STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

the Matter of the Petition of: MUNA GOWANDAN, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the New York State Labor Law and an Order under Article 19 of the Labor Law, both dated November 30, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 12-016 RESOLUTION OF DECISION

APPEARANCES

Riebling, Proto & Sachs, LLP (Andrew J. Proto of counsel), for petitioner.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Muna Gowandan, Fay Daniely, David Daniely for petitioner.
Mary Thomas, Ann Fenichel, Francis Murphy, Ida Venditti and Labor Standards Investigator Neil Benjamin, for respondent.

WHEREAS:

On January 11, 2012, Petitioner Muna Gowandan (petitioner or Ms. Gowandan) filed a petition with the Industrial Board of Appeals (Board) to review two orders to comply with Article 19 of the New York State Labor Law that the Commissioner of Labor (Commissioner, respondent, or DOL) issued against her on November 30, 2011. The first order (wage order) directs payment of $40,580.40 in wages due and owing to Arul Mary Thomas (claimant or Thomas) for the period January 1, 2005 to May 25, 2008, together with $22,840.65 in interest at 16% per annum calculated to the date of the order, and a civil penalty in the amount of $81,160.80, for a total amount due of $144,581.85. The second order (penalty order) directs payment of $1,000.00 in civil penalties for failing to keep and/or furnish true and accurate payroll records for the period on or about January 1, 2005 through May 30, 2008.

The petition alleges that Ms. Gowandan did not employ Thomas; that petitioner's husband, Krishna Gowandan, employed Thomas as a nanny from 1982 until approximately December 1998, when he terminated her employment, and challenges the civil penalties in the wage and penalty orders. Thereafter claimant resided in the Gowandans' home, did not pay rent, and voluntarily shared some household chores with Ms. Gowandan while employed by others as a nanny, babysitter, housekeeper and pet sitter. The DOL filed an answer on March 6, 2012. Upon notice to the parties, hearings were held in White Plains, New York on November 15, 2013 and January 23, 2014, before Jean Grumet, Esq., then 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 and to make statements relevant to the issues.

SUMMARY OF EVIDENCE

Testimony of Petitioner, Muna Gowandan

Petitioner's late husband Krishna, a United Nations employee, hired Thomas, "a girl from Sri Lanka" in 1982 while stationed in Liberia, to take care of their daughter, Tania, then two years old. In 1983, Krishna obtained a job at the U.N. in New York City and the Gowandans (neither of whom were United States citizens) and Thomas, as a domestic worker of a U.N. employee, moved to Hastings, New York. Petitioner testified that Krishna was the one that "was in charge" of Thomas: he paid her, and gave her all instructions. Besides her duties as nanny, claimant cleaned the house once a week, did yard work with petitioner's help and took care of the family's dog, cat and eleven tropical birds. On cross-examination, Ms. Gowandan stated that while working at the U.N., Krishna was out of the house from 7:00 a.m. to 5:00 p.m., but insisted that he had been exclusively in charge:

> "Q: You would tell [Thomas] what needs to be done as far as what needs to be done for your daughter; is that correct?
>
> "A: Once in a while, yes.
>
> "Q: You would also, at that time prior to 1998, provide directions as to how to clean your home as well, right?
>
> "A: No I never gave Mary any directions to do anything in her job; never in my life.
>
> "Q: Never?
>
> "A: No.
>
> "Q: Even though you were home with her all of the time during the day?
>
> "A: No, I never told her what to do. She used to do what I told you. I never told her anything to do."

In 1998, Krishna was fired from his job at the U.N. Krishna told Thomas that because she was in the U.S. solely because of his status with the U.N., she had to leave the country; that the family could no longer afford to pay her; and that he would get her a return ticket to Sri Lanka, which was part of her employment contract. Thomas did not want to return to Sri Lanka,

but Krishna verbally told her that her employment ended. Ms. Gowandan testified: "I could not let her go. I am not that kind of person. I told her, 'You can stay as long as you want.'"

