day operations. The two Orders under review in this case concern graphic design work performed by the Claimant, Robert Ulm, for Petitioner on October 18 and 19, 2007.

Claimant testified that he was employed for eighteen years as a graphic designer by Eastman Kodak Company. He was laid off in 2007. In October 2007, Claimant responded to an ad placed on Craigslist by Petitioner soliciting applicants for a position as a graphic designer. Claimant testified that he was seeking full-time employment with Petitioner at the time, did not operate his own graphic design business, and did not perform work as an independent contractor. According to the Claimant, the ad did not refer to the position as that of a freelancer or independent contractor.

Claimant testified that Fenti interviewed him on October 12, 2007, reviewed his prior work history, and had Claimant briefly demonstrate his graphic design skills. Petitioner then invited Claimant to return on Thursday October 18, 2007 to work with one of her designers for two hours to more fully demonstrate his skills. It was agreed between the parties that Claimant would be paid for the initial two hours at $20 per hour, and if Fenti was satisfied with Claimant's work and wished to continue his services, Petitioner would thereafter pay Claimant at $25 per hour. Fenti confirmed the agreement in an e-mail with Claimant, stating that she was having him come in to "see what you are capable of ... and after two hours [if] you are working out then I will pay you your 25.00." There was no discussion between the parties as to how long the position would last.

Claimant testified that he performed graphic design services at Petitioner's office on October 18 and 19, 2007, 6 ¼ hours each day, for a total of 12 ½ hours. Claimant stated that he utilized all Petitioner's materials and computers to perform such work and did not utilize any of his own equipment. The tasks that Claimant performed included reading background material for client ads to be placed on the web; locating the computer files of art work already done on the ads; creating, revising, and generating code for the artwork; and then e-mailing the material to clients for approval. A contemporaneous log made by Claimant of the hours and work he performed for Petitioner corroborates his testimony.

Claimant testified that at the end of his first day Fenti invited him to return the next morning and did not express any displeasure with his work. At the end of the second day, however, Fenti informed Claimant that she would call him if she wanted Claimant to return. Thereafter, Petitioner did not invite Claimant back and did not pay Claimant for the work he had performed.

Claimant testified that he then exchanged e-mail correspondence with Fenti inquiring when he would be paid for his work. Claimant provided Petitioner with a breakdown of his hours and demanded payment for 12 ½ hours work at the rates agreed to by Petitioner. In e-mail replies to the Claimant, Petitioner expressed dissatisfaction with Claimant's work. In one e-mail, Petitioner stated that Claimant "might have been here for those hours" but was not worth the rate of $25.00 for the work.

On December 10, 2007 Claimant filed a claim against Petitioner with DOL for $302.50 in unpaid wages for 12 ½ hours work. The claim stated that Claimant was owed 2 hours at the rate of $20 per hour and 10 ½ hours at the rate of $25 per hour. Claimant testified that he mistakenly listed his dates of work on the claim as October 11 and 12, 2007 but that they were actually October 18 and 19, 2007. Claimant's log corroborates his testimony. We therefore find that the 12 ½ hours were worked on October 18 and 19, 2007 and modify the Orders accordingly.

Labor Standards Investigator (LSI) Mary Confer (Confer) testified concerning DOL's investigation of Claimant's wage claim. Ms. Confer testified that the investigative file revealed that, aside from his claim, Claimant also provided DOL with the work log and chain of e-mail correspondence between Claimant and Petitioner described above. On January 2, 2008 DOL issued Petitioner a notice (i.e. initial "collection letter") notifying Petitioner that a wage claim had been filed against it by the Claimant, the details of the claim, and that if Petitioner agreed with the claim it should remit payment to the Commissioner within ten days.

DOL further advised that if Petitioner disagreed with the claim, it should respond in writing stating the basis of its dispute, and substantiate its reasons with payroll records, contracts, and documentation demonstrating payment of the wages claimed by the Claimant.

On January 11, 2008, Petitioner responded to the claim by asserting that Claimant was not an employee of Petitioner but rather an independent contractor. Petitioner also requested that Claimant submit a bill for his services.[1]

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[1] Claimant testified that he sent Petitioner a written invoice in response to Fenti's request for a formal bill. Claimant constructed the statement from a standard software form specifically for the purpose of sending it to Petitioner and did not operate any business using this invoice beforehand.

