

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

DANIEL DELISA and CHAMPION
MAINTENANCE CONTRACTORS INC.,

Petitioners,

To Review Under Section 101 of the Labor Law: an
Order to Comply With Article 6 of the New York
State Labor Law and an Order Under Article 19 of the
New York State Labor Law, both issued March 17,
2010,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 10-132

RESOLUTION OF DECISION

APPEARANCES

Aldo V. Vitagliano, P.C. (Aldo V. Vitagliano, Esq. and Kevin Brady, Esq., of counsel), for
Petitioners.

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

WITNESSES

For Petitioners: Porfirio Sanchez, Eduardo Salazar, Eddy Vicente, Stanley Michel, Gerardo
Lopez Perez, Edwin Belzaca, Hector Martin Masias, Carlos Viera, Steven Delisa, Daniel
Delisa.¹

For Respondent: Senior Labor Standards Investigator Christine Anderson.

WHEREAS:

On May 4, 2010, Daniel Delisa (Delisa) and Champion Maintenance Contractors Inc.
(Champion Maintenance) (together, Petitioners) filed a Petition with the New York State

¹ Claimants Eddy Vicente and Gerardo Lopez Perez, who came to the hearing to testify in Respondent's case,
were called as witnesses by Petitioners. Claimant Carlos Viera was subpoenaed by Petitioners. Unless
otherwise specified, "Sanchez" refers to Claimant Ventura Sanchez, not witness Porfirio Sanchez.

Industrial Board of Appeals (Board), pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR Part 66), seeking review of an Order to Comply with Article 6 of the New York State Labor Law (Wage Order) and an Order Under Article 19 of the New York State Labor Law (Penalty Order) (together, Orders) that the Commissioner of Labor (Commissioner, Respondent or DOL) issued on March 17, 2010. Respondent filed an Answer to the Petition on June 24, 2010.

The Wage Order finds that Petitioners owed the following amounts of unpaid wages to the following Claimants: (1) Carlos Viera - \$4,560.00 for the period January 17, 2009 to June 26, 2009; (2) Eddy Vicente - \$1,705.50 for the period March 1, 2007 to May 21, 2009; (3) Gerardo Lopez Perez - \$1,114.71 for the period April 24 to August 28, 2009; and (4) Ventura Sanchez - \$552.00 for the period May 9 to May 21, 2009, for a total of \$7,932.21 in unpaid wages; interest at the rate of 16%, calculated through the date of the Wage Order in the amount of \$922.81; and a 100% civil penalty of \$7,932.21, for a total amount due as of the Order's date of \$16,787.23. The Penalty Order finds that Petitioners failed to keep and/or furnish true and accurate records for each employee for the period from on or about January 17, 2009 through August 28, 2009, and demands payment of a \$500.00 civil penalty.

The Petition challenges both Orders as invalid and unreasonable and alleges that none of the Claimants were employees of either Delisa or Champion Maintenance, and that during the relevant periods: Viera was an independent contractor of and was paid in full by 55 Oak Street, LLC (of which "Delisa is the Member/Manager"); Vicente was an independent contractor of Champion Maintenance for a few odd jobs until April 2009, for which he was paid in full, and was not employed by either Petitioner after April 2009; Lopez Perez was never an employee of either Petitioner; and Sanchez did not work for Petitioners during 2009. The Petition further states that since Claimants were not employees during the relevant period, Petitioners did not maintain payroll records for them, and that Petitioners made a good faith effort to supply previous payroll records of Vicente but could not do so due to a computer crash. The Petition also challenges the interest and civil penalties imposed by the DOL.

Upon notice to the parties, hearings were held on August 31 and October 5, 2011 in White Plains, New York before Jean Grumet, Esq., 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, to make statements relevant to the issues, and to make closing arguments.

I. SUMMARY OF EVIDENCE

A. Delisa's Companies

Petitioner Delisa is the sole shareholder and owner of several companies, all of which operate from the same office in Rye Brook, New York. Stanley Michel is an outside consultant hired by Delisa to serve as his companies' comptroller, including preparing financial records, accounting, estimates, some billing and supervision. Delisa's companies include a "Champion Group" that performs repairs, maintenance, cleaning, gardening, snow

removal, and other tasks and is comprised of Champion Maintenance, Inc.², Champion Cleaning Contractors, Inc. (Champion Cleaning); Champion Landscaping Contractors, Inc., and Champion Painting Contractors, Inc. (Champion Painting); a courier company, U.S. Medical Couriers, Inc.; a taxi service, Rye Brook Cab and Airport Service, Inc.; a limousine service, Galaxy Limousine Services, Inc., and 55 Oak Street Apartments, LLC (55 Oak LLC), which owns a rental income property at 55 Oak Street in Port Chester, New York. In addition, Delisa and his aunt each own 50% of a real estate entity, 112-114 Oak Street, which owns a six-unit rental apartment complex at that address in Port Chester.

Delisa testified that Champion Maintenance was incorporated nine or ten years ago,

“to have insurance, because right now, in this type of business, it is very difficult to get insurance. So what we did was formed a corporation in case of a lawsuit, an accident, something happen[s] to the truck.... We set up the corporation so we still have other options. We have other corporations that we can get insurance under. That is the main reason we did that.”

Michel and Delisa testified that Champion Maintenance owns most vehicles and equipment used by the other Champion companies, including automobiles, a dump truck, a diesel van, a pickup truck, Bobcats, snowblowers and steam cleaning machinery. This equipment is stored at Delisa’s home or at the Rye Brook office. Keys to vehicles owned by Champion Maintenance are kept in the Rye Brook office and given to workers from the other Champion companies as needed. Workers of the other Champion companies have access to the equipment and regularly use Champion Maintenance vehicles. The Champion companies also share workers.³ According to Delisa, Champion Maintenance’s primary purpose from 2007 to 2010 was to hire independent contractors for small side jobs. Michel testified that Champion Maintenance had no employees or payroll records. In 2009, Champion Maintenance filed a Form 1120S tax return⁴ with the Internal Revenue Service (IRS) reporting that \$115,064 was paid that year to “outside services/sub contractors.”

B. Claims Filed with the DOL

In early October 2009 the DOL received Claims for Unpaid Wages (Claims) from the four Claimants, which the Claimants affirmed to be true. Claimants Viera, Vicente and Lopez Perez testified that a woman named Teresa, whom they believe to be a lawyer, helped them by filling out the Claim forms based on detailed information which they provided at a meeting with her; the Claimants signed the forms. Among the items of information requested by the Claim forms were the “Employer’s Trade Name” and its “Corporation Name, if any.” Viera’s Claim stated the former as “Champion Maintenance Contractors,

² Champion Maintenance’s filing with the New York State Department of State, Division of Corporations lists Delisa as the Chairman or Chief Executive Officer, the person who will accept service of process, the registered agent, and lists Delisa’s name and address as the principal executive office.

³ Michel, who so testified, did not know how many workers. Delisa testified that employees switched among his companies in the past; he did not recall whether this took place in 2009.

⁴ As stated on the Form 1120S, such a return is for an “S Corporation,” which according to the IRS Small Business and Self-Employed Website, is one that elects not to pay federal income tax and instead passes income, loss, deductions and credit to its shareholder(s) for reporting and payment of taxes.

Inc.” and “Champion Cleaning Contractors, Inc.,” and the latter as “55 Oak Street Apartment, LLC.” None of the other three Claimants listed a “Corporation Name, if any.” For the Employer’s Trade Name, Vicente and Sanchez listed “Champion Cleaning Contractors, Inc.,” Lopez Perez listed “Champion Cleaning, Inc.” and Daniel Delisa. All four Claims named Delisa as the “Responsible Person of Firm,” and stated that “Daniel Delisa, owner” hired the Claimant. Vicente, Lopez Perez and Sanchez’s claims state that they were paid in cash.

C. The Claimants

1. *Carlos Viera*

It is undisputed that Viera worked for Delisa for about six years, leaving in 2008 to work for a firm in Bronxville. After Viera’s employment with that firm ended, he and Delisa met accidentally at a Home Depot.