While continuing to live with the Gowandans after 1998, claimant worked as a babysitter first for a doctor and his wife, and later for two lawyers. The doctor and lawyers sponsored Thomas for a green card. Ms. Gowandan knew that Thomas had income during this period because Thomas told her she had to put money in the bank when she applied for a green card. Thomas left the house early in the morning and went to work for the other families, for whom she would clean, cook, walk their dogs, and take care of the children when they came home from school. Thomas lived in the Gowandan house and did not pay rent: "I did not charge her any fee to stay in the house even if she offered to pay me money – but I refused to take from her because I felt sorry for her."

During petitioner's direct case, Ms. Gowandan variously stated that from 1998 to 2008 Thomas "was not working for me" but "just staying in the house with us," that she "was working for me," and that although she was no longer working for the Gowandans, claimant "felt obliged to do something" since "she was living there, eating and sleeping for free." Ms. Gowandan stated that claimant liked yard work and loved gardening and "[i]f she saw a dish or two in the sink, she would wash them," but in general petitioner herself did the work Thomas had done before 1998, because Thomas was working and was not in the house. Thomas mowed the lawn, "if she saw something not in its place, she would just tidy up," and she helped with snow removal, but she spent little time on such work. She did not help with pets after 1998; by the time Krishna died in 2003, the family no longer had the birds.

Ms. Gowandan testified that she lives solely on her husband's pension, and that Thomas loaned her money which Ms. Gowandan repaid, although a lawyer for Thomas claimed in 2009 that petitioner had failed to repay "$40,000 or some amount of money" on the loan.

Testimony of Fay and David Daniely

Petitioner's sister and brother-in-law, Fay and David Daniely ("Fay" and "David"), testified they stayed with petitioner for seven months in 2006 and during that period, claimant did little housework, worked outside the house, and never indicated she was owed wages. Both Fay and David testified that they did not have outside jobs and because they were home all day they saw what petitioner and claimant did in the house. Ms. Gowandan did all the housework. Thomas left at 7:00 a.m., went to work, came home for lunch, returned to work, and came home at night. According to Fay, Thomas "liked yard work so sometimes she liked to work in the yard." Although Fay sometimes saw Thomas mow the lawn and trim flowers, shovel snow and occasionally do dishes, she never saw Ms. Gowandan direct her to work. David testified Thomas "was gone pretty much six days a week," sometimes returning as late as 10:00 p.m. "Usually on Sunday after she got back from church, depending on the weather and the time of day, she would work in the garden. It was more of a hobby or a recreational type of thing." On cross-examination, David testified that Thomas also mowed the lawn, shoveled the driveway in the winter months, "although she did not own a car," only washed her own dishes, and fed the birds "but that was more or less her hobby; things she would do on her own." During the time Krishna was alive, Thomas was "specifically tasked to take care of him and their daughter...she was to take care of the daughter the husband and the house." Thomas did "essentially what she was hired to do by Muna's husband."

Testimony of Claimant Arul Mary Thomas

Thomas testified that she began working for the Gowandan family as a nanny in 1982, when they were stationed in Africa, and moved with them to the United States in 1983 pursuant to a G-5 visa,[1] when Krishna began working at United Nations headquarters in New York City. According to Thomas, she had an oral agreement with Krishna that she would be paid $100.00 per month, plus room and board, clothing, and medical expenses. Every five years she would be entitled to a free trip to Sri Lanka and a one month vacation. Thomas shared a bedroom with Tania, who in 1983 was three, until she was fifteen years old, and cared for Tania until she left for college. Ms. Gowandan, who was in the home all day, directed Thomas' work and gave her instructions.

Although Thomas was promised a monthly salary of $100.00, she was never paid her monthly salary and received no money from the Gowandans until 1988, when she was given $9,000 in travelers' checks before returning to Sri Lanka for a two month period. This was the only money Thomas was paid throughout the 26 years that she worked for the Gowandans. Thomas testified that her family was suffering in Sri Lanka; $100.00 per month was a large amount of money by Sri Lanka standards; her reading in English is very poor and she does not understand big words; she does not know how to drive; and she was instructed by both Krishna and Ms. Gowandan not to speak to anyone outside the home. She did not tell her family in 1988 that she had not been paid because "it is a shame in my country." When Thomas returned from Sri Lanka, she asked Krishna to raise her wages to $300 per month since she was no longer only babysitting but doing all the housework, both inside and outside the house; Krishna "said okay. But never anything in writing," and in reality reverted to not paying monetary compensation at all. Claimant testified that she repeatedly asked Krishna and later Ms. Gowandan for her monthly wages so as to send money to her family, but "they said later, later, later, and later never came."

