

The order to comply with Article 6 (wage order) under review was issued by the respondent Commissioner of Labor (Commissioner) on June 30, 2009 against petitioners Exceed Contracting Corp., Maria Lasso, and Jaime M. Correa Sr¹. The wage order was also issued against Jose Rodriguez, who did not appeal or otherwise appear in this proceeding. The wage order directs compliance with Article 6 and payment to the Commissioner for wages due and owing to six named claimants in the amount of \$9,457.28 for the time period from February 17, 2008 through March 9, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the wage order, in the amount of \$3,261.41, and assesses a 100% civil penalty in the amount of \$9,457.29, for a total amount due of \$22,175.97.

The order under Article 19 of the Labor Law (penalty order) was also issued on the same date against the same parties with Jose Rodriguez failing to appeal. The penalty order imposes a \$500.00 civil penalty against the petitioners and Jose Rodriguez for violating Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee from on or about February 11, 2008 through March 9, 2008

The petition alleges that the petitioners did not employ the named claimants, that the named claimants were employed by the petitioners' subcontractor, Jose Rodriguez, and that as the petitioners did not employ the named claimants, they were not required to maintain payroll records for them.

The respondent answered that the petitioners were employers of the named claimants because the claimants named Exceed Contracting as their employer in their claim forms and listed Jaime Correa Sr. as the responsible person at the company. The respondent also answered that the subcontractor agreement provided by the petitioners during the DOL's investigation did not demonstrate that the claimants were employed by Jose Rodriguez, that there was no evidence that Jose Rodriguez was an independent contractor, and that therefore the respondent took the position that Jose Rodriguez was acting as an agent for the petitioners when hiring the claimants and allowing them to work.

SUMMARY OF EVIDENCE

Testimony of Jaime Correa Sr.

Jaime Correa Sr. testified that he is the vice president of Exceed Contracting Corp., which was formed in 2007 as a drywall contractor and has an office on 10th Street in Long Island City, New York. Petitioner Maria Lasso is the president of Exceed Contracting Corp. Correa testified that in the fall of 2007 Exceed had "a couple of projects" including the Greenwich Street and Chelsea Manor projects. CPG, the general contractor for the Greenwich Street project, hired Exceed to finish the taping work of another contractor that had not completed the work. This was the first time Exceed had worked as a contractor for CPG. A contract was entered between CPG and Exceed on October 22, 2007 to provide labor and material to complete the specified taping, spackle, and drywall work at Greenwich Street. According to Correa, he advised CPG at

¹ The orders misidentified Jaime Correa Sr. as "James" Correa. The orders were amended by stipulation at hearing to correct the error.

the time that Exceed did not have enough employees for the job and would need to subcontract the work, and they did not object. Correa testified that at the time, Exceed Contracting had "another couple employees in other jobs" but not on the Greenwich Street project. Exceed also had "a couple" of subcontractors working on other jobs at the time.

Correa testified that Exceed hired Jose Rodriguez, who Exceed had never worked with before, to do the labor on the Greenwich Street project, and entered into a written subcontract with him. Rodriguez told Correa that he had a crew of workers and was capable of doing the work. Correa showed Rodriguez the scope of the work and testified that "the directions [Rodriguez] got was directed from me." Correa further explained that CPG gave him instructions which he passed on to Rodriguez and that "I was in charge of the supervision of all the jobs to make sure that every job has the conditions and all the subcontractors do the work the way it's supposed to be in the contract."

Correa testified that at the Greenwich Street project, Exceed provided the materials, but equipment was the responsibility of Rodriguez. Exceed made weekly progress payments to Rodriguez based on the amount of work that had been completed. Correa explained that Rodriguez, not Exceed, provided the laborers for the project. Correa further explained that Rodriguez managed, supervised, and paid the laborers at the Greenwich Street project. Correa said that he was at the location 30 to 45 minutes per day to make sure Rodriguez was present and doing the work he was supposed to do. Correa stated that ultimately Rodriguez abandoned the Greenwich Street project forcing him to hire another subcontractor to finish the work.

Testimony of Hugo Llidizaci

Claimant Hugo Llidizaci testified that he was hired by Jose Rodriguez and worked at the Greenwich Street project doing plaster and taping work. Llidizaci worked on the project from September 2007 to April 2008. Rodriguez gave him his work schedule which was from 7:00 a.m. to 3:30 p.m. and told him he would pay him \$140.00 per day. Llidizaci testified that he first saw Correa while working at the Greenwich Street project and that "Jose told us that [Correa] is the boss, our boss." Llidizaci said that Correa came to the project two to three times per week and spoke to Rodriguez. He does not know what Correa and Rodriguez discussed because he could not hear their conversations.

Llidizaci testified that Rodriguez paid him and the other workers in cash, and that he never received any money directly from Exceed. Jose Rodriguez, furthermore, directed Llidizaci's work, although Llidizaci testified that "on one occasion, Mr. Correa had a meeting with all the workers and he told us that we have to be there at 7 to work" because they had been arriving late. Llidizaci observed that an "Exceed" van delivered materials to the project every week, and that Exceed also provided the workers with a scaffold.