LSI Confer testified that DOL sent Petitioner a second notice on February 28, 2008, acknowledging Petitioner's response that Claimant was an independent contractor and not an employee, but advising Petitioner that it had not submitted proof enabling DOL to determine whether this were true. DOL requested that Petitioner submit Claimant's business or insurance certificates, any prior invoices received from him, or any other documentation that would help DOL decide Claimant's actual status as a contractor or an employee. DOL further advised Petitioner that merely having an employee sign a statement that he is an independent contractor did not constitute proof of such status, and attached guidelines for Petitioner's convenience about making such a determination. Finally, DOL advised Petitioner that absent such evidence it would be compelled to uphold the claim. DOL requested that Petitioner remit payment within two weeks and advised that failure to respond would result in issuance of an Order to Comply, together with interest and penalties.

Confer testified that the file revealed that Petitioner did not respond to DOL's request for substantiation of the claim that Claimant was an independent contractor and not an employee.

Based on Petitioner's failure to submit documentation substantiating that Claimant was an independent contractor, or payroll records establishing that Claimant was paid the wages claimed, the Commissioner issued the Orders under review against Petitioner on May 23, 2008. The Wage Order directed Petitioner to pay the Commissioner unpaid wages on behalf of the Claimant in the amount of $302.50, interest to the date of the Order in the amount of $29.70, and a 100% civil penalty in the amount of $303.00. Confer testified that the file revealed that the civil penalty was based on Petitioner having been in business for more than three years; the amount of wages owed; Petitioner's failure to produce payroll records substantiating payment; Petitioner's failure to pay wages owed on time, and; Petitioner's lack of cooperation demonstrated by its failure to submit proof of Claimant's independent contractor status after being afforded the opportunity to do so. The Penalty Order assessed Petitioner a $500 penalty for failure to maintain payroll records required by the Labor Law.

Fenti testified that Claimant was an independent contractor and not an employee for several reasons. First, Claimant was not in the group of employees for whom Petitioner filed W-2 employee wage and tax statements and W-3 wage summaries with the Internal Revenue Service ("IRS") in 2007. Fenti stated that every employee who works for her files a W-2 form and is put into the payroll system.[2] Petitioner submitted into evidence the tax forms for its employees for the 2007 tax year and noted that a W-2 form was filed for an employee who earned as little as $67 and stated that since the Claimant is not listed in Petitioner's tax records and did not have a W-2 reported to the IRS, this establishes that he was not an employee. Second, Fenti pointed to the invoice submitted by the Claimant and stated that if the Claimant were an employee then he would not submit an invoice for graphic design services, an action Petitioner said the Claimant would do as an independent contractor. Third, Petitioner submitted a letter from Claimant indicating that he had filed an action against Petitioner in Small Claims Court and had withdrawn it. Petitioner argued that if the Claimant were an

[2] Claimant testified that Petitioner did not offer him a W-2 tax form to fill out.

employee then he would not submit an invoice and would not take the invoice to court.[3] Finally, Petitioner testified that there were no payroll records maintained for the Claimant because he was never employed by the Creative Think Tank Agency.

On cross-examination, Fenti testified that Creative Think Tank is a full service advertising agency that designs client ads for all media, including television, radio, and print. Fenti testified that she interviewed the Claimant to perform graphic design for the ads, as well as to do filing, answer the phone, and "whatever needs to be done." Fenti acknowledged that the agency needs someone to perform these functions in order for the business to run. Fenti further testified that the Claimant performed his design tasks at Petitioner's office utilizing Petitioner's computers and software. Fenti set the hours Claimant was to come in, negotiated the rate of pay with the Claimant, and did not put a cap on the number of hours the Claimant would be working. Finally, while Petitioner questioned the number of hours claimed by the Claimant, Fenti could not recall the exact number of hours that he worked, and surmised that the total was possibly eight.

GOVERNING LAW

A. Standard of Review and Burden of Proof

The Labor Law provides that "any person...may petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter". *See* Labor Law § 101 (1). It also provides that an order of the Commissioner "shall be presumed valid" (*See Id.* § 103 [1].)