From the mid-1980's to May 2008, when she left the Gowandan home, Thomas cleaned the house, worked in the garden, shoveled snow and salted the sidewalk and driveway, raked and collected leaves, climbed to the roof to clean gutters, chopped firewood, did laundry, shopped for groceries, carried large carpets out of the house and washed them by hand in the driveway pursuant to Ms. Gowandan's directions, helped serve and clean up after the Gowandans' frequent visiting relatives and house guests (who would stay for many weeks, thereby increasing her workload), walked and washed the family's dogs, cared for their cats, and took care of eight to eleven tropical birds, including feeding them, cleaning the cages daily and sometimes washing out all the cages in the driveway, when Ms. Gowandan told her to. There were still eight birds when claimant left in 2008. Ms. Gowandan always gave Thomas her work instructions: "She would tell me what to do so I just followed her words."

Thomas testified that when Krishna lost his job in 1998, he never told her to leave the house or that there was no longer a job for her. In 1999, two doctors, Nancy and Richard, who were the Gowandans' neighbors, "came and asked if I could work for the family and Muna said

[1] According to the United States Department of State Bureau of Consular Affairs website, "A G-4 visa is issued to individuals coming to the United States to take up an appointment at a designated international organization, including the United Nations, and their immediate family members." A G-5 visa may be issued to personal employees or domestic workers of G-4 via holders. http://travel.state.gov/content/visas/english/other/employee-of-international-organization-nato.html#personalemployees.

yes, but Mr. Gowandan did not like that I worked outside of the house." The doctors sponsored Thomas' application for a green card.

Ms. Gowandan, herself, began babysitting for four children in the Gowandan home after Krishna lost his job, and Thomas helped her take care of the four children from the early morning until 2 p.m., when Thomas left to work for the doctors. Thomas returned home at 6 p.m. and continued to work in the Gowandan home until 10 p.m. After Thomas began working for the doctors, the Gowandans no longer paid for her clothing or medical expenses, and Thomas began paying the Con Edison and water bills. Thomas testified that she continued to do all of the tasks that she had always performed in the Gowandan home, but was still not compensated for her services.

Krishna was ill for a long time before he died, and Thomas helped with his care, staying up with him when he was unable to sleep. During this time, Ms. Gowandan began borrowing money from Thomas to pay the mortgage and taxes. Ms. Gowandan promised to pay back "every penny" but Thomas was only repaid half of what she was owed. Meanwhile, Thomas continued doing the same work in the Gowandan home under petitioner's direction.

When the doctors' children grew older and needed a babysitter who could drive, Thomas was hired by two attorneys, Barbara and Phil, and babysat for them in the afternoons from 2:00 to 6:00 p.m. The attorneys took over the sponsorship of Thomas' green card from the doctors. In 2004, claimant began working for another couple, Tim and Jill, cleaning their house for three or four hours a day in the morning. Thomas also did occasional evening babysitting.

Thomas testified that during the relevant period, she awoke at 6 or 7 a.m., and immediately made tea for the petitioner, and then tidied up the house, including duties such as cleaning the bird cages, cleaning dirty dishes left in the sink, and shoveling snow. When Ms. Gowandan awoke, Thomas made her bed, put her dirty clothes in the laundry, and continued doing chores until leaving the house for three hours to perform her morning job cleaning Jill and Tim's home. Thomas then returned home, helped Ms. Gowandan with the children she was babysitting, cleaned up after the children and did other chores, before going to work for Barbara and Phil from 2-6 p.m. When Thomas returned to the Gowandan home at 6 p.m., she cleaned the scattered toys, swept and mopped the floors, and cleaned up the mess left by the children for whom Ms. Gowandan babysat. Petitioner cooked and left the dirty dishes and pots for Thomas to clean. Thomas would do other chores until 9 or 10 p.m. There were frequent guests in the house, and when they were visiting, Thomas did not finish working until 11 or 11:30 p.m. In addition, every Saturday, she did a full cleaning of the house and worked a full day on Sunday, doing household chores, working in the garden, mowing the lawn, and raking and bundling leaves. She took time off to attend church on Sundays. According to Thomas, "In Muna Gowandan's house there is no off! I worked on Saturdays and Sundays...I don't have any days off."