Llidizaci testified that Rodriguez did not pay the workers on the project for two weeks and that when he complained about it to Rodriguez, Rodriguez replied that "Jaime didn't pay me so I can't pay you," although he never told the workers to go to Exceed to ask for their wages. Llidizaci's last day of work on the project was March 7, 2008.

Although Correa did not directly supervise the workers at the Greenwich Street project, Llidizaci testified that Rodriguez told the workers that Correa needed work done in Brooklyn, so Llidizaci went to work at a project in Brooklyn for two to three days and that “when we got there [Correa] used to tell us that he needs us to fix this.” Llidizaci also testified that the work in Brooklyn was on weekends and that Rodriguez sent two or three workers to “go to the other place of [Correa].”

Testimony of Vincente Ulloi

Claimant Vincente Ulloi testified that he knows petitioner Correa through Jose Rodriguez, who hired him to work at the Greenwich Street project, where he worked from July 2007 to March 2008 at a wage rate of \$140.00 per day. According to Ulloi, Rodriguez told the workers that he worked for Exceed Contracting. Ulloi stated that he brought his own tools to work and that either Correa or Rodriguez provided the materials. Ulloi saw a blue “Exceed” van deliver the materials once every one to two weeks. Correa was present at the Greenwich Street project two to three times per week, and had a meeting once with the workers to tell them to arrive to work on time. Ulloi said that when he signed in at the Greenwich Street project, he wrote “Exceed” in the log book. Ulloi testified that work at Greenwich Street ended because Rodriguez said Correa had not paid him.

Ulloi testified that Rodriguez told him to go to work at a project in Brooklyn because Correa needed people there. Ulloi went to the job in Brooklyn where Correa gave the workers instructions. Ulloi explained that he never spoke with Correa at the Greenwich Street project, but did speak to him in Brooklyn. Additionally, Ulloi worked for Correa at a job in Long Island. Correa picked Ulloi up in Flushing and took him to the job site where Carlos, another of Correa’s subcontractors, told Ulloi what work to do. Ulloi testified that he never informed DOL that he worked for Exceed at projects other than Greenwich Street.

FINDINGS AND CONCLUSIONS OF LAW

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

Burden of Proof

The Petitioner has the burden to show that the Orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103; 12 NYCRR 65.30).

The Wage Order

It is undisputed that the individual petitioners who operate petitioner Exceed Contracting Corp., a drywall company, entered into a subcontract with CPG Construction and Development on October 24, 2007 to provide specified drywall work, specifically taping, at a project on Greenwich Street in New York, New York. It is likewise undisputed that on or about November 1, 2007, the petitioners then entered into an agreement with an individual named Jose Rodriguez

to work at the project and to provide labor for the taping work. Finally, it is undisputed that Jose Rodriguez failed to pay two weeks' wages to the claimants and left the job on or about March 7, 2008. The petitioners allege that they are not liable as employers for the claimants' unpaid wages because of the subcontract they entered with Jose Rodriguez, who they claim is the party responsible for the unpaid wages. We find, however, for the reasons set forth below, that Jose Rodriguez was not an independent contractor as asserted by the petitioners, and that the petitioners, along with Jose Rodriguez, were the claimants' employers and are responsible for the unpaid wages.

Jose Rodriguez was not an independent contractor

The ultimate inquiry into whether an individual is an independent contractor is whether such person depends on someone else's business or is in business for himself (*Van Patten Enterprises*, PR 08-090 [July 22, 2009]; *Alon Hen*, PR 08-094 [May 20, 2009]; *Abdul A. Saadat*, PR 08-098 [October 21, 2009]). Accordingly, in this case, we must look to determine whether Jose Rodriguez was "wearing the hat of an independent enterprise" (see e.g. *Boston Bicycle Couriers, Inc. v Division of Employment & Training*, 778 NE2d 964 [Mass. App. Ct. 2002]). In order to make this determination, we must consider several factors, including (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, to see if Rodriguez, was, as a matter of "economic reality", an independent contractor (*Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2d Cir 1988]). No one factor is dispositive, rather the test is based on the totality of the circumstances and the ultimate concern is whether, as a matter of economic reality, Rodriguez depended upon the petitioners for the opportunity to render service or is in business for himself (*Id.* at 1059).

We find that the petitioners did not meet their burden to prove that Jose Rodriguez was an independent contractor. Correa testified that he supervised Rodriguez's work to make sure he was following CPG's specifications and gave Rodriguez directions. There is no evidence in the record that Rodriguez made any significant investment into the business or stood to profit or loss from the project beyond the progress payments made to him by the petitioners for providing labor. Certainly the petitioners, who had subcontracted their subcontract with CPG, were the ones who stood to profit by outsourcing the labor they had contracted to provide to the general contractor. Significantly, there is no evidence that Rodriguez owned and operated his own drywall or taping business, maintained workers compensation or other insurance, held any professional licenses, or owned or rented required equipment such as scaffolds, sanding machines, and halogen lamps, while, on the other hand, the petitioners supplied all of the materials needed for the work. There is likewise no evidence in the record that the work required of Rodriguez possessed any particular skill or initiative to perform the work. Correa testified that he had never worked with Rodriguez before, that one of his employees had referred Rodriguez to him through a family relationship, and that the interview consisted of little more than Rodriguez telling Correa he was capable of doing the work. This does not indicate that the job required any special skill or initiative such as one would expect of an independent business, particularly where the record shows that Rodriguez was merely following directions given to him by Correa, which had, in turn, been given to Correa by the general contractor. Furthermore, it is

significant that the taping work performed by Rodriguez was the same type of work ordinarily performed by the petitioners, and was therefore an integral part of the petitioners' business.

