

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

LINAS SMORIGINAS AND LINAS  
CONSTRUCTION, INC.

Petitioners,

To Review Under Section 101 of the Labor Law:  
An Order to Comply With Article 6 and an Order  
Under Article 19 of the Labor Law, both dated June 5  
2013,

- against -

THE COMMISSIONER OF LABOR,

Respondent.  
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DOCKET NO. PR 13-079

RESOLUTION OF DECISION

**APPEARANCES**

Christian Killoran, Esq., for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

**WITNESSES**

Linas Smoriginas for petitioners.

Remigijus Stabacinskas and Supervising Labor Standards Investigator Heather Buzzo for respondent.

**WHEREAS:**

The petition in this matter was filed with the Industrial Board of Appeals (Board) on June 21, 2013, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) on June 5, 2013 against petitioners Linas Smoriginas and Linas Construction, Inc. The Commissioner filed his answer on August 13, 2013.

Upon notice to the parties a hearing was held in this matter on October 7, 2014, in Patchogue, 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, make statements relevant to the issues, and file post-hearing briefs.

The order to comply with Article 6 (wage order) under review directs compliance with Article 6 and payment to the Commissioner for unpaid wages due and owing to claimant Remigijus Stabacinskas in the amount of \$2,550.00 for the time period from March 5, 2012 to March 19, 2012, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$495.19, liquidated damages in the amount of \$637.50, and assesses a civil penalty in the amount of \$1,275.00, for a total amount due of \$4,957.69.

The order under Article 19 (penalty order) assesses a \$500.00 civil penalty against 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 on or about March 5, 2012 through March 19, 2012.

Respondent stipulated that the evidence supports petitioners' allegation that Linas Construction, Inc. was improperly named in the orders. Accordingly, the orders are revoked with respect to Linas Construction, Inc.

## SUMMARY OF EVIDENCE

### *The respondent's investigation*

On or about October 4, 2012, claimant Remigijus Stabacinskas filed a claim for unpaid wages with the Department of Labor (DOL) alleging that he was employed by petitioner Linas Smoriginas to perform construction work at Gurney's Inn in Montauk, New York, from March 7, 2012 to March 19, 2012. Stabacinskas' claim states the agreed rate of pay was \$30.00 an hour, that he worked a total of 85 hours, and was not paid by petitioners.

Supervising Labor Standards Investigator Heather Buzzo, who was a Senior Labor Standards Investigator at the time, was assigned to investigate Stabacinskas' claim. Investigator Buzzo testified that on November 5, 2012, she sent a letter to petitioners to clarify the claim and describe the records employers must keep under the Labor Law, and receiving no response, sent a letter on December 17, 2012 advising petitioners to submit payment or provide records by January 7, 2013. On or about January 16, 2013, DOL received time records from petitioners with no written explanation. Investigator Buzzo testified she forwarded the records to claimant with a letter explaining it appeared petitioners were alleging they had paid him in full. Claimant replied confirming he never received any wages from petitioners, and did not sign the petitioners' time records<sup>1</sup>. After receiving claimant's reply, Investigator Buzzo sent a letter to petitioners on February 11, 2013 explaining that claimant had refuted the petitioners' evidence, and advised orders would be issued if payment was not received by February 25, 2013. Investigator Buzzo testified she did not recall receiving any further communication from petitioners subsequent to her February 11 letter. Investigator Buzzo further testified she never spoke to the claimant, the petitioners, the builder, or the owners of Gurney's Inn. Her entire investigation was done by correspondence.

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<sup>1</sup>Smoriginas testified it is his own signature on the time records, and there is no evidence he ever stated otherwise to DOL or claimed it was Stabacinskas' signature.

Investigator Buzzo testified that she concluded based on her investigation that “there was an issue of credibility due to the lack of evidence from [petitioners], and that it was appropriate to move forward with the issuance of an Order to Comply.” Investigator Buzzo recommended assessment of a 50% civil penalty based on the size of the business, gravity of the violations, nature of the claim or amount due, history of prior violations<sup>2</sup>, and the petitioners’ responsiveness to the investigation. According to Investigator Buzzo, in determining the civil penalty to assess against petitioners, she considered Linas Smoriginas an officer of Linas Construction, Inc. Records in evidence indicate that Linas Construction, Inc. was not formed until after the time period relevant to this proceeding.