Thomas testified that the Danielys were living in the home while Thomas was working for the petitioner. During this time, Fay was babysitting outside the home for a family with four children, and was not home during the day. Claimant left petitioner's house in May 2008 because Ms. Gowandan did not repay the money that Thomas loaned to her. After an unsuccessful attempt to collect on the loan, her attorney suggested that she file a claim with the DOL for her unpaid wages.

Testimony of Ann Fenichel, Frank Murphy, and Ida Venditti

The DOL also called three neighbors who lived near the Gowandan house as witnesses. Ann Fenichel and her husband Francis Murphy testified that when they moved across the street from the Gowandans in 2000, it was understood that claimant was working for Ms. Gowandan, who told Fenichel that Thomas worked for the Gowandan family. Each time Thomas accepted a job babysitting for Fenichel's and Murphy's daughter, she first had to make sure she was not needed by Ms. Gowandan and the other family for whom Thomas babysat. When Fenichel and Murphy were invited to two or three parties at the Gowandan house, "Mary [Thomas] was certainly working in the kitchen and helping to serve food." Thomas sometimes invited their daughter "to help her take care of the birds or watch her;" besides feeding and showering the birds, Fenichel saw claimant "often weeding, planting and gardening" in petitioner's yard, which she described as "a work of art," and Fenichel saw Thomas walking Tania Gowandan's dog with Ms. Gowandan and the children for whom Ms. Gowandan babysat.

Murphy saw claimant at work "in the garden three or four times a week, maybe more," working around the house, walking one of the Gowandan's dogs, and carrying grocery bags home from the supermarket. Ida Venditti, another neighbor, testified that Ms. Gowandan invited her into the Gowandans' house "quite frequently on a Saturday morning" and during those visits she saw Thomas dust and polish furniture, dust a crystal ceiling lamp, and rearrange furniture. It was also Venditti's understanding that Thomas worked for Ms. Gowandan, and when something needed to be done, Ms. Gowandan would say, "no, that's all right, [Thomas] will do it." In winter, Thomas would get up early and shovel the snow. In other seasons Thomas did a lot of gardening. Venditti also testified that when Krishna was employed by the United Nations, he was travelling a great deal.

Testimony of Labor Standards Investigator, Neil Benjamin

LSI Benjamin (Benjamin) testified that he investigated Thomas' claim. He visited the Gowandan home, but no one was home, and he left a letter requesting Ms. Gowandan's appearance at the DOL offices in White Plains on July 6, 2010 with payroll records for the period January 1, 2005 through May 30, 2008, showing hours worked and wages paid to all employees, time sheets and time cards showing daily and weekly hours, work schedules, cancelled checks, and bank statements. Petitioner did not appear as requested. On August 12, 2011, a Notice of Labor Law Violation was sent to Ms. Gowandan and on September 21, 2011, Benjamin sent Ms. Gowandan a revised recapitulation report which showed the basis for the DOL's calculation of a $40,598.25 wage underpayment.

Benjamin's September 22, 2011 Narrative Report indicates that Ms. Gowandan's attorney "stated his client advised him that claimant did work for her, but only during the period 1982-1996, and was paid all wages." The attorney had no information on the wages paid. Thereafter, he stated that Thomas was a tenant of Ms. Gowandan. Benjamin testified that he based the computations supporting the wage order on in-person and telephone interviews with the claimant. He based the calculation on a 42-hour/7 day work week. Since Thomas was a live-in domestic worker, he credited petitioner with providing 14 weekly meals and 7 days of lodging.

