STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:

ADAM SUCHIN and EDNA SUCHIN and ADAM SUCHIN SHOWROOM LTD.,

Petitioners,

To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law; and an Order to Comply under Articles 19 of the Labor Law, both dated March 11, 2009,

- against -

THE COMMISSIONER OF LABOR,

Respondent.

DOCKET NO. PR 09-109

RESOLUTION OF DECISION

APPEARANCES

Howard C. Wachter, Esq., for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WITNESSES

Adam Suchin, for Petitioners.

Yong-Soon Hwang, Joyce Chan-Wong and Rebecca Scarfone, for Respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on May 11, 2009. An answer was filed on July 29, 2009. Upon notice to the parties, a hearing was held on July 20, 2010 in New York City before Anne P. Stevason, Esq., Chairperson of the Board 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, to make statements relevant to the issues, and to submit post-hearing briefs.

The Commissioner of Labor (Commissioner, DOL [Department of Labor], or Respondent) issued Orders against Petitioners Adam Suchin, Edna Suchin and Adam Suchin Showroom Ltd. (together, Petitioner) on March 11, 2009. The Order to Comply with Article 6 of the Labor Law (Wage Order) directs payment to the Commissioner for wages due and owing to Rebecca Scarfone (Scarfone or Claimant) in the total amount of $14,430.00, with interest continuing thereon at the rate of 16% calculated to the date of the Wage Order, in the amount of $2,738.93, and assesses a civil penalty in the amount of $28,860.00, for a total amount due of $46,028.93. The Order under Article 19 of the Labor Law (Penalty Order) dated March 11, 2009 assesses a civil penalty against the Petitioner in the amount of $4,000.00: $2,000.00 for "failing to keep and/or furnish true and accurate payroll records for each employee;" and $2,000.00 for "failing to give each employee a complete wage statement with every payment of wages."

The Petition alleges that Claimant was not an employee of any of the three named petitioners and that she was an independent contractor. The Answer generally denies the allegations of the Petition.

I. SUMMARY OF EVIDENCE

Testimony of Adam Suchin

Petitioner Adam Suchin (Suchin) testified that he owned a showroom where he represented the lines of certain garment manufacturers and sold their lines to various retailers or accounts. Suchin brought Claimant into the business in March of 2005 to act as an independent sales agent. Claimant brought with her various accounts and lines. There was no written agreement. Claimant was to be paid on a commission basis but due to the fact that she needed money regularly she was given a draw against future commissions twice a month. The draw was initially based on a yearly compensation of $50,000.00. This was eventually raised to $75,000.00 per year. All commissions that came into the showroom went first to Suchin. He would then pay the salespeople.

Expenses were paid by Petitioner. He paid for the showroom, the phone, the fax and for upkeep.

Since Claimant had experience in the industry and had her own contacts or accounts, Suchin did not need to direct her work. Claimant also worked with another company, Mia G, in a design and merchandising capacity for one of the product lines carried by Petitioner. This work was also done in the showroom. Suchin had no problem with Claimant doing other work given the fact that Petitioner's business was failing and there were few manufacturers that were still doing business with them. In November 2007 Petitioner stopped paying Claimant any draws because Petitioner was not being paid any commissions. The showroom eventually closed.

At different times, Petitioner had up to three salespeople in the showroom. They were all independent salespeople. At the end of the year, Petitioner would give them a 1099 tax form.

Testimony of Rebecca Scarfone

Suchin hired Claimant to work as a salesperson in his showroom in 2005. Claimant had taken some time off work to have a child and wanted to get back into the market. She told Suchin that she needed a certain salary to pay for child care and her mortgage so she could not work on commission. Suchin did not go back to her previous job, which was also paid by salary, due to the fact that it required a lot of traveling. In contrast, Suchin told Claimant that she could work four days per week and did not have to do any traveling. In addition, she was to receive two weeks paid vacation per year.

Claimant's job duties included helping Suchin run the showroom, opening the showroom, calling customers, accepting the clothes as they came into the showroom and steaming and hanging them up. She also did customer service, coordinated the lines and spoke with the manufacturers. Claimant did not work for another company while she worked for Suchin and she was not a designer or merchandiser for Mia G.

