

and a consolidated hearing was held on November 15, 2012 in New York, New York, before Administrative Law Judge Jeffrey M. Bernbach, the designated hearing officer in this proceeding.¹ 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 closing briefs.

The Commissioner of Labor (Commissioner or respondent) issued three Orders against the named petitioners on September 3, 2010: an Order to Comply with Article 6 of the New York Labor Law (wage order) finding petitioners in violation of Labor Law § 191 for failure to pay \$7,880 in wages to claimant Uriel Lebhar and ordering petitioners to pay \$7,880 in wages due, together with \$1,941.29 annual interest at 16% and a civil penalty of \$7,880, for a total due and owing of \$17,701.29; a second Order to Comply with Article 6 of the New York State Labor Law (supplemental wage order) finding the petitioners in violation of Labor Law § 198-c for failure to pay supplemental wages to the claimant and directing payment to the Commissioner of \$1,576 in supplemental wages due, together with \$388.26 annual interest at 16% and a civil penalty of \$1,576, for a total due and owing of \$3,540.26; and a third Order Under Article 19 of the New York Labor Law finding petitioners in violation of Labor Law § 661 and 12 NYCRR 142-2.6 for failure to keep and/or furnish true and accurate payroll records for the claimant, and ordered petitioners to pay \$500 as and for a civil penalty.

I. SUMMARY OF EVIDENCE

Petitioners' evidence

Petitioner U.S. Wood, LLC, which was in business from 2007 through the end of 2009, was a custom cabinet maker dealing in custom kitchen cabinetry, wall units, and the like. Upon its formation, petitioner Richard Cave owned 95% of the shares of stock in the corporation. Petitioner Michael Cave and Michael Ackerman were each given a 2 ½ % interest in the company in exchange for certain loans that they made. In February 2008, Michael Cave and Michael Ackerman surrendered their respective interests in U.S. Wood in exchange for repayment of the loans they had made, and Richard Cave became the sole owner of the company. Michael Cave continued to work at U.S. Wood as a manager.

Richard Cave agreed that several paychecks tendered to the claimant, Uriel Lebhar, were returned by the bank for insufficient funds, but testified that all those checks were subsequently repaid to Lebhar. At hearing, Richard Cave produced copies of checks and check stubs that he alleged represented all wage payments made to Lebhar during the period of his employment with U.S. Wood. Cave did not produce copies of the backs of the checks, but argued that since he had obtained the checks from the bank they must have been cashed by the claimant. According to Wood, if the checks had been returned for insufficient funds, the bank would not have had copies of them.

Richard Cave testified that on February 18, 2009 he had a dispute with Lebhar, and

¹ At the hearing, Respondent's motion to amend the caption of the case to read "Richard" Cave, rather than "Rich" Cave, was granted.

Lebhar resigned from his job. Cave further testified that the next day, Lebhar attempted to withdraw his resignation, but Cave refused. Additionally, Cave stated that he did not offer to give Lebhar two weeks' severance pay in lieu of notice. Finally, Cave conceded that pursuant to U.S. Wood's vacation policy, employees became eligible to accrue vacation pay after six months of employment.

Respondent's evidence

On or about July 21, 2008, Richard Cave hired claimant Uriel Lebhar as a shop foreman and production manager, a position he held until he resigned on February 18, 2009. Lebhar testified that his salary was \$1,575.00 per week and that he was promised an additional 3% commission on work produced in the shop and 10% of all business he brought to the company². Lebhar testified that only Richard Cave supervised him, and that he never received any direction or orders from Michael Cave, and basically had nothing to do with him.

Lebhar initially testified that several of his paychecks were not honored by the bank and that three of them were never replaced, although he was not sure for which weeks he had not been paid. He first explained that he was owed two paychecks and one check in the amount of \$400.00 which was money due to his brother-in-law. He later testified that his claim was for five weeks. His claim form, however, appears to claim that he was owed only for the weeks of February 8, February 13, and February 22, for a total claim of \$4,728.00³, which are the weeks Lebhar eventually testified were the weeks he had not been paid. Lebhar also filed a claim for unpaid vacation days.

Lebhar testified that his last day of work was February 18, 2009. His claim form indicates that he was discharged for lack of work, but he stated at the hearing that he had actually quit after a dispute with Richard Cave. Lebhar stated that he told Cave he was quitting and offered two week's notice, to which Cave replied, "I don't want your two weeks' notice – I'm going to pay you for it. Come tomorrow and pick up your tools." When Lebhar returned the following day, he attempted to withdraw his resignation, but Cave refused.