#### *Testimony of Linas Smoriginas*

Petitioner Linas Smoriginas testified that in 2012 he made a \$2,000.00 contract with a builder to perform construction work at Gurney’s Inn in Montauk, New York. Smoriginas agreed to a low price for the work in hopes of gaining future jobs from the builder. According to Smoriginas, he approached Stabacinskas to subcontract the job, because he knew Stabacinskas needed work. Smoriginas testified that Stabacinskas agreed to do the job, which consisted of building and installing cabinets, for \$1,500.00. Smoriginas retained \$500.00 to cover the cost of travelling to Montauk and supervising the work. He testified that when the work was done, he went to the site, met with the builder who liked the work, received \$2,000.00 from the builder, and paid Stabacinskas \$1,500.00 in cash. Smoriginas explained that if he had agreed to pay the claimant the amount allegedly owed, \$2,550.00, he would have actually “lost \$500.00” on the \$2,000.00 contract.

Smoriginas conceded that he did not know how many hours the claimant worked on the job or keep contemporaneous records of the hours Stabacinskas worked. He also did not have a receipt for the cash he allegedly paid to the claimant. Smoriginas testified that his only involvement with the job was to go to the site a couple of times to check on the work. Smoriginas stated that the claimant used his own tools and the materials used on the job were provided by the builder.

#### *Testimony of Remigijus Stabacinskas*

Claimant Remigijus Stabacinskas testified that in 2012 he worked for petitioner on a carpentry job at Gurney’s Inn. He testified that he and Smoriginas had known each other for a long time, and he was approached by Smoriginas about the Gurney’s Inn job.<sup>3</sup> Stabacinskas met with Smoriginas at Smoriginas’ home, where Smoriginas showed him plans for the job and asked him whether he wanted to do it and how much he wanted for the work. Stabacinskas testified that he advised Smoriginas that it would take him 80 or 90 hours to complete the project, which consisted of building and installing cabinets, and he wanted to be paid \$30.00 per hour, which Smoriginas agreed to pay. Stabacinskas further testified that the job was later changed by the builder, with petitioner’s consent, to include fixing a floor. According to Stabacinskas, the builder also asked him to build one wall and repair another. Stabacinskas told the builder he needed to first check with Smoriginas, who eventually approved the additional work and told Stabacinskas to keep track of the hours spent building and repairing walls because “it’s extra.” Stabacinskas testified that he did not do any work on the walls until he had spoken

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<sup>2</sup> Investigator Buzzo testified there was no history of prior violations for petitioners.

<sup>3</sup> Stabacinskas testified that at the time, he did not have his own business or carry his own insurance.

with Smoriginas, and that he recorded his hours for the extra work and submitted them to Smoriginas.

Stabacinskas denied that he agreed to work for a flat price. He testified he asked for \$30.00 an hour because building cabinets is craft work requiring a high degree of skill. He conceded that the work he did on the floor and the walls did not require the same skill as building the cabinets, but insisted he asked for \$30.00 an hour for all work done at Gurney's Inn, and that the extra work was done at the builder's request and approved by Smoriginas. Stabacinskas testified he worked 85 hours to complete the project and was never paid. He worked 11 days at Gurney's Inn starting around 8:00 a.m. and finishing before 4:30 p.m.

### **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):

#### **Burden of Proof**

The petitioners' 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).

#### **Stabacinskas Not an Independent Contractor**

Petitioners allege the orders are unreasonable because the claimant was an independent contractor, and therefore not a covered "employee" under Article 6 of the Labor Law (*see* Labor Law § 190 [2]). The ultimate inquiry into whether an individual is an independent contractor is whether the individual depends on someone else's business or is in business for his or herself (*see e.g. Maria Lasso et al.*, PR 10-182 [April 29, 2013] [appeal pending]). Accordingly, we must look to determine whether claimant Remigijus Stabacinskas was "wearing the hat of an independent enterprise" (*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 petitioners over claimant, (2) the claimant's 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 Stabacinskas 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, Stabacinskas depended on petitioners for the opportunity to render service or was in business for himself (*id.* at 1059).

We find that petitioners did not meet their burden of proof to show claimant was an independent contractor. Specifically, although there is no doubt the claimant is a highly skilled carpenter and the duration of the project was short, the credible evidence demonstrates that on the totality of the circumstances, Stabacinskas was not in business for himself and completely dependent upon Smoriginas for the work in question.

Smoriginas testified the verbal agreement between himself and Stabacinskas was for a flat rate of \$1,500.00 for the work irrespective of the number of hours it took to complete. However, in the absence of written contracts between Smoriginas and the builder, and between Smoriginas and Stabacinskas, we credit claimant's specific testimony concerning the agreement he alleged he reached with Smoriginas for an hourly rate of pay, which is indicative of an employment relationship and not that of an independent businessperson who stands to have an investment in the work and the opportunity for profit or loss. Smoriginas' own testimony that he made a low bid on the work in hopes of gaining further contracts with the builder and that he would have lost money had he agreed to pay the amount Stabacinskas claims, demonstrates that he, not Stabacinskas, controlled the opportunity for profit and loss. We also credit Stabacinskas' unrebutted testimony that he did not have his own business at the time or carry his own insurance which strongly mitigates against a finding that he was an independent contractor (*see* Labor Law § 861-c [1] [presumption against independent contractor status in construction industry unless individual is a separate business entity]).