Claimant was paid twice a month the entire time that she worked for Suchin until November 2007. At the end of her employment she was being paid $1,442.00 a week. Claimant received a check on November 8, 2007 which was returned for nonsufficient funds. Thereafter, she received a number of checks from Suchin through November and December which were also returned for nonsufficient funds. Claimant stopped working for Suchin on January 3, 2008. On January 14, 2008, Claimant received an email from Suchin stating that he would begin a repayment plan for the period 11/8 to 1/3 and she should receive her first payment before January 30.

Claimant testified that Suchin told her that his mother, Edna Suchin, was a partner in the business. However, Claimant hardly ever saw Ms. Suchin in the showroom and Ms. Suchin never directed Claimant's employment, told her what to do, set her schedule or paid her.

Testimony of LSI Yong-Soon Hwang

Labor Standards Investigator (LSI) Yong-Soon Hwang (Hwang) is a member of the DOL Apparel Industry Task Force and was assigned the investigation of Claimant's complaint which was filed with DOL in January of 2008.

On February 27, 2008, LSI Hwang made her first visit to Petitioner's place of business and spoke with Suchin who identified himself as president of the business. When told about Claimant's complaint, Suchin stated that Claimant was an independent salesperson and not an employee. LSI Hwang revisited Petitioner on March 13, 2008 to review records but no records were provided. Suchin stated that he had records and other

evidence to show that Claimant was not an employee but that his accountant had the records. LSI Hwang returned on March 14, 2008 but again no records were provided.

When LSI Hwang informed Claimant that Suchin was denying that she was an employee, Claimant provided LSI Hwang with copies of dishonored checks that were given to Claimant by Suchin during November and December, 2007. Two checks dated in November were each for $2885.00 representing biweekly pay. LSI Hwang determined that Claimant was making $1442.00 per week and that she was owed $14,430.00 for the weeks she was not paid plus the check fees for the bounced checks. She gave Petitioner a copy of the recapitulation sheet showing what was owed to Claimant.

LSI Hwang returned to Petitioner's on March 27, 2008 and found that the showroom had been closed. The matter was referred for an Order to Comply and LSI Hwang recommended that the maximum penalty be imposed since three attempts were made to obtain records that Suchin claimed to have and none were ever produced, and due to the amount of the unpaid wages.

LSI Hwang testified that the individual Edna Suchin was added to the Order because Claimant stated that she heard that Edna Suchin was a partner from Suchin. She also believed that Edna Suchin's name was on a bank account, but was not certain of this information.

Testimony of SLSI Joyce Chan-Wong

Senior LSI (SLSI) Joyce Chan-Wong (Chan) testified that the 200 percent penalty was added to the wage order because Petitioner was considered an egregious violator since it was not the first time that a case was filed against him, there was a prior violation in 2007, and Petitioner consistently failed to produce records that he said that he had.

The civil penalties for failure to have payroll records and failure to provide wage statements were $1,000 per week per violation. The violation period was December 10, 2007 through January 3, 2008 so each penalty of $2,000 was within the parameters of allowable penalties.

II. STANDARD OF REVIEW

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in [the petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103).

Pursuant to the Board Rules of Procedure and Practice (Rules) 65.30 (12 NYCRR 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Orders are not valid or reasonable.

III. FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rule 65.39 (12 NYCRR 65.39).

A. Claimant is an employee and not an independent contractor.

B. Definition of "employer" under Article 6 of the New York Labor Law

Under Article 6 of the New York 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]). This similarity of language is due to the fact that Congress adopted the definition of "employ" from state child labor laws to protect employees who might have been otherwise unprotected at common law (*see Rutherford Food Corp. v McComb*, 331 US 722, 728 and n.7 [1947]). 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.*, 255 FSupp2d 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 [2d 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). In applying these factors, we must be mindful that "the remedial nature of the statute . . . warrants an expansive interpretation of its provisions so that they will have the widest possible impact in the national economy" (*Herman v RSR Sec. Servs., Ltd.*, 172 F3d 132, 139 [2d Cir. 1999]). Indeed, the Supreme Court in discussing the broad definition of "employ" set forth in the FLSA has observed that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame" (*United States v Rosenwasser*, 323 US 360, 362 [1945]).