Viera testified that following their encounter at Home Depot, he asked Delisa for work and Delisa hired him at a rate of \$20.00 per hour to do plumbing, carpentry, maintenance and other work at 55 Oak Street, which Delisa had just purchased, as well as at other locations including 112-114 Oak Street and Delisa’s residence, for all of which Viera was paid \$20.00 per hour. Viera testified that while he occasionally did quick side jobs for other people, he worked on a set schedule for Delisa for \$20.00 per hour, and that work “absorbed most of my time.”⁵ Viera also repaired and organized Delisa’s industrial-quality tools, which Delisa kept at 112 Oak Street in a locker whose keys Viera would ask Delisa for each day. Viera used these tools on work for Delisa; for his side jobs, he used his own, lower-quality tools. Viera was paid on 55 Oak Street, LLC checks, signed by Delisa.

Viera testified that his work during the relevant period also included driving Delisa’s trucks to Home Depot to buy materials listed by Delisa, including drywall, lumber and shrubs, using blank checks provided by Delisa which were filled in by the Home Depot cashier; delivering the materials he purchased for Delisa at Delisa’s request to 55 Oak Street, Delisa’s Rye Brook office, or elsewhere; and leaving the Home Depot bills and the vehicle key at the Rye Brook office. With help from other workers, Viera installed boilers in each apartment at 55 Oak Street, including cleaning and removing existing piping. He also removed tile, opened floors, made repairs and painted. Delisa obtained the necessary permits for this work. Viera testified that “[w]hile I was working, when he asked for it,” Viera listed dollar prices totaling \$4,020.00 for specific tasks he performed at 55 Oak Street, 112-14 Oak Street and Delisa’s residence “so he could see what my salary was going to.” Viera listed dollar prices for the specific tasks because Delisa asked him to translate hours into dollars.

Viera testified that his employment with Delisa ended because instead of paying his full wages on a regular basis, Delisa periodically paid him \$1,000.00, and after all the boilers at 55 Oak Street were installed, provided neither full pay nor further work. At this point, Delisa had stopped paying all of the Claimants, and Viera complained to Delisa about the non-payment of wages. Viera decided to file his Claim with the DOL after checks

⁵ Michel testified that in April 2009, Viera handed him a business card, which reads: “Electrician Heat Plumbing 24 Hours a Day,” and asked if Michel personally had any work for him. Michel testified that he did call Viera for some work, but Viera said he would get back to him and Michel hired someone else.

tendered by Delisa dated August 7, 2009 for \$1,000.00 and September 7, 2009 for \$1,412.00 both bounced.⁶

Delisa testified that when they met at Home Depot and Viera asked for work, Delisa requested an estimate for installing six boilers in the 55 Oak Street building. Viera had done such work for Delisa before and Delisa figured he acquired more experience working in Bronxville. During his earlier period of employment with Delisa and his companies, Viera had been paid \$15 or \$15.75 per hour. After Delisa showed Viera the 55 Oak Street apartments, which Viera measured, Viera took Delisa to two showrooms and obtained catalogues, and gave Delisa a written proposal for the boiler installation. The proposal, which Delisa no longer has, called for Delisa to buy all materials needed, including the boilers themselves, while Viera performed necessary labor with a helper provided by Delisa, since Viera does not do carpentry. Delisa testified that Viera expected to take about a week per boiler, and it actually took him about two weeks per boiler. He testified that besides Viera's written proposal, there was also a signed contract between Delisa and Viera, but Delisa does not know where it is. There was no agreement that Viera would be paid \$20 per hour. In the course of the hearing, Delisa testified both that Viera was to be paid \$4,000 for each of the boilers installed, a total contract price of \$24,000, and that he was to be paid \$1,000 per week after he completed the work. He testified that after the boilers were installed, "we were going to discuss about doing all the bathrooms, remodel all the plumbing... , which he was going to charge me another thousand dollars per bathroom."

Delisa testified that Viera began work on the boiler project at some point during the winter of 2008-2009; while the work was being done, Delisa went to Uruguay. Delisa gave varying accounts of the length of his stay in Uruguay. On direct examination he said he was gone for one month; later he testified he was gone for two to two and a half months. When Delisa returned, on a date he does not recall, the boiler installation was finished. Delisa supplied no tools except inexpensive ones which Delisa kept at his residence, 55 Oak Street and 112 Oak Street; Viera brought his own tools, including testers to measure electrical voltage. Helpers whom Delisa hired and paid did carpentry work; Viera's responsibility was to handle plumbing, not cut walls. Viera drove his own car, a Ford Taurus, not Delisa's vehicles, to work, and picked up the helper on the way.⁷ After stating that Viera obtained keys through his office, Delisa testified that Viera had a key to 55 Oak Street "because I have known him for many years, and I know I can trust him." Delisa does not think Viera had liability insurance.

Delisa testified that when he returned from South America, he told Viera that he could not remodel the bathrooms right away; Viera responded that he was being left without work, had no other job, and "You owe me a lot of money." When Delisa asked what this meant, Viera showed him the three-page list of tasks he had performed at Delisa's residence, 55 Oak Street and 112-114 Oak Street. Delisa believed that Viera had done the tasks listed, at tenants' request – he assumed, at night or on weekends, since Viera was working at 55

⁶ While Viera testified he did not recall whether he ultimately received those two payments, his November 13, 2009 letter to the DOL, discussed below, states that "my employer paid me in the last week of the October the amount of \$1,000.00 cash," and in October also paid two checks, one for \$1,412.00 and the other for \$1,608.00, for a total received of \$4,020.00.

⁷ Delisa also testified he knows that Viera does not have a driver's license. Viera testified he does have a driver's license.

Oak Street during the day and could not be in two places at the same time – and therefore wrote “OK” after most of the tasks and dollar prices listed by Viera. But because Delisa thought the prices listed were 40% too high, he deducted 40% from the \$4,020.00 total shown, and made two payments totaling \$2,412.00.⁸ Besides the \$2,412.00 which he initially planned to pay based on the \$4,020.00 task list, Delisa ultimately paid the remaining \$1,608.00 as well. Delisa reached this decision because Viera complained to two elders of Delisa’s congregation, who discussed the matter with Delisa. Nevertheless, Viera pursued his Claim. “When I told him I wasn’t doing the bathroom[s], everything changed.”

Michel testified that Viera was issued a Form 1099 by 55 Oak LLC for his work during 2009. This 1099 lists Viera’s “nonemployee compensation” as \$27,400.00, but Michel testified that this was a typographical error and the actual correct amount was \$17,400.00, as Michel knew from having prepared a ledger sheet of all checks paid to Viera, whose total was \$17,400.00. Neither the ledger sheet, the underlying checks, nor an amended Form 1099 was provided during the hearing, nor did Michel testify concerning any amended Form 1099.

Viera’s Claim filed with the DOL on October 5, 2009 stated that he worked at 112-14 Oak Street and 55 Oak Street in the occupation “plumber,” at an agreed rate of \$20 per hour. According to the Claim, Viera requested payment of unpaid wages on August 7, 2009; Delisa gave him two checks, for one of which there were no funds, and stated that that was final payment. The Claim also stated that Delisa always said that the next week he would pay all money owed, but actually only paid \$1,000.00 in some weeks. The Claim listed amounts Viera stated were owed him for specific payroll weeks including 23 of the 24 weeks (all but the one ending June 12) ending between January 23 and July 3, 2009. According to the Claim, Viera worked 42 hours in one of these weeks, 44 hours in another, and 40 hours in each of the 21 remaining weeks, for a total of 926 hours for which, at \$20 per hour, \$18,520 was earned. According to the Claim, Viera was actually paid gross wages of \$1,000.00 in 11 of the 23 payroll weeks and nothing in the remaining 12; thus, the Claim listed a “total amount due” of \$7,520.00. Submitted with Viera’s Claim were two “55 Oak Street Apartment, LLC” checks to Viera for which the Claim states there were insufficient funds; one, dated August 7, 2009 for \$1,000.00, is marked “for work done at 55 Oak St.,” the other, dated September 7, 2009 for \$1,412.00, is marked “for final payment.”⁹

2. *Eddy Vicente*

It is undisputed that Vicente worked for Champion Maintenance in 2009 – although Petitioners asserted he did so as an independent contractor – and that he is owed some money for unpaid work.

