STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
THOMAS J. FALCONE,	
Petitioner,	
	DOCKET NO. PR 16-156
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated December 15, 2016,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Law Office of Michael J. Alber, Commack (*Anthony DellUniversita* of counsel), for petitioner.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Roya Sadiqi* of counsel), for respondent.

WITNESSES

Michael Miller, Nicholas Kravchenko, Kevin Long, and Terence Dunne, for petitioner.

Senior Labor Standards Investigator Joseph Ryan, for respondent.

WHEREAS:

On December 29, 2016, petitioner Thomas J. Falcone filed a petition for review of two orders issued against him and 3 G's Vino, L.L.C. by respondent Commissioner of Labor (Commissioner or DOL) on December 15, 2016. Respondent filed her answer on February 10, 2017. 3 G's Vino, L.L.C. did not file a petition for review.

Upon notice to the parties, a hearing was held on November 15, 2017 in Hicksville, New York, before Administrative Law Judge Jean Grumet, the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

The order to comply with Article 6 of the New York Labor Law (wage order) directs petitioner to pay $33,700.00 in wages owed to four claimants, together with interest at 16% per annum calculated to the date of the order in the amount of $3,491.56, 100% liquidated damages in the amount of $33,700.00, and a 100% civil penalty of $33,700.00, for a total amount due of $104,591.56.

The order under Article 19 of the Labor Law (penalty order) imposes 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 July 17, 2015 to June 3, 2016.

The petition alleges that the orders are invalid because petitioner is not individually liable as an employer, but was an employee of 3 G's Vino L.L.C. For the reasons set forth below we affirm the orders.

SUMMARY OF EVIDENCE

Petitioner's Evidence

Petitioner Thomas Falcone did not appear at the hearing. His counsel offered testimony from the four claimants.

Testimony of Claimant Michael Miller

Miller worked for 3 G's Vino, a liquor wholesaler located in Farmingdale from about March 2015 to March 2016. The petitioner interviewed and hired Miller to do deliveries. Miller texted his hours to petitioner on a weekly basis. Petitioner promoted Miller to "an assistant to the CEO type of role" four or five months after Miller's hiring at which point his hourly wage was raised to $15.00 per hour. Beginning about a month after Miller started work, paychecks the petitioner gave him were starting to be returned for nonsufficient funds. Each time a check was returned, Miller showed the petitioner his bank statement showing the check had not been processed, and the petitioner either replaced the check with a personal check which sometimes cleared, or the petitioner waited until there were funds in the account he was using for payroll and wrote Miller a replacement check. Miller testified that at the end of his employment, employees were not getting any payroll checks and were told by petitioner that he was in the process of switching payroll companies and in the process of securing investors and they would be paid once that happened. When no check was provided on February 24, 2016, Miller refused to work any further unless he was paid. Miller's rate of pay was $15.00 per hour during the claim period and he worked forty hours per week. Miller testified that the information in the claim form that he filed with DOL on March 1, 2016 was true. He testified that he was claiming wages for the period January 4 to February 26, 2016. Miller requested unpaid wages from the petitioner on January 15, January 29, February 12, February 26, and March 1, 2016 but did not receive those wages from petitioner

Testimony of Claimant Nicholas Kravchenko

Kravchenko worked for 3 G's Vino as a full-time sales representative until February 26, 2016, when he and petitioner discussed that Kravchenko would be available by phone, as needed.

Kravchenko continued to work until sometime in late April or early May 2016. Kravchenko was initially hired by the petitioner's father, Joseph Falcone, in July 2013, but thereafter, he almost entirely reported to petitioner. Kravchenko considered petitioner to be his boss as he communicated with the petitioner daily about sales and orders. Kravchenko's agreed rate of pay was $175.00 per week. Kravchenko testified that he often did not receive pay checks; that petitioner gave him signed checks that were returned by the bank for nonsufficient funds; and that petitioner also gave him unsigned checks and told him not to deposit them. When he wasn't paid, Kravchenko complained to petitioner, including in emails or texts. Petitioner told him that he would be reimbursed for both the checks and the bank fees incurred but Kravchenko was not reimbursed. Kravchenko testified that the weeks that he wasn't paid are accurately documented in his claim form.

Testimony of Claimant, Kevin Long

Long, who reported to petitioner for work each day and was promised compensation of $600.00 per week plus a commission on sales, began working for 3G's Vino LLC in 2013. Long was not paid at all after December 23, 2015 but continued working for petitioner until July 2016 based on petitioner's promises that he would be paid. Long testified that he did not get paid the wages for the time periods reflected in his claim form.