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that "any person in interest may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner under the provisions of this chapter" [Labor Law § 101[1]]. It also provides that a Commissioner's order shall be presumed "valid" [Labor Law § 103[1]]. A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state "in what respects [the order] is claimed to be invalid or unreasonable" [Labor Law § 101[2]]. The petitioner has the burden of proving that the order is invalid or unreasonable (Board Rules of Procedure and Practice (Board Rule) § 65.30, 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it."]; State Administrative Procedure Act § 306; *Angello v National Finance Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]. It is therefore the petitioner's burden to prove, by a preponderance of the evidence, that the orders under review are invalid or unreasonable.

An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § §195 and 661 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR § 142-2.6 provides among other things, that employers maintain and preserve for not less than six years, weekly payroll records which show each employee's name and address, wage rate, the 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. Upon request of the Commissioner, the employer is required to make the records available at the place of employment. Section 142-2.7 further provides that every employer shall furnish each employee with a statement with every payment of wages listing hours, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages. This required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid. In the instant case, it is undisputed that petitioner did not maintain required payroll records and did not provide required wage statements to the claimant.

Burden of Proof in the Absence of Adequate Employer Records

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was properly 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."

When a violation of the Labor Law is shown, DOL may credit a complainant's assertions and calculate wages due based on such information, and the employer then bears the burden of

showing that the Commissioner's calculation is invalid or unreasonable by proof of the specific hours claimants worked and that they were paid for these hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable. *Matter of Ram Hotels, Inc.*, Board Docket No. PR 08-078 [October 11, 2011]; *Matter of Angello v. National Finance Corp.*, 1 AD3d 850 [3d Dept. 2003]; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept. 1989]; *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 [1949]. In *National Finance Corp.*, the Court stated that "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 therefor, should not shift the burden to the employees" [*National Finance Corp.*, 1 AD3d at 854].

Minimum Wages and Overtime

Article 19 of the Labor Law, known as the Minimum Wage Act, requires an employer to pay each covered employee the minimum wage in effect at the time payment is due [*see* Labor Law § 652 and the Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR Part 142]. The applicable minimum wage in effect in New York during the relevant period was $6.00 per hour from January 1, 2005 through December 31, 2005; $6.75 an hour from January 1, 2006 through December 31, 2006; and $7.15 an hour from January 1, 2007 to May 30, 2008, the last date of the relevant period. [12 NYCRR § 142-2.1]. An employer is entitled to a credit towards the minimum wage for each day of lodging provided [12 NYCRR § 142-2.5(a)(ii)] and for each meal provided [12 NYCRR § 142-2.5(a)(i)].[2]

Definition of Employer

"Employer" as used in Article 19 of the Labor Law "includes any individual, partnership, association, corporation... or any organized group of persons acting as employer" Labor Law § 651[6] and § 2[7] defines "employed" to include "permitted or suffered to work." Likewise, the Fair Labor Standards Act defines "employ" to include "suffer or permit to work" [29 USC § 203(g)]. The "test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same as the test... [used] for analyzing employer status under the [federal] Fair Labor Standards Act." *Chu Chung v. New Silver Palace Rest., Inc.*, 272 FSupp 2d 314, 319 n6 [SDNY 2003]. Under both laws, more than one entity or individual can be an employee's employer. *See, e.g., Zheng v. Liberty Apparel Co.*, 355 F3d 61, 66, 78 [2d Cir 2003]; *Moon v. Kwon*, 248 FSupp 2d 201, 237-8 [SDNY 2002]; *Matter of Robert Lovinger and Miriam Lovinger and Edge Solutions, Inc.*, PR 08-059 [Mar. 24, 2010]. In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132 [2d Cir 1999], the U.S. Court of Appeals for the Second Circuit explained the economic reality test used for determining employer status under both the FLSA and New York Labor Law:

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question... with an eye to the 'economic reality' presented.... [F]actors include 'whether the alleged employer (1) had the power to hire and fire the employees, (2)

[2] While employees, generally, must be paid overtime after 40 hours, 12 NYCRR § 142-2.2 in effect during the relevant period required the employer of a live-in domestic employee, such as the claimant, pay overtime at a rate of time and one half the state minimum wage for all hours worked in excess of 44 in a work week. *See: Matter of Marvin Milich*, Docket No. 10-145 [June 12, 2013] at pages 8-9 and cases cited therein.