⁸ Delisa acknowledged that his initial August 7, 2009 check for \$1,000.00 proved uncollectible, but stated that he subsequently paid Viera \$1,000.00 in cash through Viera’s roommate Edwin Belzaca. Delisa testified that the check bounced because of a mistake by Belzaca, which Delisa did not explain; he stated that Belzaca could testify to that, but Petitioners’ counsel did not ask about the topic when questioning Belzaca, who was called as a witness by Petitioners before Delisa testified.

⁹ Viera testified that \$1,412 would not have been final payment, but he was unemployed and needed the check. As previously noted, a November 13, 2009 letter from Viera to the DOL indicates that he was subsequently paid the \$2,412.00 originally included in the two bounced checks.

Vicente testified that he worked for Delisa beginning in March 2007 doing cleaning and construction, as well as clearing snow in Rye Brook Plaza. Vicente had little construction experience, and worked as a helper using Delisa's tools. When it was time to make accounts, Delisa asked Vicente to write down his hours worked. Vicente testified that Delisa occasionally picked him up and drove him to work, though this was usually done by the managers. Vicente sometimes worked with Viera, Lopez Perez and Sanchez, all of whom also worked for Delisa. Lopez Perez worked with Vicente at Rye Brook Plaza cleaning drains and on construction; Lopez Perez, too, was a jack of all trades, helping in construction as well as clearing snow. Vicente never worked at 55 Oak Street, but sometimes helped Viera with plumbing work at 112-114 Oak Street; Vicente also cleaned the basement there.

Vicente's Claim filed with the DOL on October 1, 2009 stated that he worked in the occupation "cleaner, driver, bricklayer" and was paid in cash; that Vicente requested payment of unpaid wages "[e]very week until now;" and that Delisa "paid the wages back 2 or 3 weeks, later he told me that all money for wages is already paid." Vicente testified that he was paid \$14.00 per hour for cleaning snow by hand, and supposed he would be paid \$15.00 per hour for doing so with a bobcat, and was paid \$12.00 per hour as a helper. During the hearing, Vicente provided handwritten notes which documented some of the hours that he worked during the relevant period, which indicated that he was owed at least \$1170.00 for 78 hours of shoveling snow and \$588.00 for 49 hours of work as a helper. Vicente testified that he had other notes of hours he worked, but they were lost when he moved. He also testified that in June 2009, when he was bedridden, Delisa came to his house and gave him \$300.00. On cross-examination, Vicente admitted that he signed a receipt dated January 10, 2009 stating that he received \$200.00 from Delisa; he testified he did not remember what this payment was for.

For his part, Delisa testified that he owes Vicente money but does not know how much.

"When he was ill, or could hardly walk, I remember going to his house... I had 300 cash in my pocket, and I handed it to him, which he testified.... I know it was close to 700 that he did for me on the job site. He should have deducted 300. It is 300, 400, I don't know."

Delisa testified that he tried unsuccessfully to contact Vicente on many occasions, and did not pay what he acknowledges is owed because the DOL's claim is for more. At another point, Delisa testified that "If I ever received a letter that showing the \$700 or even the \$1000 owed to Eddy, I would have paid them on the spot. I never got that in writing."

3. *Gerardo Lopez Perez*

Lopez Perez testified that he worked for Champion Maintenance periodically, cleaning snow, cleaning buildings and removing trash, over a period of many years including six months of work at Delisa's home. The work at Delisa's home involved taking out its boiler and oil tank. Lopez Perez used Delisa's tools, including picks, shovels and leaf blowers. Delisa called Lopez Perez on a walkie-talkie; Lopez Perez was picked up by another worker in a car provided by Delisa and driven to work. Lopez Perez would write his hours down and hand them to Delisa's secretary; either Delisa or the secretary paid Lopez Perez \$15.00 per hour in cash. About two months after Lopez Perez last worked for Delisa, around September or October 2009, Delisa's son informed the workers that Delisa was bankrupt and would not provide more work.

Lopez Perez's Claim filed with the DOL on October 1, 2009 stated that he worked in the occupation "employee;" that he asked Michel, the comptroller, for unpaid wages on August 28, 2009; that Michel "said that I worked for Esteban Delisa, no[t] for the company Champion Cleaning Contractors, Inc. But Esteban Delisa is the manager and owner's son!;"¹⁰ and that "The owner Daniel Delisa told me that he doesn't pay anything." The Claim listed amounts Lopez Perez stated were owed him for the four payroll weeks ending April 30, May 15, May 22 and August 28, 2009. According to the Claim, Lopez Perez's pay rate was \$100.00 per day and during those four weeks he earned gross wages of \$1300.00 for a total of 114 hours' work, including 42.5 hours in the week ending May 15, but he was paid nothing for three of the four weeks, and \$200.00 for the week ending August 28; the Claim listed a "total amount due" of \$1,100.00.

For his part, Delisa testified that Lopez Perez "worked with us on and off on different projects. He always got paid," and is owed no money. Delisa paid him cash at the end of the day. Lopez Perez was a day laborer whom Delisa picked up on the street, brought to and from a work site, and paid for the day.

4. *Ventura Sanchez*

Sanchez did not testify at the hearing. His Claim filed with the DOL on October 1, 2009 stated that he was hired by Delisa in April 2003 and worked for Champion Cleaning in the occupation "bricklayer," until May 21, 2009. According to the Claim, Sanchez's pay rate was \$12.00 per hour, and he was owed \$552.00 for 66 hours' work from May 9, 2009 to May 21, 2009 at 28 Ridge Boulevard in Rye Brook, New York; he asked Daniel and Esteban Delisa for unpaid wages "[e]very week until now," and was told "that I worked for Esteban Delisa," not for the company, even though Esteban Delisa was a manager and "I and other workers worked with the tools, licencia [sic] of the owner Daniel Delisa."

Michel testified that he knows both from reviewing Champion companies' records and first-hand that Sanchez did not work for Delisa in 2009; Michel saw Sanchez come to the office looking for work, but he was told that unfortunately there was no work to give him. Sanchez last worked as a mason for Champion Maintenance in 2008; he leaves the country each fall and returns in the spring and asks Delisa for work, but in 2009 there was

¹⁰ All four Claims, including that of Lopez Perez, listed Esteban Delisa in a space for "Name of superintendent, manager or foreman." (Sanchez's Claim listed both Esteban Delisa and Denise Melo in that space.)

no work for him. Michel also testified that he was present at a July 29, 2010 conversation between Sanchez and Delisa in which Sanchez stated that a woman lawyer “sort of forced him into signing” his Claim; Michel then typed a statement which Sanchez swore to and signed, stating that he was approached by Viera to claim that Delisa owed him money, and

“I informed Carlos Viera that I had not worked for Daniel Delisa this year and he advised me that it didn’t matter and to just make the claim, which I did. I did not work for Champion Maintenance or Daniel Delisa in anyway during 2009 and Daniel Delisa or his companies do not owe me any money. I did work for Daniel’s son Steven and he owed me for 2 days that I worked for him.

“Carlos’s lawyer forced me to sign a statement that saying that I was owed money even though it was not true and I regret doing it.”

Delisa also testified that Sanchez is not owed money. According to Delisa, in other years Sanchez was an independent contractor of Champion Maintenance and employee of Champion Cleaning, but did not work for Delisa in 2009. “Every time he comes to the country he works for me.... He even called me a couple of weeks ago from Panama, he wants to have me help him come into the country to work for me.” Delisa testified that Sanchez told him he signed the Claim, but was stupid and wrong to do so. Delisa also testified that he had a contract with Sanchez, but did not bring it to the hearing since he believed it was unnecessary since Sanchez provided an affidavit showing he was not owed anything.

