STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: GARY HSIN LIANG (T/A HAPPY LEMON INC.), Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Article 19 of the Labor Law, both dated May 11, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 11-184 RESOLUTION OF DECISION

APPEARANCES

Wang Law Office, PLLC (Chunyu Jean Wang of counsel), for the petitioner.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Melanie Scotto of counsel), for respondent.

WITNESSES

Steve Wang and Gary Hsin Liang for the petitioner.

Labor Standards Investigator Guangming Liu for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on June 17, 2011, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioner Gary Hsin Liang (T/A Happy Lemon Inc.) on May 11, 2011. The Commissioner filed his answer on July 29, 2011.

Upon notice to the parties a hearing was held in this matter on August 20, 2013, in New York, New York, before Anne P. Stevason, then 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, make statements relevant to the issues, and file post-hearing briefs.

The order to comply with Article 19 of the Labor Law (wage order) under review directs compliance with Article 19 and payment to the Commissioner for minimum wages due and owing to Xiang Dong Guo in the amount of $2,531.75, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $799.06, and assesses a civil penalty in the amount of $2,531.75, for a total amount due and owing of $5,862.56.

The order under Article 19 of the Labor Law (penalty order), as amended at hearing, assesses a $1,000.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from February 14, 2009 through May 21, 2009.[1]

The petition alleges the orders are invalid or unreasonable because the claimant was a shareholder in the business for the entire claim period, and therefore could not be an employee under Article 19 of the Labor Law.

SUMMARY OF EVIDENCE

On or about August 19, 2009, claimant Xiang Dong Guo filed a claim for unpaid wages and a minimum wage/overtime complaint with the New York State Department of Labor (DOL). The claims allege that the claimant worked as a "cashier/worker" or "store keeper" for Happy Lemon, a tea and coffee shop located in Flushing, New York, from February 14, 2009 to August 10, 2009, that he was hired by the store's owner, petitioner Gary Hsin Liang, that his agreed rate of pay was $7.00 an hour, he received no overtime pay, that he worked 76 hours per week, and was not paid any wages for the last 16 days he worked for the petitioner for a total of $1,374.35 in unpaid wages. The claims further allege that Mr. Liang closed the shop without informing the claimant and that the petitioner informed the claimant he did not have the money to pay him.

Labor Standards Investigator Guangming Liu testified that DOL assigned him to investigate Xiang Dong Guo's claim against the petitioner. Records in evidence show that the claim was assigned to him on or about June 11, 2010. Investigator Liu testified that Happy Lemon was no longer in business at the time he commenced his investigation of the petitioner. Therefore, he visited Mr. Liang at another business that he owned. During the visit, he made an appointment to return and inspect wage and hour records. When he returned for the second visit, Mr. Liang's accountant provided a shareholder agreement to him, but did not produce records of the hours the claimant worked or the wages he was paid. Investigator Liu testified that since the petitioner did not provide records to refute the wage claim, he calculated unpaid overtime wages based on the claim forms for the time period February 2009 until the date of the signed shareholder agreement. According to Investigator Liu, the shareholder agreement was not sufficient to refute the claim because it did not cover the entire time period the claimant stated the petitioner had failed to pay him. Finally, Investigator Liu testified that he determined the claimant was an employee until he became a business partner on May 22, 2009 and any hours from the claim forms after that date were not included in the underpayment he found were due and owing.

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[1] Due to a typographical error in the penalty order, the same violation was listed twice, and the total due and owing was stated as $2,000.00. Respondent's attorney agreed at hearing that the total due and owing should be $1,000.00.

Petitioner Gary Hsin Liang testified that in February 2009 he entered a partnership agreement with the claimant and that the claimant was a shareholder from the start of the business even though the agreement was not formally drafted until several months later due to a delay on the part of Mr. Liang's business attorney.[2] The petitioner stated that he owned 80% of the shares of the company, and the claimant owned the other 20%. He further testified that he approved all business decisions himself since he was the 80% owner, and that the store's lease was in his name. The claimant was responsible for the daily operation of the store. Additionally, the claimant collected the cash at the end of each day and brought it to the petitioner to be deposited in the bank. Mr. Liang testified that he paid a salary to the claimant and that he also gave him a portion of the shop's profits. Mr. Liang made these payments to the claimant but does not remember what the claimant's salary was. Mr. Liang eventually decided to close the shop because the business was not profitable and he was unable to pay the store's rent. He testified that he asked the claimant for the money to pay the rent, but the claimant did not have sufficient funds so he paid it himself. When the business was dissolved, Mr. Liang did not buy back the claimant's shares.