Factor 1: The degree of control exercised by the employer over the worker

Claimant worked in Petitioner's showroom with Suchin on a set schedule four days per week. She was responsible for opening the business in the morning. She only sold the lines that were available in the showroom. Although Suchin testified that he did not direct Claimant's work because she was experienced in the industry, he had overall control of the business.

Factor 2: The worker's opportunity for profit or loss

Claimant's sole investment in her work was her time and services. She was paid a salary, the same amount of money, twice a month. Although Suchin stated that Claimant was being paid a draw against commissions, he provided no evidence of commission calculations or reconciliations of commissions against draws. In fact, Suchin testified that Claimant's draw was first based on compensation of $50,000 per year and then was raised to $75,000 per year. Petitioner paid all expenses.

Although Suchin testified that Claimant was in business for herself, Claimant denied it and there was no evidence to support that allegation.

Factor 3: The degree of skill and independent initiative required to perform the work

Although Claimant was a skilled and experienced salesperson, she did not bring any specialized skill to Petitioner's business. Claimant was doing the same work that Suchin was doing.

Factor 4: The permanence or duration of the working relationship

Claimant was not hired on a short term basis. She was hired in March 2005 for an unlimited period. She worked solely for Petitioner from that date until January 2008, at which time she quit because she wasn't being paid.

Factor 5: The extent to which the work is an integral part of the employer's business

Petitioner was in the business of selling garment manufacturer lines to customers. Claimant's job was doing exactly that and, as stated before, was the same job that Suchin was doing. Therefore, her work was an integral part of the business.

We find that based on the totality of the circumstances the Claimant was dependent on the Petitioner's business for "the opportunity to render service" (*see Brock v Superior Care*, 840 F2d at 1059). Accordingly, an employment relationship existed between the Petitioner and the Claimant and the Petitioner is liable for any unpaid wages under Article 6 of the Labor Law.

C. Edna Suchin was not Claimant's Employer.

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

> "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]). Claimant testified that Edna Suchin never directed or controlled her work, her schedule or her pay. The only evidence concerning Edna Suchin's involvement in the business was Suchin's alleged statement that Edna Suchin was a partner. We, therefore, find that Edna Suchin was not Claimant's employer and her name should be removed from both orders.

D. Civil Penalties for failure to pay wages are affirmed.

The Wage Order additionally assessed a civil penalty in the amount of 200% of the wages due. Labor Law § 218 provides, in pertinent part:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order [to comply] if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an amount equal to double the amount found by the commissioner to be due."

SLSI Chan's testified that Petitioner had had a prior Labor Law violation in 2007. That testimony was not rebutted by the Petitioner. Therefore, Labor Law § 218 required the Commissioner to assess a 200% civil penalty, which we affirm.

E. The Civil Penalties for failure to have records and failure to issue wage statements.

The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amount is reasonable in all respects.

F. Interest is due.

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." We therefore affirm the rate of interest imposed in the Wage Order but find that the amount of interest assessed must be modified based on the reduction in the amount of wages found due.

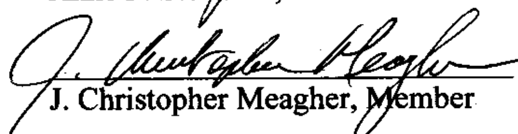
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 6 (Wage Order) is modified to remove the name "Edna Suchin" from the order but is otherwise affirmed in all respects; and

2. The Penalty Order is modified to remove the name "Edna Suchin" from the order but is affirmed in all other respects; and

3. The Petition is otherwise denied.

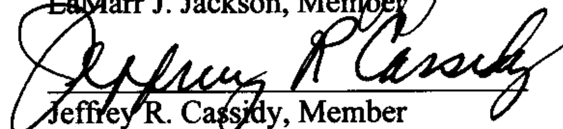
Anne P. Stevason, Chairman



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
April 27, 2011.