D. The DOL Investigation and Petitioners’ Response

Senior Labor Standards Investigator Christine Anderson testified that the DOL reviewed the Claims, corrected mathematical errors, and on October 30, 2009, wrote to Champion Maintenance c/o Delisa requesting either payment of specified total amounts (\$8,580.00 for Viera, \$1,705.50 for Vicente, \$1,114.71 for Lopez Perez and \$552.00 for Sanchez)¹¹ or a full statement of the reasons such amounts were not due, and “a copy of any payroll record, policy, contract, etc. to substantiate your position.” Anderson testified that the letter was addressed to Champion Maintenance because all four Claims gave the same employer address, Viera’s Claim gave three names for the employer,¹² and the DOL picked one of these names.

¹¹ The Minimum Wage Order for Miscellaneous Industries, 12 NYCRR § 142-2.2, requires that most employees be paid overtime at one and one half times their regular rate for hours worked over 40 in a week. The Claims filed by Viera, Vicente and Lopez Perez listed overtime hours in at least one payroll week but did not compute a premium for the overtime hours shown; it appears that the DOL corrected this error, raising the total amount of Viera’s claim by \$60.00 and the total amount of Lopez Perez’s claim by \$14.71. It also appears that the DOL may have erroneously thought that Viera stated he was paid \$1,000.00 in only ten rather than 11 weeks, or for some other unexplained reason, may have increased by \$1,000.00 the \$7,580.00 (including the overtime premium) underpayment implied by his Claim’s list of hours worked and wages paid.

¹² As stated above in the discussion of “Claims Filed with the DOL,” Viera’s Claim stated the “Employer’s Trade Name” as “Champion Maintenance Contractors, Inc.” and “Champion Cleaning Contractors, Inc.,” and its “Corporation Name, if any” as “55 Oak Street Apartment, LLC.”

On November 16, 2009 Delisa replied on Champion Maintenance letterhead. He stated that Champion Maintenance did not employ Viera, Lopez Perez or Sanchez during calendar year 2009; Vicente may have worked for Champion Maintenance at the beginning of 2009, but a computer crash made this temporarily impossible to check.

“.... I believe that he was fully paid in the past.

“Carlos Viera is an independent plumbing contractor that did work for Daniel Delisa. This work was performed at his residence and two other commercial properties, which he owns. Mr. Viera was fully paid for all the work that he did. Copies of checks and bills from Mr. Viera attached.

“Sanchez Ventura and Gerardo Perez did not do any work for Champion Maintenance Contractors, Inc.”

With his letter, Delisa enclosed the list prepared by Viera of dollar prices totaling \$4,020.00 for specific tasks performed at Delisa's residence, 55 Oak Street and 112-14 Oak Street, and three “55 Oak Street Apartment, LLC” checks to Viera in amounts totaling \$4,020.00. As discussed earlier, at least one (according to Viera, two) of these checks had actually been returned for insufficient funds; Viera stated in a November 13, 2009 letter to the DOL (which Anderson testified it received before Delisa's letter) that after filing his Claim, he was paid a total of \$4,020.00 in October 2009.

The DOL found Delisa's letter insufficient to invalidate the Claims. On January 5, 2010 Anderson wrote to Champion Maintenance, c/o Delisa, acknowledging his letter and stating that the \$4,020.00 reduced Viera's Claim from \$8,580.00 to \$4,560.00. Anderson stated that Delisa had submitted no evidence to substantiate that the Claimants were independent contractors or were not employees:

“You have failed to remit any signed contracts with these claimants, any copies of their dbas or corporate entities, or any proof that they have workers compensation insurance or any liability insurance. You have failed to remit any timecards, payroll journals, cancelled checks or any other collaborating [sic] documentation to support your contentions.”

She requested payment of the remaining total claim (after deducting \$4,020.00) of \$7,932.21, and stated that otherwise an Order including fines and penalties would be issued. Anderson received no response, and on January 12, 2010 recommended issuance of the Orders. For the Wage Order, she recommended a 100% civil penalty based on the employer's failure to keep and furnish required records and to document its contentions.

It is undisputed that in addition to these written exchanges, both Michel and Delisa telephoned and spoke with Anderson during the DOL investigation. Michel testified that he stated that at least three Claimants never even worked for the company during relevant periods; Anderson replied that the burden to prove this was on the company. Anderson testified that Michel stated that the Claimants were independent contractors; she replied that

the DOL needed copies of their contracts, licenses to do business and invoices, and documentation of payments made to them. Delisa testified that he returned a call from the DOL; asked: "How can they prove that they worked for me when they did not work as an employee?," and was told that the employer, not the DOL or workers, had the burden of proof. Anderson testified that Delisa called to request an extension of time to respond because of a computer crash, which she granted.

E. Employer Records

Michel testified that following his conversation with Anderson, he checked the records of all four Champion companies and of 55 Oak LLC. He did not check 112-114 Oak Street records, but believes Viera is the only Claimant who might have been paid by that entity; he knows that none of the Claimants was paid by Delisa's courier, limousine or taxi companies. Michel testified that based on Champion Maintenance records which he checked (but which were not produced at the hearing), neither Viera, Lopez Perez nor Sanchez worked for Champion Maintenance during 2009; Vicente worked briefly for Champion Maintenance at the beginning of the year as an independent contractor, and may still be owed \$400 or \$500.¹³ Based on Michel's review of records, Viera was last an employee of a Champion company, Champion Cleaning, in April 2008,¹⁴ and later worked as an independent contractor for 55 Oak LLC. The records showed no payments to Lopez Perez or Sanchez during 2009.¹⁵

At the hearing, Petitioners introduced in evidence the documents concerning Viera previously submitted to the DOL with Delisa's November 16, 2009 letter, and Michel testified, as previously discussed, that he prepared a ledger sheet of all the checks paid to Viera in 2009 and the total was \$17,400.00, although a 55 Oak LLC IRS Form 1099 for calendar year 2009 erroneously recorded payment to Viera of \$27,400.00 in "Nonemployee compensation" to Viera. Neither the ledger sheet, the underlying checks nor any amended Form 1099 was introduced. Petitioners also introduced the January 10, 2009 receipt in which Vicente acknowledged receipt from Delisa of \$200.00. With these exceptions, Petitioners produced no records of payments to Claimants, payroll or time records, or contracts with Claimants or anyone else.

According to Michel, at the time of Delisa's November 16, 2009 letter, a computer crash had caused some of Petitioners' records to be lost. The DOL extended Petitioners' time to respond, and Michel and Delisa testified that all computerized information of Delisa's companies, except some records of Champion Cleaning, was ultimately retrieved. However, no additional records beyond those included with Delisa's November 16, 2009 letter were ever supplied to the DOL nor introduced at the hearing. Michel testified that he

¹³ As previously stated, Michel testified that Champion Maintenance had no payroll records; its records which he reviewed were of checks paid to what he described as independent contractors. Michel testified that he concluded that Vicente might be owed money since he could not verify that checks written to Vicente cleared the bank, but it was possible Delisa paid Vicente these amounts in cash. He testified that Champion Maintenance did not issue Vicente a 1099 Form for 2009.

¹⁴ The Petition states that Viera "worked as an independent contractor for Petitioner Champion Maintenance Contractors Inc. until March 2008."

¹⁵ As previously stated, Delisa testified that Lopez Perez worked "with us" as an occasional day laborer and was paid cash for all work performed.

did not turn records over to the DOL because Anderson only requested records for Champion Maintenance, which had no payroll records, not for other companies. Delisa testified that he has records of the hours Claimants worked but did not bring them to the hearing because he did not think it was necessary. He testified that he did not bring Champion Maintenance contracts to the hearing because he was not asked to do so, and that there were also receipts for cash payments to the Claimants which he did not bring to the hearing. At another point, Delisa testified that he has no documents pertaining to work done for him by the four Claimants from 2007 to 2009, other than those introduced at the hearing.

F. Other Evidence

Porfirio Sanchez and Eduardo Salazar, elders of Delisa's congregation, testified that Viera approached them stating that Delisa owed money for work performed. The elders discussed this with Delisa, who said he had paid Viera for all work contracted for but would also pay the additional amount which Viera claimed. Viera was not present nor did the elders further communicate with him. In addition, the elders testified, Viera had given them a list of other people supposedly owed money; Delisa denied owing them and stated he would immediately call one on his cell phone. Salazar testified that he could hear and recognize the voice of Lopez Perez, whom he knew; Porfirio Sanchez testified that while he did not recognize the voice, he heard Delisa say "Gerardo, it's coming to my attention that I owe you money," and heard the other speaker "sa[y] clearly, he goes, no, no, no."

