

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

LETICIA WALKER (T/A CONNELLY
DRYWALL LLC),

Petitioner,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19 of the Labor
Law, and an Order to comply with Articles 4 and
6 of the Labor Law, both dated June 29, 2009,

In the Matter of the Petition of:

LETICIA WALKER (T/A CONNELLY
DRYWALL LLC),

Petitioner,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19 of the Labor
Law, and an Order to comply with Article 6 of the
Labor Law, Both dated August 6, 2009

-against-

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NOS.
PR 09-235 & PR 09-279

RESOLUTION OF DECISION

APPEARANCES

Leticia Walker, pro se petitioner.

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

WITNESSES

Leticia Walker, for petitioner.

Andrew Cahill, Labor Standards Supervising Investigator, for respondent.

WHEREAS:

The petitions for review in the above-captioned cases were filed with the Industrial Board of Appeals (Board) on August 13, 2009 and October 6, 2009, respectively. Answers were filed on November 17 and 25, 2009. Upon notice, the cases were consolidated for the purpose of hearing and a consolidated hearing was held on May 4, 2011 in Buffalo, New York before LaMarr Jackson, Esq., Member 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 make closing arguments.

In case no. PR 09-235, the Commissioner of Labor (Commissioner, DOL [Department of Labor], or respondent) issued two orders against Dennis Mejia, and Patrick Hopkins and Leticia Walker (T/A Connelly Drywall LLC) on June 29, 2009: an order to comply with Article 19 of the New York State Labor Law (hereinafter referred to as the "wage order") finding a violation of Labor Law 652 for failure to pay employees ("claimants") the New York State minimum wage from March 31, 2009 through June 3, 2009 and directing payment to the Commissioner in the amount of \$35,300, together with \$823.56 as and for 16 percent interest and a civil penalty of \$70,600, for a total due and owing of \$106,723.56; and an order (hereinafter referred to as the "penalty order") finding that they failed to comply with Articles 4 and 6 of the New York Labor Law by failing to pay the claimants wages not later than seven calendar days after the end of the week within which they were earned, for employing a minor and for failing to have an employment certificate for such minor; for which petitioners were ordered to pay \$18,000, \$1,000 and \$1,000, respectively, for a total due and owing of \$20,000 on the penalty order.

In case no. PR 09-279, the Commissioner of Labor issued two additional orders against the same persons named in PR 09-235, both dated August 6, 2009: an order to comply with Article 19 of the New York State Labor Law ("second wage order"), finding said persons in violation of Labor Law 652 for failure to pay employees ("claimants") the New York State minimum wage from April 13, 2009 through June 4, 2009 in the amount of \$23,430, together with \$512.94 as and for 16 percent interest and a civil penalty of \$46,860, for a total due and owing of \$70,802.94; and an order ("second penalty order") finding them in violation of Labor Law, Section 191 (1) (a) for failure to pay manual workers not later than seven calendar days after the end of the week within which the wages were earned, for which they were ordered to pay a civil penalty of \$10,000.

Although the Orders were issued against Leticia Walker, Dennis Mejia and Patrick Hopkins, only Leticia Walker filed a petition for review of the Orders. The petitions were filed with the caption listing Connelly Drywall, LLC. However, the Orders only listed Connelly as a trade name. Counsel for the Board wrote Walker to confirm that she was the only petitioner, requesting a response if this was incorrect. No response was received.

The main allegation of the petition is that the employees on the schedule of unpaid wages listed in the Orders, were due wages from Dennis Mejia, and not petitioner, who was not their employer, since Mejia subcontracted the work and hired the employees. In

response, DOL confirmed that only Walker filed a petition and that based on the contracts and the interviews of employees, petitioner was an employer. The Answer also confirmed that only Walker had filed a petition and that, therefore, since the 60 day appeal period had passed, the orders were final against Mejia and Hopkins.

I. SUMMARY OF EVIDENCE

Petitioner's evidence

Petitioner Leticia Walker testified that she is the owner of Connelly Drywall LLC, a North Carolina business which is engaged in the construction business. In 2009, Christa Construction LLC, of Victor, New York, had a contract to provide construction services at the dormitories at Brockport College, located in Brockport, New York (Brockport College Suites project). On or about February 25, 2009, Connelly entered into a subcontract with Christa to perform part of the work on the Brockport College Suites project, primarily the installation of drywall. Although the work was to be performed in New York, Connelly failed to file or register itself in New York as a foreign corporation doing business in New York. Walker testified that she did not know of any obligation to register Connelly in New York. Aside from Walker, Connelly's operations manager, Patrick Hopkins, was also involved in the work at the Brockport College Suites Project, and was, in fact, the individual who signed the subcontract with Christa.