Additionally, Vincente Ulloi's credible and un-rebutted testimony that the claimants signed in at the job site under "Exceed" (as opposed to under Jose Rodriguez's name or that of a company owned by Rodriguez) further supports that Rodriguez was not in business for himself, but was, rather, an "agent" or "foreman" for Exceed (*see* Labor Law §§ 2 [6] and [8-a] [defining agents and foremen as "employers"]). Accordingly, based on the totality of the circumstances and the record before us, we find that the petitioners' have failed to prove that Jose Rodriguez was an independent contractor.

Having found that Rodriguez was not an independent contractor, removes the relationship between him and the petitioners from the type of "typical general contractor/subcontractor" relationship wherein "the general contractor is not an employer of its subcontractor's employees" (*Ovadia v Industrial Board of Appeals*, 19 NY3d 138, 143 [2012]). Indeed, in the matter here before us, the petitioners, themselves, are a subcontractor, and they engaged by their own admission in the same trade (drywall) as Rodriguez, which does not resemble the "typical" relationship described by *Ovadia*, where the appellant was a general contractor, like CPG, who subcontracted each phase of construction to subcontractor experienced with that phase. *Ovadia* does not address sub-subcontracting, particularly where the subcontractor, as here, sub-subcontracts to an individual engaged in the same trade (drywall) throwing into question, as discussed above, the sub-subcontractor's status as an independent contractor².

The petitioners were the claimants' employer

"Employer" as used in Articles 6 and 19 of the Labor Law means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* 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 § 230 [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

² We note that in 2010, the Legislature, recognizing the problem of misclassification of employees as independent contractors in the construction industry as a serious problem, enacted the New York Construction Agency Fair Play Act (*see* Labor Law § 861-a).

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]).

The petitioners, based on Correa’s testimony and timesheets in evidence, had very few workers on payroll during the time period in question. In order to meet the terms of the contract Exceed entered with CPG, Correa needed more workers. The petitioners, although they did not hire or fire any of the claimants, did hire Jose Rodriguez to meet the labor demands of the contract with CPG, who, as discussed above, was the petitioners’ agent and foreman on the Greenwich Street project, and acted in the interests of the petitioners with respect to the claimants and directed and supervised their work at the project based on the scope of work specified by Correa. Additionally, Correa, based on the credible and un-contradicted testimony of Ulloi and Llidizaci, met on one occasion with the claimants to instruct them to show up to work at the Greenwich Street job on time, and requested that Rodriguez send the claimants to other locations at which Correa supervised the claimants’ work. Finally, Correa, himself, admitted that he was in charge of the “supervision” of all Exceed’s jobs and that his “responsibility was to make sure that Jose Rodriguez, with his guys, performed the work that we have in the agreement with my company.” That the petitioners, including Correa, did not continuously monitor Rodriguez and the claimants at all times and directly exercised their control only occasionally does not diminish its existence or remove the petitioners from liability (*Moon v Kwon*, 248 FSupp2d 201, 236 [SDNY 2002] [internal citations omitted]). We find based on this evidence that the respondent’s determination that petitioners, along with Rodriguez as their agent and foreman, exercised the requisite control over the claimants to be held liable as employers is reasonable. Accordingly, we affirm the wage order.³

Civil Penalty

The wage order assesses a 100% civil penalty. The petition does not specifically challenge the imposition of the civil penalty, and therefore any objection has been waived (Labor Law § 101 [2]). Furthermore, the petitioners did not produce evidence at the hearing that the penalty was unreasonable. Therefore, we affirm the 100% civil penalty assessed by the respondent in this matter.

³ We do not need to review the calculations made by the respondent where the petitioners have only challenged their status as employers and not the amount of wages found due and owing.

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 section 14-A sets the “maximum rate of interest” at “sixteen percent per centum per annum.”

Penalty Order

Having found above that the petitioners employed the claimant, the penalty order is affirmed in its entirety because the petitioners were required to maintain employment records relating to the claimants (*see* Labor Law § 661; 12 NYCRR 142-2.6). There is no dispute that the petitioners failed to keep such records with respect to the claimants.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed;
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, 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 29, 2013.



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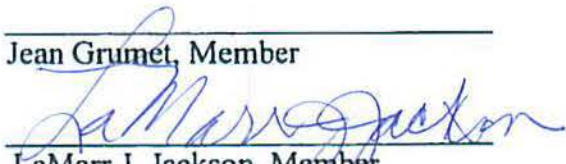
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Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
April 29, 2013.