Steve Wang testified that he is very good friends with petitioner Gary Hsin Liang and that he went to China with Mr. Liang to help him obtain the franchise rights to sell Happy Lemon brand bubble tea, although Mr. Wang had nothing to do with running the petitioner's business. After obtaining the rights, Mr. Liang opened a bubble tea shop in Flushing, New York. Mr. Wang explained that he knows the claimant, Xiang Dong Guo, and, in fact, introduced him to the petitioner. Mr. Wang was at the petitioner's business in Flushing, New York, watching the store in the petitioner's absence, when the claimant came in looking for work or a business opportunity. The claimant told Mr. Wang that he had managed the bubble tea shop across the street which was going out of business, was familiar with the industry and had regular customers, and inquired about a position at Happy Lemon. Mr. Wang then introduced the petitioner to the claimant, but was not part of the hiring process.

Shortly after introducing the claimant to the petitioner, Mr. Wang went to China. Upon his return, the petitioner advised him that the claimant was a partner in the bubble tea shop and that they had entered into a shareholder agreement. Mr. Wang testified that he did not actually know when the shareholder agreement was signed, and that he was not personally present during any conversations between the claimant and the petitioner concerning the agreement.

ANALYSIS

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):

The petitioner's burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

The petitioner's challenge to the orders is based on the allegation that the claimant was a 20% shareholder for the entire claim period, and therefore could not be found to be an employee

[2] Not the same attorney who represented the petitioner in this appeal.

under Article 19 of the Labor Law. We, however, disagree with the petitioner and find that he did not meet his burden of proof to demonstrate by a preponderance of the evidence that the claimant was a shareholder from February 14, 2009, his first day of work according to the claim form, until May 22, 2009, the date of the shareholder agreement.

The petitioner testified that the claimant was a 20% shareholder from the start of his work at the petitioner's business; however, the "Share Transfer and Issuance Agreement" entered between the parties on May 22, 2009, contradicts the petitioner's testimony. The agreement is written prospectively and makes no mention of any ownership interest of the claimant's prior to the date of the agreement. In fact, the agreement states that "Liang presently owns 100%" of the shares of the company, and further provides that the claimant "is desirous of acquiring from [the petitioner] 20% of outstanding shares." The contract entered between the parties is unambiguous that at the time it was entered, May 22, 2009, the claimant had no ownership interest in the petitioner's business, which was owned at the time solely by the petitioner. Accordingly, we find the Commissioner's determination that the claimant was an employee of the petitioner prior to May 22, 2009, is reasonable.

We also answer the related question of whether the petitioner was an employer of the claimant in the affirmative. "Employer" as used in Article 19 of the Labor Law means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as employer" (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 § 203 [g]), and "the test for determining whether an entity or person is an 'employer' under New York Labor Law is the same . . . 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 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" (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 circumstances, no one of which is exclusive." (*Id.* [internal citations omitted]).

Here, the claimant's statement to DOL clearly indicates that he was hired by the petitioner, who owned the tea shop where the claimant worked. The petitioner presented no credible evidence to rebut the claimant's statement to DOL. Moreover, the petitioner admitted

Here, the claimant's statement to DOL clearly indicates that he was hired by the petitioner, who owned the tea shop where the claimant worked. The petitioner presented no credible evidence to rebut the claimant's statement to DOL. Moreover, the petitioner admitted that he started the business, made business decisions for the company, paid the claimant's salary, and received cash daily from the business which he deposited in the bank. The record, as discussed above, also shows that the petitioner was the sole owner of the business during the time period relevant to the orders. We find that the petitioner exercised sufficient "operational control" over the business and the claimant's employment to satisfy the test for employer status (*Irizarry v Gristedes*, 722 F3d 99 [2d Cir 2013]). Specifically, the credible evidence shows that the petitioner hired the claimant, supervised conditions of employment by making business decisions for the company, and determined and paid the claimant's salary. Accordingly, the respondent's determination that the petitioner was the claimant's employer is reasonable.

The petitioner did not specifically challenge the amount of wages the Commissioner found due and owing, the civil penalty assessed in the wage order, or the interest imposed (*see* Labor Law § 101 [2] [any objection not raised in the appeal is waived]). Therefore, we affirm the wage order in its entirety. The penalty order, which was amended at the hearing to reduce the civil penalty to $1,000.00 for failing to keep and/or furnish true and accurate payroll records as required by Labor Law § 661 and 12 NYCRR 142-2.6 is also affirmed. Investigator Liu testified that the petitioner produced no legally sufficient payroll records during the investigation, and none were produced at hearing. Therefore, the penalty order as amended is reasonable in all respects. The petitioner raised an additional allegation in the petition regarding the conduct of a DOL investigator, which was not proven and is completely without support in the record, and that we find has no merit.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is modified to reduce the amount due from $2,000.00 to $1,000.00 in accordance with our decision; and

3. The petition for review be, and the same hereby is, denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Absent
Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
August 7, 2014.