The subcontract provided, among other things, that Connelly was responsible to "provide all labor, materials, equipment and services including, but not limited to, competent supervision, shop drawings, samples, tools and scaffolding as are necessary for the proper performance of the work under the subcontract." The subcontract also prohibited Connelly from assigning any part of Connelly's work without written approval of Christa. The subcontract further obligated Connelly to designate a representative to be on site to supervise the work, which Connelly did by designating Hopkins as the onsite supervisor, although Walker testified that Hopkins was, in fact, not onsite on a daily basis.

Walker testified that Connelly sub-subcontracted the work on the Brockport College Suites project to Denis Mejia, who had been referred to Connelly a "couple of months" before work on the Brockport College Suites project commenced. Walker testified that Mejia worked on another project at Cortland, and Connelly moved him to Brockport College Suites when another sub-subcontractor was unable to do the job. The sub-subcontract was entered between Mejia and Walker on March 17, 2009, and provided, among other things, that Mejia would supply adequate personnel to perform the duties on the project, would adhere to the General Contractor's (Christa's) schedule, and would comply with OSHA standards. The sub-subcontract also detailed the way the drywall work was to be performed.

Walker testified that Connelly was only at the job site in Brockport approximately twice a month, and had no employees working on the project. Mejia and his workers were present at the project every day, and Mejia monitored safety and compliance with the sub-subcontract, and signed off on the workers' time. Walker testified that nobody from Connelly told Mejia's workers when to work or what their work schedule would be.

According to Walker, Mejia's employees used their own tools, but drywall materials and screws were provided by Connelly. Walker made payments on the sub-subcontract within five days of receipt of payments from Christa pursuant to the subcontract. Walker testified that she believed she paid Mejia enough for him to pay his workers. Walker explained that rarely, approximately five or six times, Christa's superintendent contacted Connelly with concerns about the quality of Mejia's work. In those instances, Walker went over the problems with Mejia. On one occasion, the superintendent advised Connelly that work was behind schedule and Walker contacted Mejia to discuss it.

Walker testified that at some point, Christa asked Connelly to provide I-9 Employment Verification forms for Mejia's workers. Mejia had the employees complete the forms and provide identification to Christa, and then Christa made a notebook and had the workers sign in and out each day. The forms were signed by Mejia on behalf of Connelly and list him as "drywall foreman." Mejia's I-9, dated February 27, 2009, lists him as Connelly's employee and was signed by Walker. Walker explained that Mejia's I-9 was completed prior to the decision to give him the sub-subcontract at Brockport College Suites. Walker also testified that Mejia's Connelly business card was made before the sub-subcontract. Finally, Walker testified that Connelly carried the workers compensation insurance for Mejia and his workers because she could get a better rate than he could, and that she held no unemployment insurance in New York because she had no employees.

Respondent's evidence

Supervising Labor Standards Investigator Andrew Cahill testified that the orders on appeal resulted from a multi-agency law enforcement raid of the Brockport College Suites project conducted on or about June 3, 2009. As part of the raid, investigators from DOL interviewed Mejia and several of his workers. Mejia informed the investigators variously that he was a foreman or a drywall supervisor doing business as MO Drywall, but had never filed a D/B/A certificate. In one interview with investigators, he is alleged to have stated that he supervised employees for Connelly. Several workers at the project who were interviewed by DOL investigators allegedly stated that they were hired by and supervised by Mejia. The employees all stated that they were owed wages for work performed on the project that Mejia did not pay them for. One employee informed DOL investigators that when he asked Mejia for his wages, Mejia told him that his boss had not paid him yet. Some of the interview forms indicate that the workers believed they worked for Connelly Drywall and/or Leticia Walker. The daily work activity sheets from the project list Connelly as a contractor and Denis Mejia as the foreman. Christa's project directory for Brockport College Suites lists Connelly Drywall. Mejia is not mentioned in the directory.

Cahill testified that Connelly Drywall LLC is not registered in New York and that Connelly was not named in the orders because "legally they do not exist in the State of New York." Cahill explained that DOL named Walker as an individual employer in the orders because DOL did not find the sub-subcontract between Connelly and Mejia to be a valid independent contractor agreement and because Walker owns Connelly. The wages found due and owing by the orders were calculated based on the statements of the employees.

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 by a preponderance of the evidence that the Orders are not valid or reasonable (*see also* State Administrative Procedure Act § 306).

III. FINDINGS AND CONCLUSIONS OF LAW

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):

Petitioner was an employer under Articles 4, 6 and 19 of the Labor Law

At the outset, we must determine whether petitioner Leticia Walker was the claimants' employer. For the reasons set forth below, we find that petitioner is an employer under the Labor Law.

"Employer" as used in Articles 6 and 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]; *see also* Labor Law § 190 [3]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7])¹.

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]).