Testimony Claimant, Terence Dunne

Dunne was hired by and reported to the petitioner throughout much of his employment. Dunne testified that he did sales work for 3 G's Vino LLC through at least June 3, 2016, but was still receiving directions from petitioner up until September 2016. Dunne was paid a salary and a car allowance per biweekly payroll period and understood that his biweekly salary was $1,600.00, as reflected in his claim form. Dunne testified that he never received any pay for the weeks set forth in his claim form.

Respondent's Evidence: Testimony of Joseph Ryan and Documents

Joseph Ryan testified that he is a Senior Labor Standards Investigator for DOL. He identified various documents from the DOL investigative file. DOL sent several letters to petitioner regarding unpaid wages but did not receive a response until Ryan left petitioner a message on November 30, 2016. Petitioner called Ryan back and said that he was only an employee of 3 G's Vino LLC. Petitioner did not provide any information regarding the unpaid wages that DOL inquired about. Ryan recommended a 100% civil penalty be issued against petitioner in part because petitioner did not respond to DOL's letters, did not provide any timecards or payroll records to DOL, and did not otherwise dispute the claims.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether an order issued by the Commissioner is "valid and reasonable" (Labor Law § 101 [1]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*Id.* § 103 [1]). Petitioners have the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (Board Rules [12 NYCRR] § 65.30; State

Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.,* 1 AD 3d 850, 854 [3d Dept 2003]).

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 Rules (12 NYCRR) § 65.39.

Petitioner Was the Claimants' Employer

The term "employer," as used in Article 6 of the Labor Law, "includes any person, corporation or association employing any individual in any occupation." (Labor Law § 190 [3]) As used in Article 19 of the Labor Law, it "includes any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). Labor Law § 2 [6] defines "employer" as "the person employing" a worker, "whether the owner, proprietor, agent, superintendent, foreman or other subordinate," and § 2 [7] defines "employed" to include "permitted or suffered to work." The test for determining whether a person, as well as a corporation, is an "employer" under the New York Labor Law is the same one used for analyzing employer status under the federal Fair Labor Standards Act (FLSA), which like Labor Law § 2 [7], defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). (*See, e.g., Matter of Netram v New York State Industrial Board of Appeals,* 2018 NY App Div LEXIS 4540* [3d Dept 2018]; *Cohen v Finz & Finz, P.C.*, 131 AD3d 666 [2d Dept 2015]; *Bonito v Avalon Partners, Inc.,* 106 AD3d 625, 626 [1st Dept 2013]; *Chung v New Silver Palace Rest., Inc.,* 272 FSupp 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 explained the "economic reality test" used for determining employer status under the statutes:

> "[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 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).

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*Id.)* Under the broad New York and FLSA definitions of "employer," more than one person or entity can be found to be an employee's employer (*Zheng v. Liberty Apparel Co.*, 355 F3d 61 [2d Cir 2003]; *Matter of Stephen B. Sacher, Travco, Inc., and Sacher & Co., CPA, P.C.,* PR 11-151 [April 10, 2014]).

Applying this test to the present case, we find that petitioner was the claimants' "employer" as a matter of economic reality and was responsible for the wages owed. The petitioner had the burden to prove that he was not the employer and other than calling the claimants as witnesses, the

petitioner himself did not testify nor introduce any of his own records. (Board Rules [12 NYCRR] § 65.30; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

The four claimants' credible testimony combined with the claim forms and copies of pay checks amply demonstrate that petitioner was the claimants' employer under these standards. Petitioner recruited, interviewed, hired, and promoted Miller; Miller texted his hours to petitioner each week; and petitioner issued checks to Miller. Kravchenko reported to petitioner on a daily basis about sales and orders and considered the petitioner to be his boss. He saw petitioner sign paychecks and was told by petitioner not to deposit checks when there were insufficient funds in the company account. Long testified that he was hired by the petitioner and reported to him daily. Dunne testified that he was hired by and reported to the petitioner and was paid by petitioner. Each of the claimants credibly testified that when they were not paid, they went to petitioner for redress.