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."

² Richard Cave denied that he promised commissions to the claimant.

³ The claim form is confusing. It lists seven weeks of wages owed with the first two and the last two weeks crossed out leaving only the weeks of February 8, 15, and 22. The Claimant testified that he did not know who had made the cross-outs on his claim form.

Therefore, the burden is on the petitioners to prove by a preponderance of the evidence that the orders are not valid or reasonable (*see also* State Administrative Procedures Act § 306).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Employer status

The threshold issue to be determined is whether Richard Cave and Michael Cave were employers of the claimant within the meaning of the New York Labor Law.

Labor Law § 190 defines the term “employer” as “include[ing] any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service” (Labor Law § 190 [3]). An “employee” is described in the statute as “any person employed for hire by an employer on any employment” (Labor Law § 190 [2]). Furthermore, to be “employed” under the Labor Law means that a person is “permitted or suffered to work” (Labor Law § 2 [7]).

The Board has found individuals to be employers if they possess the requisite authority over employees (*see e.g. Matter of David Fenske [T/A] AMP Tech and Designs, Inc.*, PR 07-031 [December 21, 2011]; *Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 [January 27, 2010]). In *Herman v. RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999], the court articulated this test for determining employer status:

“the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the ‘economic reality’...[T]he relevant factors include whether the alleged employer (1) had the power to hire and fire the 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.”

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a “totality of circumstances” (*Id.*).

It is undisputed on the record that Richard Cave hired and supervised Lebharr and, therefore, is an employer within the meaning of the Labor Law. However, it is similarly undisputed that Michael Cave neither hired nor supervised nor, according to the claimant, “had anything to do with” him and, therefore, is not an employer under applicable law. Thus, the petition of Michael Cave is granted and the orders are revoked with respect to him.

B. The wage order

When a petitioner fails to produce requested payroll records, the Department of Labor is permitted to rely on information supplied by a claimant (*see Matter of Ram Hotels, Inc. [T/A Rodeway Inn]*, PR 08-078 [October 11, 2011] *appeal pending*). The petitioners in this case produced no payroll records until the day before the hearing, and we note that those “earnings statements” are not proof that the wages in question were paid. The issue in this case involves checks that were given to the claimant, but not honored by the bank. The petitioners admit that several checks were returned for insufficient funds and none of the records they have provided sufficiently demonstrate which checks were dishonored and which were replaced and when. On the records provided, we are unable to make an accounting to determine that the claimant was paid for the weeks of February 8, February 13, and February 22, 2009.

Where, as here, an employee files a complaint for unpaid wages with DOL and the employer has failed to keep adequate records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides, in relevant part:

“Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements.”

In the absence of adequate payroll records, the Commissioner may issue an order to comply based on employee complaints and interviews. In the case of *Angello v. National Finance Corp.*, (1 AD3d 850, 768 NYS2d 66 [3d Dept. 2003]), the Commissioner issued an order to an employer to pay wages to a number of employees. The order was based on the employees’ sworn claims filed with the Department of Labor. The employer had failed to keep required employment records. The employer filed a petition with the Board claiming that the claims and therefore, the order, were overstated. In its decision on the petition, the Board reduced some of the claims. The court, on appeal, held that the Board erred in reducing the wages since the employer failed to submit proof contradicting the claims. Given the burden of proof in Labor Law § 196-a and the burden of proof which falls on the petitioner in a Board proceeding, 12 NYCRR 65.30, “the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees” (*Id.* at 854).

In this case, the wage order is for five weeks of pay plus interest and penalties. Although the components of the order are unclear, it appears to be seeking three weeks of salary loss due to the failure of petitioners to make good on salary checks that bounced, plus two weeks’ severance pay.

Petitioners testified that checks produced at hearing repaid claimant for all of the dishonored checks, but since the backs of the checks were not produced, the petitioners failed to prove that the checks were successfully negotiated by the claimant. We find that production of only part of the checks, the front, is not dispositive. However, Cave credibly testified that a two week severance was not promised and that the company has no such policy. Accordingly the

wage order is modified to reflect only the wages due and owing for the weeks of February 8, 15, and 22, 2009, because the credible evidence supports the conclusion that the petitioners failed to pay the claimant for three weeks (February 8, 15 and 22, 2009) as opposed to five. Therefore, the wage order is affirmed to the extent of awarding Claimant three weeks' wages.