> 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.* at 139 (internal citations omitted).

In *Campos v Lemay,* 2007 US Dist LEXIS 33877 [SDNY 2007], the court, using the economic reality test, found the plaintiff, a live-in domestic worker and her employer to have an employer/employee relationship under both the New York Labor Law and the Fair Labor Standards Act. The court, stated:

> "The NYLL defines "employer" and "employee" in the same broad manner as the FLSA. *Lopez v Silverman,* 14 F Supp 2d 405, 411 n 4 [SDNY 1998]; *Ansoumana v Gristedes Operating Corp.*, 255 F Supp 2d 184, 189 [SDNY 2003]. To determine whether an employer/employee relationship exists under the FLSA *and* the NYLL, other courts in this district have turned to the Second Circuit's economic reality test...*Ansoumana*, 255 F Supp 2d at 189-190. Since the Court has concluded that Plaintiff is a covered employee under the FLSA, it follows that Plaintiff is also entitled to partial summary judgment declaring that she is a covered employee under the NYLL."

See also: Pusha Topo v Ashwin Dhir and Nisha Dhir, 2004 US Dist LEXIS 4134 [SDNY 2004].

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Because the hearing before the Board is *de novo* [Board Rule § 66.1(c), 12 NYCRR § 66.1(c)], we must consider the testimony and other evidence received at the hearing and make necessary credibility determinations when deciding whether to affirm, revoke or modify the orders. *Matter of Zi Qi Chan a/k/a Zi Qi Chen and Jason Tong a/k/a Zhi Rong Tang and Henry Foods, Inc.*, Board Docket No. PR 10-060 [March 20, 2013].

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 [12 NYCRR § 65.39]. For the reasons stated below, we find that the petitioner has not met her burden of proving that during the relevant period the claimant was merely a tenant and not an employee, and we affirm the wage order and the penalty orders in their entirety.

Petitioner Employed The Claimant During the Relevant Period

Petitioner portrayed Thomas as a tenant who, during the relevant period, lived rent-free in her home, and claimed that the claimant contributed to the household by doing light garden and yard work because she "loved" it. Petitioner's brother-in-law, David Daniely called the work

performed by Thomas as "more of a hobby." Claimant, by contrast, described the work as continuing a job she had done for more than twenty years; she and other DOL witnesses portrayed the extensive work, including cleaning up after petitioner's babysitting business, clearing snow, maintaining the yard and petitioner's beautiful garden, housework, serving at parties, and caring for at least eight tropical birds and other pets, as vital to petitioner's well-being. We credit the testimony of Thomas regarding her duties and find that she was clearly "permitted or suffered to work," and thus, was "employed" during the relevant period, as well as throughout the 26 years she worked in the petitioner's home. *See, e.g., Matter of Joaquin Turcios and Korona USA Holding Corp. (T/A Korona Night Club)*, Board Docket No. PR 11-198 [January 16, 2014].

Both parties agree that prior to 1998, claimant was employed in the Gowandans' house for housekeeping work including cleaning, yard work, snow removal and care for the family's birds and animals. We do not credit petitioner's claim that only Krishna, not she, employed the claimant. While Krishna hired claimant and discussed her wage, it is not credible that it was only or even primarily he who directed her, including telling her how and when to care for the Gowandans' daughter and later to do house and yard work. Petitioner herself testified Krishna was typically outside the home working from 7:00 a.m. to 5:00 p.m. while she was home with their daughter and claimant; Venditti testified Krishna did "a lot of traveling." Petitioner herself also testified that in 1998 when Krishna told claimant that she would have to return to Sri Lanka, it was petitioner who told her, "You can stay as long as you want."