Edwin Belzaca testified that he has been a limousine driver for one of Delisa's companies, which he identified as "Champion,"¹⁶ for four years, and shared an apartment with Viera. Viera, who often stated that Delisa owed him money and he needed to do something about it, stated that "we can form a group so we can, like, go against him because of nonpayments," and asked Belzaca "if I wanted to be with him and I told him, no, I can't." Viera also stated that "I don't work for Danny" and "that I work for myself and I have my own company." Delisa asked Belzaca to testify.

Hector Masias testified that he is a tenant of Delisa at 55 Oak Street, where he pays \$300 per month rent; has worked two or three days a week for Delisa for two years earning \$200 or \$250 per week; and is Lopez Perez's cousin. Viera and Lopez Perez invited Masias to participate in a demand they were making against Delisa, which Masias refused to do "because they wanted me to say lies." While Viera never discussed work with Masias, Masias knows that Lopez Perez's Claim is a lie, because "he would say that they did not owe him money." Delisa told Masias to testify, and drove him to the hearing.

Steven Delisa, Delisa's son, testified that Vicente, Lopez Perez and Sanchez worked briefly for him as day laborers, using equipment some of which was borrowed from Daniel Delisa. Specifically, Vicente, Lopez Perez and Sanchez worked for three or four days around August 2008 on a driveway in Port Chester; Sanchez also worked regrouting a walkway in Harrison.¹⁷

¹⁶ Delisa testified that his limousine and taxi companies are Galaxy Limousine Service and Rye Brook Cab and Airport Service.

¹⁷ As previously noted, all four Claims list Esteban (Spanish for Steven) Delisa as a manager for Petitioners. Lopez Perez testified that besides working for Delisa, he also worked for Delisa's son, and Sanchez's Claim stated that he asked both Daniel and Esteban Delisa for unpaid wages.

II. STANDARD OF REVIEW

When a petition is filed, the Board reviews whether an order issued by the Commissioner of Labor is “valid and reasonable” (Labor Law § 101[1]). Any objections not raised in the petition shall be deemed waived (*Id.* § 101[2]). The Labor Law provides that an order of the Commissioner shall be presumed “valid” (*Id.* §103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (*Id.* § 101[3]). Pursuant to the Board Rules (12 NYCRR § 65.30), “The burden of proof of every allegation in a proceeding shall be upon the person asserting it.” Therefore, the petitioners’ burden of proof in this matter is 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).

Labor Law §§ 195[4] and 661 require employers to maintain payroll records and to make them available to the Commissioner. An employer’s failure to keep adequate records does not bar employees from filing or collecting claims for unpaid wages. Rather, where employee claims demonstrate a violation of the Labor Law, DOL must credit the complaint’s assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. *See* Labor Law § 196-a; *Matter of Angello v. Nat. Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]. 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.” *Cf. Anderson v Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 [1949], superseded on other grounds by statute, in which the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

“[W]here the employer’s records are inaccurate or inadequate... [t]he solution... is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer’s failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee’s labors without paying due compensation.”

Citing to *Anderson*, the Appellate Division in *Mid-Hudson Pam Corp.*, *supra*, agreed:

“The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee... Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute.

See also Matter of Frank Marino, Rick Fiaallo and FM Cleaning Inc., PR 10-064 [May 30, 2012].

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to Board Rule 65.39 (12 NYCRR § 65.39). We find that the record evidence amply demonstrates that all the Claimants were employed by Delisa, who was an employer within the meaning of the Labor Law and was responsible for required wage payments to his employees during the relevant period; that Champion Maintenance was also an employer of Claimants Vicente, Lopez Perez and Sanchez; that none of the Claimants was an independent contractor and all were employees. We affirm the Orders except as modified below.

Article 6 of the New York Labor Law defines “employer” as “any person, corporation or association employing any individual in any occupation, trade, business or service,” *see* Labor Law § 190[3]. Labor Law § 2(7), like the federal Fair Labor Standards Act, 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 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 FSupp2d 314, 318 n6 [SDNY 2003]). In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999], the Court articulated this test for determining employer status:

“the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the ‘economic reality’.... [T]he relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”

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

In determining whether an individual is an employee covered by the Labor Law or an independent contractor without statutory protection, “the ultimate concern is whether, as a matter of economic reality the workers depend upon someone else’s business for the opportunity to render service or are in business for themselves.” *Brock v. Superior Care Inc.*, 840 F2d 1054, 1059 [2d Cir 1988]. Factors to be considered in assessing such economic reality include: (1) the degree of control exercised by the employer over the workers, (2) the workers’ 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. No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a “totality of circumstances.” *Id.* at 1058-1059.

A. Viera Was An Employee of Delisa, and Was Not Paid in Full

The Petition alleged that Viera was an independent contractor of 55 Oak LLC, and

was paid in full by 55 Oak LLC. For the following reasons, we find that the Commissioner's findings that Viera was an employee of Delisa and was owed unpaid wages was valid and reasonable.

At the outset, we note that Viera's and Delisa's testimony were in many respects in conflict. Viera testified that Delisa hired him to perform miscellaneous plumbing, electrical, carpentry and maintenance work, including but not limited to installing boilers after cleaning and removing existing piping, at a rate of \$20 per hour. Delisa testified he hired Viera specifically to install six boilers at 55 Oak Street, at a contract price of "\$4,000 per boiler, cash," \$24,000 for the whole contract, based on a written proposal from Viera and with a subsequent, written and signed contract; that Viera does not do carpentry work; and that Delisa therefore hired and paid helpers to perform carpentry work needed for the boiler installation. Viera testified he used industrial-quality tools owned by Delisa and kept at 112 Oak Street in a locker whose keys Viera would ask Delisa for each day; Delisa testified he supplied only inexpensive tools kept at his residence, 55 Oak Street and 112 Oak Street, and that Viera had a key to 55 Oak Street "because I have known him for many years, and I know I can trust him." Viera testified that he often drove Delisa's trucks and transported drywall, lumber and shrubs from Home Depot to Delisa's office, 55 Oak Street or other locations to which Delisa directed him; Delisa testified that Viera drove his own car and that Delisa knew that Viera did not have a driver's license. For reasons discussed below, we credit Viera's rather than Delisa's testimony on these and other points where the two conflicted.¹⁸

First, much of the evidence from Petitioners themselves was internally inconsistent and/or inconsistent with the idea that Viera was, as Delisa claimed, hired specifically for one job, boiler installation at 55 Oak Street to be performed at a per-boiler price. For example, it is clear from Delisa's own testimony, from his November 16, 2009 letter to the DOL, and from the task list Delisa enclosed with that letter and relied on at the hearing, that Viera did not work only on boilers or at 55 Oak Street, but also at Delisa's residence and 112-114 Oak Street performing a wide variety of tasks. Similarly, Delisa testified that he was in Uruguay with his family while Viera performed the boiler installation, but also that Viera "used to tell me where he worked, how many hours. He would come to my office and I would pay him for the time that he provided me."

Petitioners also failed to produce either the written proposal from Viera or the signed contract with Viera both of which Delisa claimed existed. Nor did Petitioners produce proof of any payments to Viera prior to the \$4,020.00 which he received after the end of his employment; the Form 1099 which Petitioners produced was acknowledged to be erroneous, and neither previous checks to Viera nor even the check ledger which Michel testified he prepared to fill out the 1099 and reviewed in connection with his testimony was ever produced. Such documentary proof had been repeatedly requested: the DOL's October 30,

¹⁸ At the hearing, Petitioners argued that Viera (and/or Teresa) sought to foment false claims. The evidence did not support the argument. Porfirio Sanchez and Salazar, elders of Delisa's congregation, essentially testified simply that Viera said Delisa owed money and Delisa denied it. Belzaca and Masias, both of whom depend on Delisa financially and were brought by him to the hearing, basically testified that Viera and Lopez Perez complained about Delisa and invited them to complain as well, but Belzaca and Masias declined. With the possible exception of Masias' vague and unexplained statement that Lopez Perez "would say that they did not owe him money," nothing in this testimony is even counter to the Claims.