The record evidence amply demonstrates that as a matter of economic reality petitioner had the authority to hire the claimants, supervise and control their work schedules and conditions of employment, and maintain their employee records. All four claimants' testimony was not only credible, but undisputed, as neither petitioner nor any other witness appeared at the hearing to dispute it. Petitioner failed to provide sufficient evidence to meet his burden of proof. While the petition asserts that petitioner stopped working for 3 G's Vino LLC in January 2016, no evidence to support this assertion was ever provided and it is belied by each of the claimants' credible testimony that they continued to be employed by the petitioner after January 2016.

Petitioner moved at the hearing to dismiss claims against him with respect to Dunne since the claim for unpaid wages filed by the latter listed only Joseph Falcone, not petitioner, as "responsible person" of the firm, but Dunne's testimony showed that petitioner ran the business day to day. Dunne's testimony and claim form support a finding that petitioner was his employer. We deny petitioner's motion and find that petitioner employed all four claimants under the "economic reality" test.

The credible evidence supports the Commissioner's finding that petitioner was the claimants' employer.

The Wage Order is Affirmed in Part and Modified in Part

As already stated, a petition to the Board must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived. (Labor Law § 101 [2]). In the present case, the only issues raised in the petition were that petitioner was an employee rather than an employer, stopped working for 3 G's Vino LLC in January 2016 and was improperly named as an employer, claims we have rejected for reasons explained above.

It is undisputed that petitioner did not provide employment records requested by DOL, nor were they offered as evidence at the hearing. 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). Labor Law § 196-a provides that if an employer fails to comply, "the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements." As 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 calculations to the employer." (*See also Matter of Garcia v* Heady, 46 AD3d 1088 [3d Dept 2008]; *Matter of Bae v Indus. Bd. of Appeals*, 194 AD3d 571 [1st Dept 2013]; *Matter of Ramirez v Commissioner*, 110 AD3d 901 [2d Dept 2013]; *Matter of Aldeen*, PR 07-093 [May 20, 2009], *aff'd sub nom. Matter of Aldeen v. Indus. Appeals Bd.*, 82 AD3d 1229 [2d Dept 2011]). In the absence of required records, it was proper for the DOL to accept the claimants' statements as the best available evidence. We affirm the wage order but modify the amount of wages due to one claimant based on the testimony given at the hearing. Miller testified that he was paid $15.00 per hour and worked forty hours per week, which would be a weekly wage of $600.00. Miller's claim form and the DOL's order include a weekly wage of $650.00. We modify the wage order to reflect Miller's testimony at the hearing such that his total unpaid wages are $4,800.00 (8 weeks at $600.00 per week). The total amount of wages sought in the order is modified to $33,300.00.

Interest

Labor Law § 219 [1] provides that when the Commissioner determines that wages are due, the order directing payment of those wages shall include "interest at the rate of interest 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." Petitioners did not offer any evidence to challenge the imposition of interest. As discussed above, we modified the amount of wages owed to Miller. Interest, therefore, shall be reduced proportionally.

Liquidated Damages

Labor Law § 218 provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. Petitioner failed to offer evidence challenging the imposition of liquidated damages. As discussed above, we modified the amount of wages owed to Miller. The liquidated damages, therefore, shall be reduced accordingly.

The Civil Penalty Is Affirmed

The unpaid wages order includes a 100% civil penalty. Labor Law § 218 [1] provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Article 6 of the Labor Law, respondent shall give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements."

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Petitioners did not introduce any evidence to challenge the civil penalty. We affirm the 100% civil penalty but the dollar amount shall be reduced proportionally because we modified the amount of wages owed to Miller.

The Penalty Order Is Affirmed

Labor Law § 218 (1) provides that where a violation is for a reason other than the employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed $1,000.00 for a first violation. In this case, respondent assessed a $500.00 penalty against petitioner for failure to keep and/or furnish true and accurate payroll records for each employee from on or about July 17, 2015 through June 3, 2016; a violation of Labor Law § 661 and 12 NYCRR 142-2.6. As set forth in more detail above, petitioners did not produce any evidence to show they maintained payroll records. We affirm the penalty order.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified and respondent is directed to issue an amended wage order consistent with this decision reducing the wages owed to $33,300.00, and adjusting interest, civil penalties, and liquidated damages accordingly.

2. The penalty order is affirmed; and

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

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York,
on August 8, 2018.

Petitioners did not introduce any evidence to challenge the civil penalty. We affirm the 100% civil penalty but the dollar amount shall be reduced proportionally because we modified the amount of wages owed to Miller.

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