A petition filed with the Board that challenges the validity or reasonableness of an Order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable". (*See* Labor Law § 101[2]). It is a petitioner's burden at hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable. (*See* Rules § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angelo v National Finance Corp.*, 1 AD3d 850, 854 [3d Dept 2003]).

It is therefore Petitioner's burden to prove by a preponderance of evidence the allegations in its Petition that the Commissioner's determinations in the two Orders are invalid or unreasonable because Claimant was an independent contractor and did not work the hours found in the Wage Order.

B. Recordkeeping Requirements

Labor Law §§ 195(4) and 661 require employers to maintain payroll records. §661 requires employers to make such records available to the Commissioner:

"Every employer shall keep true and accurate records of hours

[3] Claimant testified that he filed a small claims action against Petitioner for his wages but withdrew it after filing with DOL because the court advised him that he could not have two cases simultaneously.

> worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time . . . ."

The Commissioner's regulations at 12 NYCRR 142-2.6 also provide in relevant part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:
> (1) name and address;
> (2) social security number;
> (3) wage rate;
> (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
> (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
> (6) the amount of gross wages;
> (7) deductions from gross wages;
> (8) allowances, if any, claimed as part of the minimum wage.

C. DOL's Calculation of Wages in the Absence of Adequate Employer Records.

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. (*See* Labor Law § 196-a.; *Angelo v Natl. Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]). 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 calculations to the employer."

In *Anderson v Mt. Clements Pottery Co.*, 328 US 680, 687-688 (1949), superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate....[t]he solution...is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his

> statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Citing to *Anderson v Mt. Clemens,* the Appellate Division in *Mid-Hudson Pam Corp., supra,* agreed:

> "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee.... Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

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

Under Article 6 of the Labor Law, "employer" is defined as "any person, corporation, or association employing any individual in any occupation, trade, business or service"(Labor Law § 190[3]). "Employed" is defined as "permitted or suffered to work" (Labor Law § 2[7]). The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work". (29 U.S.C. § 203[g]). Because the statutory language is identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship. (*See Ansoumana v Gristede's Operating Corp.*, 225 F Supp2d 184, 189 [SDNY 2003].)

In determining whether an individual is an employee covered by the Labor Law, or an independent contractor without wage and hour protections, "the ultimate concern is whether, as a matter of economic reality the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v Superior Care Inc.*, 840 F2d 1054, 1059 [2nd Cir 1988]). The factors to be considered in assessing such economic reality include: (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship, and; (5) the extent to which the work is an integral part of the employer's business (*id.* at 1058-1059). No one factor is dispositive (*id.* at 1059).

FINDINGS

Claimant was an Employee and not an Independent Contractor

Petitioner's proof was insufficient to establish that Claimant worked as an independent contractor and not an employee. It was Petitioner's burden to prove that "as a matter of economic reality" Claimant was in business for himself and not dependent on Petitioner to render the graphic design work he performed for Petitioner. (*Brock v Superior Care Inc., supra* at 1059). Such "economic reality" is determined by a balancing of factors, including the control exercised by Petitioner over the Claimant's work; the Claimant's opportunity for profit or loss from his work beyond his own labor; Claimant's skill and independent initiative in performing the work; the duration of the work Claimant was hired to perform, and; whether

the graphic design services Claimant rendered were integral to Petitioner's business. (*Id.* at 1058-59). The bulk of Petitioner's proof was not direct evidence of these factors but rather speculation in support of inferences. Petitioner's inferences are strained, however, and do not meet the burden to establish the economic reality that Claimant was an independent contractor and not an employee.

Petitioner argued that since Claimant is not listed in its tax records and did not file a W-2 form for the 2007 year, this establishes that he was not an employee. However, Petitioner did not contradict Claimant's testimony that he was not offered a W-2 form to fill out. The absence of tax records is self-serving and not affirmative proof of independent contractor status. (*See Brock v Superior Care, Inc.*, 840 F2d 1054, 1059 [2nd Cir 1988] [*quoting Real v Driscoll Strawberry Assoc., Inc.* 603 F2d 748, 755 [9th Cir 1979] ["an employer's self-serving label of workers as independent contractors is not controlling"]).