We also reject petitioner's claim that Krishna terminated Thomas' employment in 1998, and credit claimant's testimony that she was never told anything of the kind. It is undisputed there was no written or formal discharge, and that claimant did not return to Sri Lanka as Krishna supposedly told her she must. Nor do we credit petitioner's claim that after 1998 claimant did very little work. While claimant's testimony concerning her continuing employment was credible, internally consistent and supported by the credible testimony of her unbiased neighbors, Fenichel, Murphy and Venditti (who testified she had more in common with Ms. Gowandan than with claimant), petitioner's version, supported only by her sister and brother-in-law, whose testimony we also do not credit, was riddled with discrepancies and inconsistencies and, in some cases, was facially incredible.

The Narrative Report indicates that petitioner initially admitted employing Thomas, but only for the limited period 1982-1996. At the hearing, she disavowed the admission and claimed not only that Thomas never worked for her but also, incredibly, that she never in her life gave her a direction to do anything. Ms. Gowandan initially testified that she could never take money from claimant; later she admitted that she did borrow money from Thomas, but stated that she repaid it; and she did not dispute claimant's testimony that Thomas, not petitioner, paid utility bills, taxes, and the mortgage. Petitioner testified that claimant did no work with the family's pets after 1998, and that "we lost all of our birds before 2003" (claimant testified that there were still eight in 2008). Fenichel, however, testified claimant "was always feeding the birds, showering the birds and.... taking care of all the animals." Fenichel did not move to the neighborhood until 2000, she testified that her daughter (born in 1998) was old enough to be invited by claimant "to help her take care of the birds," and most of her testimony was about the period 2005 to 2008. Even petitioner's brother-in-law David initially testified he could not recall whether there were still pets during his 2006-2007 visit; only in redirect testimony did he decide that his recollection of petitioner taking care of birds might have been from earlier visits.

Fenichel testified that Thomas had to get petitioner's permission before accepting jobs babysitting for Fenichel's daughter. Likewise, when the doctors sought to hire claimant as an afternoon babysitter for their children in 1999, they sought Ms. Gowandan's permission, which was given over Krishna's objection.

Petitioner's credibility and that of Fay and David Daniely were further undermined by the apparent tailoring of their testimony to minimize both petitioner's interaction with claimant (for example, by claiming that only Krishna ever gave claimant instructions) and the amount of work claimant did after 1998, including during the relevant period. For example, Ms. Gowandan failed to mention her own babysitting business – which by its nature, greatly increased necessary housekeeping work – even though claimant's testimony in that regard was not disputed. While petitioner testified the Gowandans could not keep Thomas as an employee after Krishna lost his job because they could not afford to, claimant testified she was paid only once in her 26 years of employment. Petitioner did not dispute Thomas' testimony concerning claimant's pre-1998 wages. David Daniely testified that claimant was "specifically tasked" to care only for Krishna and Tania, and that claimant did "essentially what she was hired to do by Muna's husband." He referred to her work in the garden on Sundays as "more of a hobby or a recreational type of thing" and stated that while Thomas cared for the birds "that was more or less her hobby; things she would do on her own." Likewise, Fay Daniely testified that claimant worked in the garden only because "she liked to work in the yard."

Similarly, while petitioner testified claimant gardened because she "liked to do the yard work; she loved gardening," such work was undisputedly part of claimant's job before 1998. Petitioner further contradicted her inference that what claimant did for her was just a labor of love by testifying that since claimant was "eating and sleeping for free, she felt obliged to do something in the house." While their relations were surely influenced by factors including claimant having come from a distant country, living with petitioner throughout her stay in the United States, and helping to raise petitioner's daughter, with whom claimant shared a room for twelve years, we find that claimant's employee status did not change when Krishna lost his job; that she always remained an employee and not, as petitioner contends, a family member; and that petitioner continued to be claimant's employer both before and after Krishna's death. That claimant held other jobs while also continuing to work for petitioner likewise does not mean petitioner ceased to be her employer. That cleaning up after petitioner's babysitting business, clearing snow, maintaining the yard and garden, and caring for tropical birds and other pets, other housework and serving guests was not claimant's only job does not mean that it was not a job.