2009 letter sought “any payroll record, policy, contract, etc. to substantiate your position;” Anderson’s January 5, 2010 letter stated that “[y]ou have failed to remit any signed contract.... timecards, payroll journals, cancelled checks or any other collaborating [sic] documentation;” and the Notice of Hearing directed the parties “to appear and produce at this hearing all evidence, oral and documentary, relevant and material to the issues raised.”

To the extent that one exists, the payment record is inconsistent with Delisa’s testimony that there was a \$24,000 contract that was adhered to, but consistent with Viera’s that there was an agreement to pay him \$20 per hour but Delisa instead made sporadic lump-sum payments of \$1,000. In particular, there is no evidence at all that Viera was paid the \$24,000 price which Delisa testified was agreed on; as attested by Michel, 55 Oak LLC records for 2009 show that Viera was paid \$17,400, presumably including the \$4,020 Delisa testified he ultimately paid for tasks beyond boiler installation.¹⁹ Viera’s testimony that the agreement was to pay him \$20.00 per hour as an employee is also consistent with Delisa’s testimony about Viera’s history: Delisa stated that when Viera worked for him prior to April 2008 – according to Michel, as a Champion Cleaning employee – Viera did work similar to the boiler installation for which he was supposedly later hired by 55 Oak LLC as an independent contractor, and was paid wages of \$15 or \$15.75 per hour.

Turning to the factors identified in *Brock* and *Herman* as significant to an assessment of economic reality, there is evidence that Delisa exercised control over Viera. Viera testified, for example, that he drove Delisa’s trucks to Home Depot to buy materials listed by Delisa, delivering the materials to locations chosen by Delisa. Delisa himself testified that Viera “used to tell me where he worked, how many hours,” and that he, not Viera, hired Viera’s helpers. According to Viera’s testimony, which we have credited, Delisa supplied the expensive tools with which Viera worked. If, as we have found, Viera was paid \$20.00 per hour for miscellaneous work, not \$4,000.00 per boiler installed as Delisa claimed, it is obvious Viera had no significant opportunity for profit and loss. Even by Delisa’s account, Viera was paid strictly for his labor while Delisa purchased all materials, including the boilers to be installed, and Delisa also hired and paid those who worked for Viera: this is not the opportunity for profit and loss associated with an independent contractor who agrees to organize and perform a complete job for a lump sum. The same point can be made with respect to independent initiative – it was Delisa, not Viera, who organized the work. Delisa did not dispute Viera’s testimony that Delisa, not Viera, obtained all necessary permits including for boiler installation. As to duration of the working relationship, it is undisputed that except for an interval of less than a year when Viera worked for a firm in Bronxville, he worked for Delisa for seven years. And, the work Viera performed was integral to Delisa’s maintenance and repair business, a core business of the Champion group of companies, as well as Delisa’s real estate businesses.

Delisa also had the power to hire and fire employees: both Viera himself, and the helpers who worked with Viera. Delisa supervised and controlled Viera’s schedule; Delisa himself testified that his understanding was that Viera must have performed extra tasks at night or on weekends, belying any notion that Viera was free to set his own schedule or

¹⁹ Again, Petitioners submitted no proof that Viera was actually paid the \$17,400 which Michel testified was reflected in records he examined but did not produce. Viera’s Claim and November 13, 2009 letter indicate he was paid \$15,020 in 2009.

freely take on outside employment. Delisa determined the rate and method of payment; he himself testified, for example, that he unilaterally decided that the dollar prices stated by Viera for specific tasks should be reduced 40%. When payment was late, it was Delisa who took complaints, and then ultimately made up a portion of the payment. Michel's testimony concerning employer records, as discussed above, was inadequate, itself indicated that these records were not always accurate, and was unsupported by production of the documents themselves. Such non-production of documents that had been repeatedly requested and would have been expected to be produced even absent a request is itself significant and is an additional reason not to rely on evidence from Petitioner witnesses such as Delisa and Michel when such was contradicted by other evidence. Petitioners, as discussed earlier, bear the burden of proof under Labor Law § 103 and the Board Rules; they did not meet that burden.

At the hearing, Petitioners also appeared to contend that because the Orders name Champion Maintenance as well as Delisa personally as Viera's employer, and/or because 55 Oak LLC, which is not named in the Orders, paid Viera's wages, Delisa could not be personally liable as an employer. As discussed above, while Viera may have been paid with 55 Oak LLC checks, he was not working solely at 55 Oak Street, the property owned by 55 Oak LLC, but also at Delisa's residence, at 112 Oak Street (owned by Delisa together with his aunt), and at other locations. Indeed the Petition itself alleges that that Delisa was 55 Oak Street LLC's "Member-Manager" and that "as the owner of 55 Oak Street LLC, [he] hired Carlos Viera as an independent contractor *to work on Petitioners' other properties*" (emphasis supplied).

More fundamentally, Article 6 of the Labor Law is broadly written to include not only corporations as defined "employers" under the statute, but also *any person...employing any individual in any occupation, industry, trade, business or service*" (Labor Law § 190[3]) (emphasis added). Under § 2[7]'s broad definition of "employed" and the "economic reality" test already discussed, more than one entity can be found to be an employee's employer. For example, in *Jiao v. Chen*, 2007 U.S. Dist. LEXIS 96480 [SDNY, Mar. 30, 2007], the Court found not only that an individual defendant was personally liable as the employer of an underpaid worker, but also that this personal liability "would not be affected" by a finding that a corporation of which the defendant was president, and which was not named as a defendant in the case, actually owned the hotel where the worker worked "and therefore could also be considered his employer" (*id.* at *36). See also *Herman v. RSR Sec. Servs. Ltd.*, 172 F3d at 139 [applying "economic reality" test to find that individuals are employers under the FLSA]. The Board has repeatedly found individuals to be employers, along with a corporate or business entity, if they possess the requisite authority over employees. See, e.g., *Matter of David Fenske (T/A AMP Tech and Design, Inc.)*, PR 07-031 [Dec. 14, 2011]; *Matter of Robert Lovinger et al.*, PR 08-059 (Mar. 24, 2010); *Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 (Jan. 27, 2010).

For all these reasons, we find that Petitioners did not meet their burden of proving that Delisa was not Viera's employer, that Viera was paid in full, or that the Orders as they relate to Viera were not reasonable and valid, with the following two exceptions. First, it Champion Maintenance should not have been listed as Viera's corporate employer. Anderson testified, essentially, that the DOL simply picked at random one of the three

corporate names listed in Viera's Claim. While the evidence establishes that Viera often drove Champion Maintenance vehicles and performed work for Delisa companies other than 55 Oak LLC, including Champion Maintenance, his paychecks were from 55 Oak LLC. Second, as noted earlier, the Order overstated the amount of underpayment supported by Viera's Claim, by \$1,000.00. We modify the Order accordingly.

B. Vicente Was An Employee of Both Petitioners, and Was Not Paid in Full

The Petition alleged that Vicente "was an independent contractor of Petitioner Champion Maintenance Contractors Inc. for a few odd jobs until April 2009," and "[u]pon information and belief," was paid in full. For the following reasons, we find that the record shows Vicente to have been an employee of both Petitioners, and that the Commissioner's finding that he was owed unpaid wages is valid and reasonable, as modified below.

There was essentially no evidence that Vicente was an independent contractor rather than an employee, despite the Petition's contention. For example, there is no evidence Vicente was hired to perform a specific distinct service using methods and at times set by his own judgment; on the contrary, he testified without contradiction that he performed various unskilled or semi-skilled jobs including cleaning, helping with construction, clearing snow, driving a Bobcat and cleaning carpets and drains. Vicente was paid an hourly wage, which he testified varied from \$12 to \$15 per hour depending on the specific task he was performing. He had little construction experience, and used Delisa's tools. Michel testified he did not know if Vicente had a contract, and Delisa did not claim that he did.

