

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

MOHAMED OUMMIH,

Petitioner,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 6 of the Labor
Law, dated January 12, 2009,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 09-034

RESOLUTION OF DECISION

APPEARANCES

Adel A. Chahine, Esq. for petitioner.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin A. Shaw of
counsel), for respondent.

WHEREAS:

On February 19, 2009, Mohamed Oummih (Petitioner) filed a petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR part 66), seeking review of an Order to Comply that the Commissioner of Labor (Commissioner) issued against him, Hassan Zayer, and Queensbridge Multi Services Inc. on January 12, 2009.¹ The Order is an Order to Comply with Article 6 of the Labor Law (Wage Order), which finds that Petitioner failed to pay wages to Julio Puchi and Victor Puchi (Claimants) and demands payment of \$1,400.84 in wages due and owing, interest at the rate of 16% calculated to the date of the order in the amount of \$523.55 and a civil penalty in the amount of \$1,051.00 for a total amount of \$2,975.39. The Wage Order is \$880.84 for the period August 28, 2006 to September 2, 2006 for Julio Puchi and \$520.00 for the period September 27, 2006 to September 30, 2006 for Victor Puchi.

The Board issued a Resolution of Decision on May 26, 2010, finding Petitioner in default for failing to attend a hearing on May 5, 2010. Petitioner filed a motion for reconsideration with the Board, and on July 28, 2010, we issued a second Resolution of Decision granting the motion and reinstating Petitioner's petition.

¹ Zayer and Queensbridge Multi Services Inc. have not filed petitions seeking review of the Order.

The petition challenges the Order as unreasonable or invalid on the grounds that Petitioner was not Claimants' employer and that their sole employer was Hassan Zayer. The Commissioner denies Petitioner's assertions, and argues that the while Zayer was "technically" Claimants' employer, he was not their only employer, and was a "straw man" that Petitioner used to avoid his employer obligations.

Upon notice to the parties, the Board held a hearing at its offices in New York City on June 10, 2011, before Board Chairperson and designated hearing officer, Anne P. Stevason, Esq. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

SUMMARY OF EVIDENCE

Mohamed Oumih's Testimony

Petitioner Mohamed Oummih owns two buildings, one of which is the claim location at 13-05 40th Avenue in Long Island City. Petitioner has used his son-in-law, Hassan Zayar, who he described as an independent contractor, for maintenance and construction work on the buildings since the 1990s.

Petitioner testified that he knew Claimants as they worked in his buildings, but that they worked for Zayer. Petitioner maintained that he did not hire them, had no work or wage agreements with them, did not supervise them, and had no contact with them while they were working.² He admitted that he checked on the work that they did in August and September 2006, and while he could not recall how often, he stated that he usually checked every two or three days.

Petitioner described his working relationship with Zayer. He told Zayer what job needed to be done and Zayer told him how much it would cost. He paid Zayer for jobs, but never paid Zayer's helpers. Petitioner also maintained that he did not know what Zayer paid for materials or for labor for jobs that he did for him.

Hassan Zayer's Testimony

Hassan Zayer has worked in construction for 15 years and worked on Petitioner's two buildings on many occasions. Zayer's business was called "Zayer Construction," but he did not have a "d/b/a," insurance to run a business, Workers' Compensation, nor unemployment insurance, and did not keep records of Claimants' hours or wages. In addition to working on Petitioner's buildings he worked for family, friends and a few other clients. He usually worked on his own, but at times he hired others to help, and usually those helpers were Claimants.

Zayer explained his working relationship with Petitioner. He had no written contract with Petitioner. Petitioner told Zayer what jobs needed to be done, and Petitioner paid him for those jobs. Zayer then paid Claimants, or other helpers, from money that Petitioner gave him.

² Petitioner's petition asserts that he "never dealt with [the claimants] in any capacity," and that he did not know them.

Zayer recalled doing painting, plastering and tile work at Petitioners 13-05 40th Street building in August and September 2006. Petitioner contacted him to do the work and he hired Claimants at \$120 a day to assist in the work. Zayer insisted that he paid them for their work, in cash, though he admitted that did not make any tax withholdings on their pay.

Julio Puchi's Testimony

Julio Puchi (J. Puchi) recalled that Zayer called him and asked him if he wanted to work at Petitioner's 40th Avenue building. He agreed and worked there at the end of August through the beginning of September, 2006. He frequently saw Petitioner at the property as Petitioner checked on his work and inquired if any materials were needed. According to J. Puchi, Petitioner went to the hardware store with him to pick up materials because Zayer wasn't at the work site.

J. Puchi maintained that Zayer usually paid him cash for his work, but that Petitioner paid him when Zayer was not available. He explained that in August 2006, Zayer was working on another project and that he told Claimant that he had to deal with Petitioner; that Petitioner was "going to take care of business;" and, that Petitioner was going to pay them.

J. Puchi testified that from August 28 to September 2, 2006, additional help was needed for work at Petitioner's property; that Petitioner told him to get a helper; that he got someone for two of those days; and, that Petitioner gave him the money to pay the helpers.