Petitioner's main argument against continuing employee status, namely, that no one would continue as an employee for ten years without pay, would carry more weight had claimant not worked while receiving little or no monetary compensation at a time when her employee status is not disputed. We credit Thomas' testimony that except for one lump-sum payment in 1988, she was never actually paid even the $100.00 per month she had initially been promised. Petitioner's counsel also argued that claimant's complaint to the DOL was really about not unpaid wages, but an uncollectible loan. That argument goes more to claimant's subjective motivation for finally complaining than to the validity of her complaint. While claimant did testify that if petitioner had repaid all she borrowed, "we would not be here wasting the time here today, sir. I would have let everything go," her testimony that "I would have let everything go" does not mean she did not also have a valid wage claim.

Petitioner's counsel also argued that it was implausible that Thomas would continue working for Ms. Gowandan for 26 years without being paid. It is undisputed that Thomas was brought to this country as a young girl and that English was not her native language. She credibly testified she was warned by both Krishna and Ms. Gowandan not to speak to anyone outside of the house, that reading English was hard for her, and that although her family in Sri Lanka was suffering, she did not tell them that she was not being paid because it was considered shameful. Claimant did not have a car and did not drive. Based on the hearing testimony, we find it very plausible that even more recently, when she found part-time employment outside the Gowandans' home, she was isolated from her family in Sri Lanka and remained dependent on the family that brought her to the United States as a young girl.

While Krishna was likely also claimant's employer before his death, we find that Ms. Gowandan was an employer during the relevant period under the "economic reality" test stated in *Herman* and discussed above. By her own account, it was petitioner who told claimant to stay when her husband sought to discharge her; we find that petitioner had the power to hire and fire. We credit the testimony of claimant and other witnesses that petitioner supervised and controlled her work, schedules and conditions of employment. At least after Krishna's death, it was also Ms. Gowandan who decided not to pay claimant, or to pay her only through provision of free room and board. There is no evidence that anyone, including Krishna, ever maintained employment records, the last *Herman* factor. We find that given the totality of circumstances here, the "economic reality" was that petitioner was claimant's employer during the relevant period, and that the DOL's finding that petitioner employed claimant until 2008 was reasonable and valid.

The Wage Order Is Affirmed

Thomas credibly testified that she began her day at 7:00 a.m. or earlier by making tea for Ms. Gowandan, tidying up the house, making Ms. Gowandan's bed, caring for the birds, preparing laundry and cleaning up before the arrival of the children petitioner babysat. After working for Jill and Tim for 3 hours in the morning, claimant returned to Ms. Gowandan's house, finished work there about 2:00 p.m., cared for other families' children and again returned at 6:00 p.m. to clean up after the children in Ms. Gowandan's house, wash dishes, "tidy up everything and sweep the kitchen floor when it was all sticky and I would mop and do all of that." If there were no guests work would be done by 9:00 p.m., if there were guests, "11:00 or 11:30." On weekends, claimant testified, she also worked; "every Saturday we did a real cleaning" of all the rooms. There was also gardening and yard work and, in the winter, snow removal. David Daniely corroborated Thomas' testimony that claimant worked in the garden on Sundays, and we credit Thomas' testimony that she worked on Saturdays and Sundays and did not have any time off.

We find that the DOL's calculation of wages earned by and owed to claimant during the relevant period, based on a 42-hour/7 day per week work week, with credit given to petitioner for providing 14 meals and seven days' lodging, was reasonable and valid.

The Imposition of a 200% Civil Penalty Was Appropriate in this Case

Labor Law § 218 provides that in the case of an employer whose violation is willful or egregious, a 200% penalty shall be found to be due. We find that the petitioner did not meet her

burden of proving that the violation was not willful and egregious. Under the circumstances of this case, a 200% penalty is valid and reasonable.

The Penalty Order is Affirmed

It is undisputed that petitioners did not provide DOL with requested payroll records or provide wage statements to claimant. The penalty order is affirmed.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition is denied.

Recused
Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr 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