Petitioner's claim that Claimant's invoice establishes his contractor status is also unavailing. We credit Claimant's testimony that the invoice was a one time form Claimant constructed and sent Petitioner at Fenti's request after the DOL claim was filed in hopes that he would be paid for his work. It does not constitute evidence that Claimant was otherwise in business for himself as a graphic designer or was an independent contractor in his dealings with Petitioner.

Finally, Claimant's having filed and withdrawn a small claims action against Petitioner for his wages is not proof of independent contractor status. Labor Law §§196- a and 198 afford employees alternate remedies to file wage claims, either with the Commissioner or the Court, to collect unpaid wages from employers. The exercise of rights guaranteed "employees" by the Labor Law does not constitute evidence that they are *not* "employees" protected by that very same statute.

We find that the record evidence amply demonstrates that Claimant was an employee of Petitioner as a "matter of economic reality" under the applicable five part balancing test.

First, Petitioner set the hours Claimant was to render his graphic design services, and had Claimant use Petitioner's computers and materials at Petitioner's office to perform it. Petitioner also supervised the performance of Claimant's design work. Petitioner agreed to pay Claimant at the rate of $25 per hour only after an initial two-hour trial period as long as Claimant was "working out". Petitioner then kept Claimant on after the trial period, invited him to return a second day, and did not express any initial displeasure with the quality of Claimant's work. After the second day, however, Petitioner did not invite Claimant to return. Claimant's termination supports the reasonable inference we draw that Claimant was no longer "working out." Petitioner's supervision over the terms, manner, means, and performance of the graphic design services performed by Claimant are consistent with his status as an employee. (*See Brock v Superior Care, Inc., supra* at 1060 [employer setting of wages, hours, and review of work performance are indicia of supervision and control consistent with employment]; *Bynog v Cipriani Group,* 1 NY2d 193,198 [2003] [critical inquiry in determining employment relationship is degree of control by employer over results produced or the means used to produce the results]).

We credit Claimant's testimony that he was not in business for himself as a graphic designer at the time he sought full-time employment with Petitioner. Petitioner, on the other hand, operated a full service advertising agency whose core business was designing client ads for all forms of media. The sole source of Claimant's income was from the services he performed for the agreed rates of $20 and $25 for his labor. Claimant was thereby economically dependent on the agreement and had no opportunity for profit or loss. Such return is properly classified as wages from employment and not profit or loss from work as an independent contractor. (*See e.g. Brock v Mr. W. Fireworks, Inc.*, 814 F2d 1042, 1051 [5th Cir 1987] [where employee's sole opportunity for return is from his own labor, he cannot be said to have opportunity for profit or loss that exists for an independent contractor]).

While Claimant is no doubt an experienced graphic designer, Petitioner determined what work was to be performed by Claimant and what he would be paid for that work. Petitioner assigned Claimant the design work that needed to be done and Claimant did it. Such dependence on an employer to provide the opportunities for work does not reflect the skill and independent initiative of an independent contractor. (*See Brock v Superior Care, Inc., supra* at 1060 [where skilled nurses did not use technical skills in any independent way to obtain work opportunities, but instead depended on employer for job assignments for which the employer controlled the terms and conditions, economic reality reflects employment]).

There was no discussion between the parties as to how long the graphics design position for which Claimant was hired would last. Fenti conceded that she did not set a cap on the number of hours that Claimant would be working and stated in an e-mail that Claimant would be paid after the trial period at the rate of $25 per hour if Claimant was "working out." As we find above, the record evidence suggests that Petitioner terminated Claimant's services after two days because Claimant was not "working out." While the duration of the economic relationship between Petitioner and Claimant turned out to be short, Petitioner's hiring of Claimant on an open-ended basis for a position as a graphics designer at the rate of $25 per hour is evidence that Claimant was an employee, not an independent contractor.