C. The supplemental wage order

The record is clear that company policy at U.S. Wood was that an employee began to accrue vacation pay after six months of employment. As claimant worked from July 21, 2008 to February 18, 2009, he satisfied the requirement for vacation pay; and virtually no effort was made by petitioners at the hearing to contest his claim for same. Therefore, the supplemental wage order is affirmed, except to the extent that is revoked with respect to Michael Cave, who as we discussed above, was not an employer under applicable law.

Civil Penalties

The wage order and supplemental wage order each assess a 100% civil penalty. The Board finds that the considerations required to be made by the Commissioner in connection with these penalties were proper and reasonable in all respects.

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."

D. The penalty order

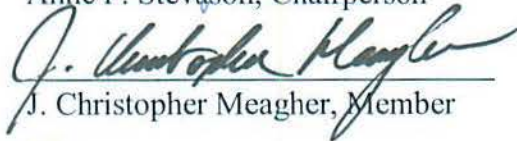
The penalty order assesses a \$500.00 civil penalty against the petitioners for failing to keep and/or furnish true and accurate payroll records for each employee in violation of Labor Law § 661 and 12 NYCRR 142-2.6. The penalty order further states that the petitioners were "duly requested to provide payroll records for the period from on or about January 1, 2008 through December 31, 2009. While we note that there is no evidence in the record that the respondent "duly requested" the petitioners to produce payroll records, the petitioners bore the burden of proving that they did not violate Labor Law § 661 and 12 NYCRR 142-2.6. 12 NYCRR 142-2.6 provides that every employer shall maintain weekly payroll records showing, for each employee, *inter alia*, wage rate, number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, and allowances, if any, claimed as part of the minimum wage. The petitioners did not produce evidence at the hearing (or during the investigation) to demonstrate that they kept such records. As discussed above, the earnings statements and checks produced by the petitioners at the hearing were insufficient to prove that the petitioners had paid the claimant for the pay periods in question. Accordingly, the penalty order is affirmed except to the extent that is revoked with respect to Michael Cave, who as we discussed above, was not an employer under applicable law.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The wage order is modified to reduce the amount due and owing to three weeks' wages (February 8, 15, and 22, 2009) with the interest and civil penalties to be recalculated accordingly, and is revoked with respect to Michael Cave, and the Commissioner is directed to issue an amended wage order consistent with this decision.
2. The supplemental wage order is affirmed with respect to Richard Cave and U.S. Wood, LLC, and revoked with respect to Michael Cave, and the Commissioner is directed to issue an amended supplemental wage order consistent with this decision.
3. The penalty order is affirmed with respect to Richard Cave and U.S. Wood, LLC, and revoked with respect to Michael Cave, and the Commissioner is directed to issue an amended penalty order consistent with this decision.
4. The petition of Michael Cave is granted.
5. The petition of Richard Cave and U.S. Wood, LLC. be, and the same hereby, is denied.



Anne P. Stevason, Chairperson

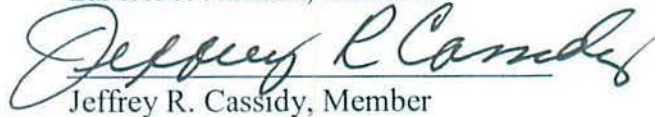


J. Christopher Meagher, Member



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
April 29, 2013.




NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The wage order is modified to reduce the amount due and owing to three weeks' wages (February 8, 15, and 22, 2009) with the interest and civil penalties to be recalculated accordingly, and is revoked with respect to Michael Cave, and the Commissioner is directed to issue an amended wage order consistent with this decision.
2. The supplemental wage order is affirmed with respect to Richard Cave and U.S. Wood, LLC, and revoked with respect to Michael Cave, and the Commissioner is directed to issue an amended supplemental wage order consistent with this decision.
3. The penalty order is affirmed with respect to Richard Cave and U.S. Wood, LLC, and revoked with respect to Michael Cave, and the Commissioner is directed to issue an amended penalty order consistent with this decision.
4. The petition of Michael Cave is granted.
5. The petition of Richard Cave and U.S. Wood, LLC. be, and the same hereby, is denied.

Anne P. Stevason, Chairperson

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
April 29, 2013.