The bald assertion that an individual is an independent contractor, without more, is not proof of such status. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059-61 [2d Cir. 1988] (quoting *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 755 [9th Cir 1979]) ("an employer's self-serving label of workers as independent contractors is not controlling.") Nor can Michel's or Delisa's testimony that Champion Maintenance regarded or characterized all its workers as independent contractors, indeed that that was Champion Maintenance's main purpose during the relevant period, be accepted as controlling. The "economic reality" test discussed above, not the label selected by an employer, determines employee or independent contractor status. As the Board stated in *Matter of Piotr Golabek and Amica Corp.*, PR 09-127 [Dec. 14, 2011], "employee status is not negated by leaving workers off... tax returns or an employee list. On the contrary, if employees are misclassified as independent contractors, legal ramifications result."

It is undisputed that Champion Maintenance was the corporate entity for which Vicente worked and hence, since he was not an independent contractor, was his employer. The evidence is sufficient to hold Delisa liable as his employer also. Delisa is the sole owner of Champion Maintenance, as well as the other companies for which the Claimants worked. Vicente testified that he worked for Delisa, using Delisa's tools; that when it was time to make accounts, Delisa asked Vicente to write down his hours worked; that Delisa paid him; and that Delisa even occasionally picked him up and drove him to work. Petitioners called attention to a January 10, 2009 receipt in which Vicente acknowledged receipt from Delisa of \$200.00. Delisa, in his own testimony, confirmed that in June 2009 when Vicente "was ill, or could hardly walk, I remember going to his house" and handing him \$300.00 in cash which Delisa testified should be deducted from Vicente's arrears of

wages. Under the standards discussed above, Delisa was, in “economic reality,” Vicente’s employer along with Champion Maintenance.

It was also valid and reasonable, under the standards discussed above, to reject the Petition’s contention “[u]pon information and belief” that Vicente was paid in full. Delisa himself testified that Vicente was *not* paid in full, and was owed as much as \$1,000.00. Vicente testified that the Claim which he signed, prepared by Teresa based on a detailed conversation, was based, among other things, on notes which he had kept and showed to Teresa of the hours he spent cleaning the shopping center on specific days from April 13 to 27, 2009; total hours he spent on snow work, regular cleaning work and driving a Bobcat; and hours he spent cleaning carpets and drains at the shopping center on specific days. The notes also record a trip to a hospital emergency room on June 11, 2009. These notes indicate that Vicente was owed at least \$1170.00 for shoveling snow and \$588.00 for work as a helper. Some of these notes were introduced as hearing exhibits; Vicente testified that he formerly had additional papers as well, but lost them when he moved.

Although the Petitioners claimed that they have other records of cash payments to the Claimants, Vicente’s January 10, 2009 receipt for the \$200.00 payment from Delisa was the only record of payment to Delisa which they produced. In addition, Delisa admitted during the hearing that he still owes Vicente varying amounts of wages up to \$1,000.00. Under the standards discussed above, which base employer status on economic reality and in the absence of required employer records accept employees’ credible allegations of the extent of underpayment, we find that the Petitioners failed to meet their burden of proof with respect to the Wage Order as it relates to Vicente. However, we credit the Petitioners with the \$300.00 cash payment that Delisa made to Vicente during Vicente’s illness and the \$200.00 payment on January 10, 2009, and we modify the Wage Order accordingly.

C. Lopez Perez Was An Employee of Both Petitioners in 2009

The Petition alleges that Lopez Perez was never an employee of either Petitioner. As explained below, the evidence does not so establish. For the following reasons, we find that the record shows Lopez Perez to have been an employee of both Petitioners, and that the Commissioner’s finding that he was owed unpaid wages not invalid or unreasonable.

Lopez Perez testified that he worked for Champion Maintenance periodically, cleaning snow, cleaning buildings and removing trash, over a period of many years including six months of work at Delisa’s home. Lopez Perez used Delisa’s tools, including picks, shovels and leaf blowers. Delisa called Lopez Perez on a walkie-talkie; Lopez Perez was picked up by another worker in a car provided by Delisa and driven to work. Lopez Perez would write his hours down and hand them to Delisa’s secretary; either Delisa or the secretary paid Lopez Perez \$15.00 per hour in cash. For his part, Delisa testified that Lopez Perez “worked with us on and off on different projects,” as a day laborer. Under the standards discussed above, which base employer status on economic reality and, in the absence of required employer records, accept employees’ credible allegations of the extent of underpayment, we find that the Petitioners failed to meet their burden of proof with respect to the Wage Order as it relates to Lopez-Perez.

D. Sanchez Was an Employee of Both Petitioners in 2009

The Petition alleges that Sanchez was not an employee of Champion Maintenance in 2009 and did not work for Petitioners during the period from May 9, 2009 to May 21, 2009.²⁰ The principal support for the allegation introduced by Petitioners was testimony from Michel and Delisa that Sanchez repudiated his Claim, stating that a woman lawyer – presumably, Teresa – “sort of forced him into signing” his Claim; Michel then typed a statement which Sanchez swore to and signed, stating that he “did not work for Champion Maintenance or Daniel Delisa in anyway during 2009.... Carlos’s lawyer forced me to sign a statement that saying that I was owed money even though it was not true and I regret doing it.” As explained below, in the circumstances of this case we find that this evidence is insufficient to discredit Sanchez’s Claim, and that the Commissioner’s finding that he was owed unpaid wages remains valid and reasonable.

How, or why, Teresa could have “forced” or “sort of forced” Sanchez to sign a Claim is unexplained. Nor did evidence establish that Sanchez understood the document Michel prepared; as discussed earlier, we have found testimony from Delisa and Michel concerning other issues to be unreliable. While it is difficult to see how Teresa could have “forced” Sanchez to sign a Claim form at a meeting at which, according to the three other Claimants who attended, it is easy to see that Sanchez’s circumstances gave him an interest in satisfying Delisa, especially since his Claim was, in any event, relatively small. Both Delisa and Michel testified that Sanchez has worked for Delisa every year except the one in question, 2009, and continues to rely on him for work. Delisa testified that “He even called me a couple of weeks ago from Panama, he wants to have me help him come into the country.” Had Sanchez indeed been trying to “say[] that I was owed money even though it was not true,” as stated in the affidavit prepared by Michel, it is unlikely he would have claimed to have worked for just two weeks, at a specific location different from those referred to by the other Claimants. Under all the circumstances, we give little weight to the affidavit and to Delisa’s and Michel’s hearsay testimony on this issue, and find that under the standards discussed above, which base employer status on economic reality and in the absence of required employer records, accept employees’ credible allegations of the extent of underpayment, we find that the Petitioners failed to meet their burden of proof with respect to the Wage Order as it relates to Vicente. Petitioners failed to meet their burden of establishing that invalidity or unreasonableness of the Wage Order with respect to Sanchez.

E. Failures to Distinguish Among Delisa’s Companies and to Supply Records Undercut the Petition As a Whole

With respect to all the Claimants and all the issues discussed above, failures to distinguish among Delisa’s companies and to supply records further undercut the Petition as a whole. For example, Petitioners argued that while the Orders are directed at Champion Maintenance, that company had no payroll or employees; they argued that Viera worked for 55 Oak LLC, and some other Claimants for Champion Cleaning or Champion Painting. Yet

²⁰ Michel testified that Sanchez’s last work was for Champion Maintenance; Delisa testified that Sanchez was an employee of Champion Cleaning and independent contractor of Champion Maintenance.

it is undisputed that Viera worked not only at 55 Oak Street, owned by 55 Oak LLC, but also at other locations including Delisa's residence. Michel testified that Sanchez's last work was for Champion Maintenance; Delisa testified that Sanchez was an employee of Champion Cleaning and independent contractor of Champion Maintenance.