Walker contends that she was not the claimants' employer, because she subcontracted Connelly's subcontract with Christa to Mejia. In essence, Walker believes that she is not the employer, because Mejia was. It is, however, well settled that employees may have one or more joint-employers (*see e.g. Zheng v Liberty Apparel Co., Inc.*, 355 F3d 61 [2d Cir 2003]), although the Court of Appeals recently clarified that in the construction context a contractor may not be liable as a joint employer of a subcontractor's employees where nothing more than "the usual contractor/subcontractor relationship" exists (*Ovadia v. Industrial Bd. of Appeals*, 19 NY3d 138, 145 [2012]). We find that the relationship between

¹ Article 4 of the Labor Law does not define "employer", but we note that the definition of "employed" found at Labor Law § 2 (7) applies to Article 4.

Connelly and Mejia was not the typical one contemplated by the Court of Appeals. Indeed, Connelly, unlike the general contractor in *Ovadia*, was itself a subcontractor, and under the terms of the subcontract with Christa, not permitted to assign the subcontract without the written consent of Christa. Walker produced no evidence that written consent was even sought to assign Connelly's subcontract to Mejia. Furthermore, it is clear from the un rebutted evidence produced by DOL (i.e. the daily work activity sheets and the project directory) that Christa did not recognize Mejia as a subcontractor on the project, but, instead, considered at all times that Connelly was the drywall subcontractor and Mejia its foreman. Additionally, Walker certified an I-9 Employment Verification form for Mejia as an employee of Connelly shortly before she subcontracted the subcontract to him. Finally, Mejia certified several I-9 Employment Verification forms on behalf of Connelly for workers on the project.

We find as a matter of "economic reality" that Walker, as the owner of Connelly, who negotiated the subcontract with Christa, hired Mejia, gave explicit written directions to Mejia on how to perform the work (the sub-subcontract) made payments to Mejia intended to be used to compensate the employees, provided materials and workers compensation insurance to Mejia, instructed Mejia on how to perform the work when notified by Christa of problems with the quality or timeliness of the work, and acted as the point of contact between Christa and Mejia for employment verification of Mejia and his workers, exercised sufficient control over the terms and conditions of the claimants' work that it was reasonable for DOL to determine that she was an employer under the Labor Law (*see e.g. Matter of David Fenske (T/A) Amp Tech and Designs, Inc.*, PR 07-031 [Dec 21, 2011]; *Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 [Jan 27, 2010]). That Walker was not present at the work site supervising the claimants on a daily basis or that they were supervised by Mejia does not relieve her from liability as an employer under the Labor Law (*See Herman v RSR Security Services Ltd.*, 172 F3d at 139 [quoting *Donovan v Janitorial Services, Inc.*, 672 F2d 528, 531 [5th Cir 1982] ["Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control 'do not diminish the significance of its existence'"]; *see also Carter v Dutchess Community College*, 735 F2d 8, 11-12 [2d Cir 1984] [fact that control may be "qualified" is insufficient to place employment relationship outside statute]; *Moon v Kwon*, 248 F Supp 2d 201, 237 [SDNY 2002] [fact that hotel manager may have "shared or delegated" control with other managers, or exercised control infrequently, is of no consequence]).

The wage orders are affirmed

The petitions do not challenge DOL's determination of the amount of wages due and owing, arguing only that Walker is not individually liable for such wages because she is not an employer. As discussed above, we find Walker was an employer. Therefore, the wage orders are affirmed in their entirety, including the imposition of civil penalties and interest.


The penalty orders are affirmed

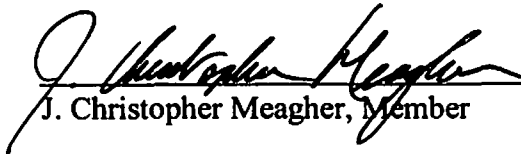
The petitions likewise do not specifically challenge the penalty orders, asserting only

that Walker was not an employer and therefore did not employ a minor in violation of Article 4 of the Labor Law or need to maintain an employment certificate for such minor and did not violate Article 6 by failing to pay the claimants' wages not later than seven calendar days after the end of the week within which the wages were earned. As discussed above, we find that the petitioner was an employer. Accordingly, as she produced no evidence at hearing to contradict the findings of the penalty orders and did not contest their amounts, they are affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

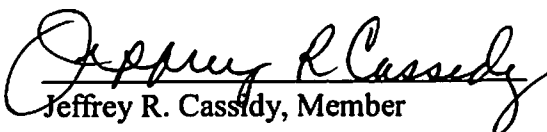
1. The wage orders are affirmed; and
2. The penalty orders are affirmed; and
3. The petitions for review be, and the same hereby are, denied.


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
October 17, 2012.

that Walker was not an employer and therefore did not employ a minor in violation of Article 4 of the Labor Law or need to maintain an employment certificate for such minor and did not violate Article 6 by failing to pay the claimants' wages not later than seven calendar days after the end of the week within which the wages were earned. As discussed above, we find that the petitioner was an employer. Accordingly, as she produced no evidence at hearing to contradict the findings of the penalty orders and did not contest their amounts, they are affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The wage orders are affirmed; and
2. The penalty orders are affirmed; and
3. The petitions for review be, and the same hereby are, denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member



LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
October 17, 2012.