

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
ALEXANDER LEVY A/K/A ALEXANDER	:
LEVITSKY,	:
	:
Petitioner,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply With Article 6 of the Labor Law	:
and an Order Under Article 19 of the Labor Law, both	:
dated August 19, 2010,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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DOCKET NO. PR 10-305

RESOLUTION OF DECISION

**APPEARANCES**

Alexander Levy, petitioner *pro se*.

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

**WITNESSES**

Alexander Levy for the petitioner.

Senior Labor Standards Investigator Lori Roberts for the respondent.

**WHEREAS:**

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on October 13, 2010<sup>1</sup>. Upon notice to the parties a hearing was held on March 5 and April 9, 2013 in New York, New York, before Devin A. Rice, Associate Counsel to 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 file post hearing summations.

<sup>1</sup> A motion to dismiss filed by the respondent was denied by letter dated May 19, 2011.

The order to comply with Article 6 (wage order) under review was issued by the respondent Commissioner of Labor (Commissioner) on August 19, 2010 against petitioner Alexander Levy A/K/A Alexander Levitsky and Aaron Bethea and Zona Scherer A/K/A Zona Castellano and Caring Care of New York Incorporated and Caring Care Inc. and ANR Advance Home Care Services, Inc. Aaron Bethea , Zona Scherer A/K/A Zona Castellano, Caring Care of New York Incorporated, Caring Care Inc. and ANR Advance Home Care Services, Inc. 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 92 named employees in the amount of \$139,075.08 for the time period from July 1, 2009 through August 9, 2009, with interest continuing thereon at the rate of 16% calculated to the date of the wage order, in the amount of \$22,861.67, and assesses a 200% civil penalty in the amount of \$278,150.16, for a total amount due of \$440,086.91.

The order under Article 19 of the Labor Law (penalty order) was also issued on the same date against the same parties, with only the petitioner appealing. The penalty order imposes a \$1,000.00 civil penalty against the petitioner and the other named parties 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 July 7, 2009 through August 9, 2009.

### SUMMARY OF EVIDENCE

The orders under review in this matter were issued by the respondent against the petitioner and various other individuals and entities following the failure of a home health care agency, trading as Caring Care of New York, to pay its employees from July 1 to August 9, 2009. Senior Labor Standards Investigator Lori Roberts testified that approximately 100 claims were filed with the Department of Labor (DOL) concerning the failure of Caring Care of New York to pay its employees' wages. Roberts further testified that only three of those claim forms mentioned the petitioner as a responsible person at the firm. Those three claim forms, two of which came from the same household, allege that Alexander Levy is a "boss." Roberts testified that DOL's determination that Levy was an employer responsible for the unpaid wages was based on information she received from the claim forms and other information given to her during the investigation. Roberts admitted that she did not speak to those claimants, nor did Roberts know who signed the checks for ANR Advanced Home Care, who was responsible for paying the wages, or who was in charge of the agency. Emails in evidence show that there were multiple agencies, including the Attorney General's office, criminally and civilly investigating the individuals and entities named in the orders. An email written by an Assistant Attorney General to the DOL's Deputy Director of Office of Special Investigations, which was forwarded to DOL investigators, states that "other than Aaron Bethea , based on information gathered in the course of our investigation, the following individuals may be principals or officers of one or more of the corporations that are the subject of your inquiry . . . Alexander Levy a/k/a Alexander Levitsky . . . ." Roberts never contacted the Attorney General's office to discuss this information.

Petitioner Alexander Levy, for his part, testified that he never worked for ANR or Caring Care, stating that his only role was as a computer consultant who developed their billing system. He testified that he never hired employees, fired employees, supervised employees, signed checks or had any corporate involvement in ANR, and that he was no longer a consultant in 2009 when the wages in question accrued. Levy further testified that he understood that ANR ceased

operations in 2008 and its assets were purchased by Caring Care, Inc., a company he never had any association with. Levy testified that his only investment in ANR was the time and labor he put into developing a software package for the company, for which he was never paid. He also testified that in 2000 or 2001 he wrote several checks to Zona Castellano<sup>2</sup> totaling \$60,000 to \$80,000 as a personal loan. This loan was never repaid.

### 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).

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).

“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 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]).

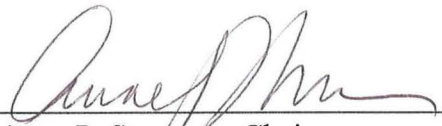
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<sup>2</sup> According to Levy’s testimony, his relationship to Castellano existed prior to his involvement with ANR as a consultant. He testified that he first did work for Ms. Castellano’s husband.

Alexander Levy testified that he had no control over the employees named in the wage order. He stated that he was a computer consultant for ANR, and did not hire, fire or manage employees, write checks, or have any corporate control at ANR. He further testified that he was terminated from his role as a computer consultant for ANR in 2008, prior to the date the wages at issue were earned, and had no relationship to Caring Care. The petitioner, having credibly denied that he was an “employer” shifted the burden of proof to the respondent, who failed to establish any evidence that Levy can be held individually liable as an employer for the wages found due and owing by the wage order. The respondent’s evidence linking the petitioner to the unpaid wages consisted of three claim forms (out of 100) naming Levy as “boss,” and an email from the Attorney General’s office stating that Levy “may be” a principal or officer in one of the companies named in the orders. Roberts never spoke to the claimants who named Levy as “boss” or contacted the Attorney General’s office to discuss the information they had regarding Levy’s role in the companies being investigated. Indeed, the strongest evidence relied on by DOL to hold the petitioner liable for the owed wages appears to be prior sworn testimony at an allocation during which he admitted he had invested in ANR, which, even if true, does not ipso facto make him an employer under Articles 6 and 19 of the Labor Law (*see e.g. Matter of Robert Rubin*, Docket No. PR 09-227 [February 14, 2013]), where the respondent presented no evidence that he exercised any control over the employees named in the wage order. For these reasons, we find that the orders are unreasonable with respect to the petitioner and must be revoked as to him as on the record before us there is no evidence to support DOL’s determination that the petitioner was an employer responsible for the unpaid wages or for maintaining employment records.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

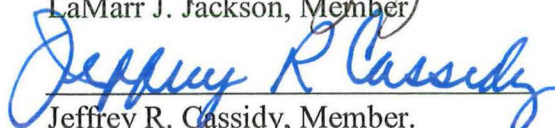
1. The wage order is revoked with respect to Alexander Levy A/K/A Alexander Levitsky; and
2. The penalty order is revoked with respect to Alexander Levy A/K/A Alexander Levitsky; and
3. The petition of Alexander Levy A/K/A Alexander Levitsky be, and the same hereby is, granted.

  
 Anne P. Steyason, 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  
 October 2, 2013.