Indeed, Petitioners often appeared confused about just which of Delisa's companies Claimants were working for. While the Petition states that Viera "worked as an independent contractor for Petitioner Champion Maintenance Contractors Inc. until March 2008," Michel testified that based on his review of records, Viera was last an employee of Champion Cleaning, in April 2008. While Michel implied that at least Delisa's limousine and taxi companies, identified by Delisa as Galaxy Limousine Service and Rye Brook Cab and Airport Service, were separate and distinct, Belzaca testified that he is a limousine driver for "Champion." Viera was paid by 55 Oak LLC, but worked not only at 55 Oak Street but also at Delisa's residence and at 112-114 Oak Street, in addition to delivering materials ranging from drywall to shrubs in Champion Maintenance trucks from Home Depot to Delisa's Rye Brook Plaza office or other locations. Petitioners acknowledge that Vicente worked for Champion Maintenance and their most specific statement concerning Lopez Perez was Delisa's testimony that Lopez Perez worked "with us," not for 55 Oak LLC or at 55 Oak Street. Yet it is clear from testimony that both worked side by side with Viera, who Petitioners assert was 55 Oak LLC's independent contractor.

What is clear from the record is that Delisa, personally, owned and ran all the companies, including their labor relations, with little or no distinction drawn among them. Thus Viera testified that while paid by 55 Oak LLC, he drove Delisa's trucks, presumably owned by Champion Maintenance, to buy materials ordered by Delisa, including drywall, lumber and shrubs. Delisa testified that Champion Maintenance was created for insurance purposes, "in case of a lawsuit, an accident, something happen[s] to the truck," and Michel and Delisa testified that Champion Maintenance owns the vehicles and equipment used by other companies. There was no claim, much less evidence, that the other firms pay Champion Maintenance for use of its vehicles and equipment; the record indicates that keys are simply given to people from other Champion companies as needed.

Petitioners' failure to provide the DOL with records during its investigation or to introduce records at the hearing – including records Petitioners insist exist, and which could, if that were true, support their claims – is also striking. While Petitioners claimed that Champion Maintenance has no payroll records, Michel testified that records of its non-payroll payments formed the basis for his review of what Vicente was owed; no records of such payments were supplied to the DOL or introduced at the hearing. Nor did Petitioners produce or introduce records of other Champion companies or 55 Oak LLC, which could have substantiated claims about what Viera was paid, and about when, for how long and for whom the other Claimants worked and what they were paid.

While the Petition states that non-existent records could not be produced and that Petitioners were hampered in producing records by a computer crash, the testimony was that all records except some Champion Cleaning records were recovered; Petitioners referred to and purported to rely on existing records which they did not produce. Petitioners implied this was because the DOL failed to request records other than payroll records of Champion Maintenance. Not only would it have been natural, if such records existed, for Petitioners to

produce and introduce evidence favoring them even without an express demand, in fact the DOL's initial October 30, 2009 letter sought "a copy of any payroll records policy, contract, etc. to substantiate your position," and Anderson's January 5, 2010 letter referred to "timecards, payroll journals, cancelled checks or any other collaborating [sic] documentation." And, the Notice of Hearing stated in bold face letters that this was Petitioners' opportunity to prove their case and all evidence that they wished the Board to consider must be presented at the hearing, and directed the parties to "produce at this hearing all evidence, oral and documentary, relevant and material to the issues raised." Delisa testified he had a written proposal from and a signed written contract with Viera, but provided neither. He testified that everyone who gets a Champion Maintenance check is sent an IRS Form 1099 and signs a statement that he is an independent contractor; while such statements would not, in any event, determine employee status for reasons discussed above, we note that no such statements were actually produced. Other records which Michel and Delisa testified existed, but did not produce, included payment and payroll records of 55 Oak LLC and the check ledger which Michel stated he prepared with respect to Viera, records of hours the Claimants worked (which Delisa testified he did not bring because he did not think it necessary), Champion Maintenance contracts (which Delisa testified he did not bring because he was not asked to do so²¹), and receipts for cash payments to the Claimants. Petitioners introduced just one such receipt, a January 10, 2009 receipt in which Vicente acknowledged payment of \$200.00 by Delisa.

In such circumstances, it is not unreasonable or invalid to apply the presumptions codified in Labor Law § 196-a and enunciated in *Mid-Hudson Pam Corp., Mt. Clemens Pottery* and other decisions discussed above, and to rely on the "best available evidence," including the Claims which Claimants affirmed to be true, to estimate the amount of underpayment to them. Petitioners argued that the Claims were trumped up by Viera or Teresa, but on their face the Claims were detailed, specific and carefully prepared; no evidence suggests anything improper in Teresa's helping the Claimants by asking detailed questions and assisting them to fill out the forms.²²

F. The Penalties and Interest Imposed Was Valid and Reasonable

The last issue raised by the Petition is a contention that the penalties and interest imposed in the Orders were unreasonable. The Wage Order assessed a civil penalty in the amount of 100% of the wages found due. The Board finds that the considerations that the Commissioner acted reasonably and validly in light of the considerations which she was

²¹ As already stated, the DOL's initial October 30, 2009 letter sought "any... contract, etc. to substantiate your position;" Anderson's January 5, 2010 letter specifically noted that Petitioners "failed to remit any signed contracts with these claimants."

²² The Claims and the Wage Order to which they gave rise, far from outlandish, are actually rather modest, besides being specific, detailed and seemingly carefully prepared. Sanchez's Claim involves two weeks' work; that of Lopez Perez, four weeks' work over a five-month period. Viera stated that rather than paying him full wages, Delisa periodically paid \$1,000.00, repeatedly saying that the next week, he would pay all money owed. The Wage Order, as noted above, is for substantially less than the amount implied by Vicente's Claim.

required by Labor Law §§ 218 and 219 to take into account. The Penalty Order assessed a civil penalty for record-keeping violations in the amount of \$500.00. Having found that the Claimants were employees, we necessarily reject Petitioners' contention that they were not required to maintain and produce payroll records pursuant to Labor Law § 661. Since they violated that statute, the Penalty Order was valid and reasonable.

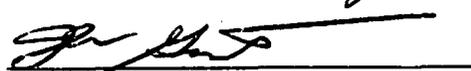
Labor Law § 219 [1] provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the Banking Law." Banking Law 14-A sets the "maximum rate of interest" at "sixteen percentum per annum from the date of the underpayment to the date of payment." The Board finds that the considerations required to be made by the Commissioner in connection with the interest set forth in the Order are valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

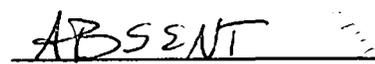
1. The Wage Order is affirmed as modified by reducing the amount found due to Viera by \$1,000.00 from \$4,560.00 to \$3,560.00 and by reducing the amount due to Vicente by \$500.00 from \$1705.50 to \$1205.50 and by reducing the interest and civil penalty on such amounts proportionally, and by deleting the identification of Champion Maintenance as Viera's corporate employer. The Wage Order is affirmed in all other respects; and
2. The Penalty Order is affirmed;
3. Except to the extent stated above, the Petition is denied.


Anne P. Stevason, Chairperson


J. Christopher Meagher, Member


Jean Grumet, Member

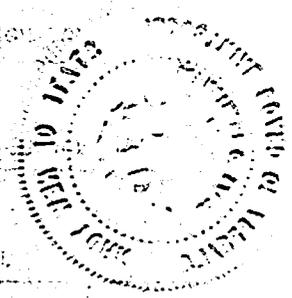
LaMarr J. Jackson, Member


Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 10, 2012.

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Labor Law § 219 [1] provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the Banking Law." Banking Law 14-A sets the "maximum rate of interest" at "sixteen percentum per annum from the date of the underpayment to the date of payment." The Board finds that the considerations required to be made by the Commissioner in connection with the interest set forth in the Order are valid and reasonable in all respects.

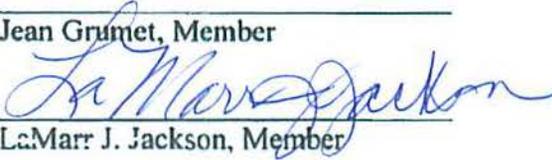
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is affirmed as modified by reducing the amount found due to Viera by \$1,000.00 from \$4,560.00 to \$3,560.00 and by reducing the amount due to Vicente by \$500.00 from \$1705.50 to \$1205.50 and by reducing the interest and civil penalty on such amounts proportionally, and by deleting the identification of Champion Maintenance as Viera's corporate employer. The Wage Order is affirmed in all other respects; and
2. The Penalty Order is affirmed;
3. Except to the extent stated above, the Petition is denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member



LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
September 10, 2012.