J. Puchi also testified that he called Petitioner when he was not paid for his last week of work. Petitioner responded that he would try to contact Zayer, but when Julio Puchi called back, Petitioner refused to pay him

Victor Puchi's Testimony

Victor Puchi (V. Puchi) did flooring work for three days at Petitioner's 40th Avenue building the last week in September, 2006. He got the work through Zayer, who he worked for sporadically since 2000. He saw Petitioner at the work site for five or ten minutes every day or every other day. When Petitioner visited work sites where Claimants were working, he asked if there were any materials needed, and if so, they went with him to buy them. However, no materials were needed for the September 2006 job.

V. Puchi stated that Zayer, and not Petitioner, always paid him, and when he was not paid for the days he worked in September 2006, he contacted Zayer, who told him that he would only be paid if he kept coming to work, which he was unable to do as he was working elsewhere. He also called Petitioner and told him that he had not been paid, but Petitioner told him that he worked for Zayer and that he should contact him.

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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 commissioner under the provisions of this chapter” (Labor Law § 101 {a}). It also provides that an order of the Commissioner shall be presumed “valid” (Labor Law § 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” (Labor Law § 101[2]). It is the 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 (Board’s Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 [The burden of proof of every allegation in a proceeding shall be upon the person asserting it”]; *Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

B. Definition of Employer 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 USC § 203 [g]). Because the statutory language is identical, the New York Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*see e.g. Ansoumana v Gristede’s Operating Corp.*, 226 F Supp 2d 184, 189 [SDNY 2003]).

In *Herman v. RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir. 1999), the Second Circuit Court of Appeals stated factors to be used for determining employer status:

“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]). See also, *Matter of Richard Delledonne*, Docket No. PR 08-145 [July 22, 2009]; *Matter of Abdul Wahid*, Docket No.

08-005 [November 17, 2009]; and, *Matter of Franbilt, Inc.* Docket No. PR 07-019 [July 30, 2008] for Board cases that rely on the *Herman* test.

FINDINGS

Petitioner was J. Puchi's Employer during the Claim Period.

We find that Petitioner did not meet his burden of proof to show that he was not J. Puchi's employer from August 28 to September 2. J. Puchi credibly testified that while Zayer normally paid him for work on Petitioner's properties, Zayer told him that he was not going to be present at the worksite during the claim period and that he was to deal directly with Petitioner; that Petitioner was "going to take care of business;" and, that Petitioner was going to pay him. Further, J. Puchi testified that Petitioner authorized the employment of additional help for the work during the claim period and that Petitioner gave him the money to pay that employee. When J. Puchi was not paid, he went to Petitioner, not Zayer, for payment.

Moreover, Petitioner was often at the jobsite checking J. Puchi's work, and he procured materials needed for the job. In Zayer's absence, Petitioner supervised J. Puchi, acted in the capacity of his employer and paid J. Puchi his wages.

Petitioner did not act as V. Puchi's Employer

V. Puchi's testimony regarding his work from September 27 to September 30 was different from the testimony of J. Puchi. Unlike Petitioner's control over J. Puchi, Petitioner did not exercise similar control over V. Puchi.

V. Puchi testified that he was never paid by Petitioner, and when he believed he had not been paid for the three days he worked during the claim period, he approached Zayer, not Petitioner. V. Puchi contacted Petitioner only after he got Zayer's response to his pay demand. Further, once contacted Petitioner made it clear that he was not responsible for V. Puchi's pay, that he worked for Zayer and that he should talk to him about his pay.

While Petitioner frequently checked on Claimants' work, he did not provide any materials to V. Puchi, as he did for J. Puchi. Though the evidence established that he may have done so in the past, it also established that he did not do so during V. Puchi's claim period.

We note that the Commissioner does not challenge Hassan Zayer's status as Claimants' employer, but argues that Zayer and Petitioner (and Queensbridge Multi Service Inc.) were Claimants' joint employers during the claim periods. Though it is well established that employees may have more than one employer (*see, e.g., Matter of Robert Lovinger Docket No. PR 08-059* [March 24, 2010]), we make no finding regarding whether Zayer, or Queensbridge Multi Service Inc. were the Claimants' employer during the claim period as they have not filed a petition in this matter.

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." Banking Law 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum from the date of the underpayment to the date of payment."

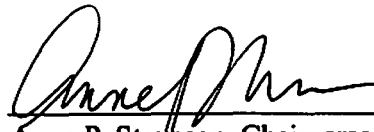
Petitioner did not challenge the assessment of interest made by the Wage Order. Subject to the modifications below, the Board finds that the considerations required to be made by the Commissioner in connection with the interest set forth in the Order are valid and reasonable in all respects.


IMPOSITION OF CIVIL PENALTIES

The Wage Order additionally assessed a civil penalty in the amount of 75% of the wages due. Petitioner did not challenge the civil penalty, and the Board finds, subject to the modifications below, that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amount are reasonable in all respects.

NOW, THEREFORE IT HIS HEREBY RESOLVED THAT:

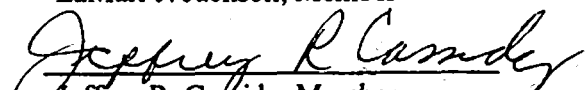
1. The Petitioner is responsible for paying the Wage Order in the amount of \$880.84 for Julio Puchi.
2. The Commissioner will recalculate the interest and civil penalty due based on these findings with respect to Petitioner.
3. The Petitioner is not responsible for the Wage Order in the amount of \$520.00 for Victor Puchi.


Anne P. Stevason, Chairperson


J. Christopher Meagher, Member


Jean Grumet, Member

LaMarr J. Jackson, Member


Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 29, 2012.