### **Smoriginas was an 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 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]). Smoriginas failed to meet his burden of proof to show he was not Stabacinskas' employer. We find he exercised sufficient control over claimant to support the respondent's determination that he was an employer. Smoriginas hired

Stabacinskas to work on the Gurney's Inn project, supervised Stabacinskas' work to the extent that he agreed to the rate of pay, approved additional work requested by the builder, required Stabacinskas to keep track of his hours for extra work, and reviewed the completed work with the builder prior to being paid.

### **The wage order**

It is undisputed that Smoriginas failed to maintain any contemporaneous records of time worked and wages paid to claimant, and that the records he submitted to DOL were made after the claim was filed for his own purposes and not based on personal knowledge of the hours claimant actually worked. Additionally, although Smoriginas claims to have paid \$1,500.00 to Stabacinskas, there is no record that wages were actually paid. In the absence of records, Smoriginas bears the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989], “[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner’s calculation to the employer.”

Therefore, Smoriginas has the burden of showing that the Commissioner’s order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimant worked and that he was paid for those hours, or other evidence that shows the Commissioner’s findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011]). Where no records are available, DOL is “entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate” (*Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378 [(1<sup>st</sup> Dept 1996), citing *Mid-Hudson Pam Corp.*). In this case, the Commissioner used the best available evidence, which was the claimant’s statement. That statement was fully corroborated at hearing by claimant’s credible and un rebutted testimony. Therefore, we find respondent’s determination that Smoriginas owes Stabacinskas \$2,550.00 in unpaid wages reasonable.

### ***Liquidated Damages***

Where the Commissioner determines an employee has not been paid all wages owed, Labor Law § 198 requires him to assess liquidated damages in an amount not in excess of 100% of the unpaid wages unless the employer has a good faith basis to believe the underpayment was in compliance with the law. Smoriginas did not produce any evidence of a good faith basis to believe the underpayment was in compliance with the law, and we affirm the assessment of 25% liquidated damages as reasonable.

### ***Civil penalty***

The wage order assesses a 50% civil penalty. The Commissioner must impose an “appropriate civil penalty” where he determines that a violation is not willful or egregious and there is no history of prior wage and hour violations (Labor Law § 218 [1]). The Commissioner in assessing the civil penalty applicable in this case was required to “give due consideration to

the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and . . . the failure to comply with recordkeeping or other non-wage requirements" (*id.*). Investigator Buzzo testified that those were the factors she considered in determining to recommend a 50% civil penalty. Petitioners did not present enough evidence to meet their burden of proof in challenging the validity or reasonableness of the Commissioner's determination. In contrast, respondent submitted testimonial and documentary evidence that supports its determination for a 50% civil penalty. Therefore, we find the civil penalty is valid as issued by respondent.

### *Interest*

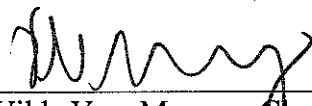
Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law § 14-a sets the maximum rate of interest at "sixteen per centum per annum."

### **Penalty order**

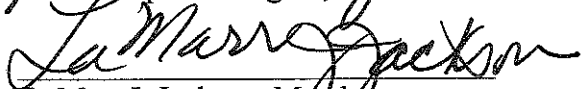
Respondent imposed a \$500.00 civil penalty against petitioners for violating Labor Law § 661 and 12 NYCRR § 142-2.6 by failing to keep and/or furnish true and accurate payroll records for the claimant. There is no dispute that Smoriginas failed to keep records, and the penalty order is affirmed.

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

1. The orders against Linas Construction, Inc. are revoked;
2. The orders against Linas Smoriginas are affirmed; and
3. The petition for review be, and the same hereby is, granted in part and denied in part.


  
Vilda Vera Mayuga, Chairperson

  
J. Christopher Meagher, Member

  
LaMarr J. Jackson, Member

  
Michael A. Arcuri, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at New York, New York, on  
March 11, 2015.

  
Frances P. Abriola, Member

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LaMarr J. Jackson, Member

Dated and signed by a Member  
of the Industrial Board of Appeals  
at Utica, New York, on  
March 11, 2015.

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Michael A. Arcuri, Member

  
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Frances P. Abriola, Member