Finally, and most important in the weighing of factors in this case, the graphic design services that Claimant was hired to perform were essential to Petitioner's business as a full service advertising agency. Fenti testified that Claimant was hired to design the ads for its clients, do filing, answer the phones, and "whatever needs to be done". Petitioner conceded that it needed someone to perform these functions for its business to run, much as a law firm needs lawyers. Claimant's graphics design work was thus integral to Petitioner's business and is the most telling evidence of his status as an employee. (*See Brock v Superior Care, Inc., supra* at 1060 [lower court finding that services rendered by nurses constitute most integral part of health care provider's business weighs heavily in favor of determination that nurses were employees]). Petitioner cannot hire an employee to perform the essential functions of its business and then avoid its obligation under the Labor Law to pay wages for such employment by misclassifying him as an independent contractor.

Petitioner Violated Article 6 of the Labor Law by Failing to Pay Claimant Wages Due

We affirm the Commissioner's Order directing payment to the Commissioner of unpaid wages owed the Claimant. Having failed to produce time and payroll records required

by Labor Law § 661 and 12 NYCRR § 142-2.6, DOL's calculation of wages must be credited unless Petitioner met its burden to negate the reasonableness of the Commissioner's determination (*Angelo v Natl. Fin. Corp., supra.*).

We reject the claim in the Petition that the Wage Order is in error because the Claimant worked for Petitioner for 7 ½ hours, only one day, and not the 12 ½ hours set forth in the Order. In the absence of employer records, DOL may make reasonable inferences and "is permitted to calculate back wages due to employees by using the best available evidence." (*See Matter of Mid - Hudson Pam Corp. v Hartnett, supra* at 821).

The Claimant's written claim with DOL asserts 12 ½ hours of work for Petitioner over a two day period. This statement was corroborated by a contemporaneous log maintained by the Claimant and by Claimant's credible testimony at hearing. Claimant's statements were the best available evidence of his hours worked and thereby created a reasonable inference as to the amount of back wages due him. The evidence was never rebutted by Petitioner at hearing. Petitioner submitted no payroll or other records substantiating the Claimant's hours. When asked on cross-examination how many hours Claimant worked, Petitioner said she could not recall, but surmised that it might be eight hours. In an e-mail between the parties, however, Petitioner conceded that Claimant "might [have] been here" for the hours claimed. Petitioner's testimony was simply too general and speculative to overcome the presumption favoring the Commissioner's calculation. In the absence of sufficient credible proof negating the reasonableness of such calculation, the Commissioner's determination based on "the best available evidence" is therefore valid and reasonable. (*See Matter of Mid - Hudson Pam Corp. v Hartnett, supra*).

INTEREST

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks 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 percent per centum per annum."

Petitioner did not challenge the assessment of interest in the Order. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the interest set forth in the Wage Order are valid and reasonable in all respects.

IMPOSITION OF CIVIL PENALTIES

If the Commissioner determines that an employer has violated Article 19 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand to pay the total amount found to be due and owing. Labor Law § 218 (1). In an order directing compliance, the Commissioner is authorized to assess a civil penalty based on the amount owing. Labor Law § 218 (1) continues:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of these provisions, rules, or regulations, or to an employer whose violation has been found to be willful or egregious, shall direct payment to the Commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages ... found by the Commissioner to be due, plus the appropriate civil penalty ... In assessing the amount of the penalty, the Commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages ... the failure to comply with recordkeeping or other non-wage requirements."

Petitioner did not challenge the Commissioner's assessment of a civil penalty in the Wage Order. The Board finds that the determination made by the Commissioner in assessing a 100% civil penalty against Petitioner is therefore valid and reasonable in all respects.

Petitioner Violated Article 19 of the Labor Law by Failure to Keep and/or Furnish Payroll Records of Claimant's Employment

Fenti testified that no payroll records were kept of the services Claimant performed because he was not employed by Creative Think Tank Agency. Petitioner did not otherwise challenge the Commissioner's Penalty Order. Since we reject Petitioner's challenge that Claimant was an independent contractor and not an employee, the Commissioner's determination that Petitioner violated Labor Law § 661 and 12 NYCRR § 142-2.6 for failure to maintain and/or furnish records of Claimant's employment is valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The two Orders to Comply with Articles 6 and 19 of the Labor Law, dated May 23, 2008, are modified to reflect Claimant's dates of employment to be October 18 and 19, 2007;

2. The two Orders are hereby affirmed in all other respects, and;

3. The Petition is denied

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

ABSENT
LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
October 21, 2009.