STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: BRITE LIMOUSINE INTERNATIONAL, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and an Order under Article 19 of the Labor Law, both issued December 7, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 11-070 RESOLUTION OF DECISION

APPEARANCES

Farhat N. Qureshi, *pro se* for Brite Limousine International Inc.

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

WITNESSES

Hasan Bacovic and Farhat Qureshi, for the petitioner.

Maria Elizabeth Cueva, Labor Standards Investigator, for the respondent.

WHEREAS:

This proceeding was commenced when the petitioners filed a petition with the Industrial Board of Appeals (Board) on March 4, 2011. The petition was served on the respondent Commissioner of Labor (Commissioner) on March 17, 2011. In response, the Commissioner filed a motion to dismiss the petition, pursuant to Board Rules of Procedure and Practice (Rules) 65.13 (d) (1) (iii) (12 NYCRR 65.13 [d] [1] [iii]) based on the fact that the petition was filed more than 60 days after the Orders were issued. After briefing, by Interim Decision, dated March 29, 2012, the Board granted the motion to dismiss the petition with respect to Farhat Qureshi and denied the motion with respect to Brite Limousine International, Inc. (Brite) and instructed respondent to file an answer to the petition of Brite.

The order to comply with Article 6 (wage order) under review was issued by the respondent Commissioner of Labor (Commissioner) on December 7, 2009 and directs payment to the Commissioner for wages due and owing to Mirza Khan in the amount of $3,580.50 for the time period from September 5, 2005 to November 6, 2005, with interest continuing thereon at the rate of 16% calculated to the date of the wage order, in the amount of $2,341.75, and assesses a 75% civil penalty in the amount of $2,685.37, for a total amount due of $8,607.62.

The order under Article 19 of the Labor Law (penalty order) imposes a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee from on or about May 4, 2006 through May 12, 2007.

The petition alleges that the orders are not reasonable and valid because the claimant Mirza Khan is an independent contractor and not an employee.

Upon notice to the parties, on May 21, 2013, a hearing was held in this matter in New York, New York, before Anne P. Stevason, Chairperson of the Board, and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and make statements relevant to the issues.

SUMMARY OF EVIDENCE

Petitioner's Case

Brite provides limousine services to customers in and around New York City. Its drivers are treated as independent contractors and are paid per trip and given a 1099 form for tax purposes at the end of the year. The most common assignment is to pick up or drop off a passenger at either JFK or LaGuardia Airport. The rate for pick up or drop off at JFK was fixed at $26.00, and $20.00 for La Guardia. The rates were set by Brite. Otherwise, the drivers received a set rate which was based on approximately $13.00 per hour for other fares, being a percentage of the hourly fee charged to the customers (calculated at either 43% of $30/hour or 37% of $35/hour).

Brite owned the cars used by the drivers, and paid for insurance and repairs. However, if there was an accident, the driver would be responsible for the first $1,000 in repairs. The drivers were responsible for paying for gas and phones.

Drivers did not have a set schedule and could refuse any assignment. However, drivers who were usually available were the first to be called for assignments. Drivers are free to work for other limousine companies and could rent Brite's limousines for $300 per week if they wanted to use it for purposes other than working for Brite. It is unclear whether claimant Mirza Khan ever worked for another service or rented one of Brite's limousines. In order to be paid, the drivers would submit invoices to Brite and Brite would pay the drivers usually within 45 days of submission, but sometimes later. Invoices were also used to bill clients, who were usually billed by the hour.

Claimant drove for Brite in September and October 2005 but stopped driving for Brite after a car accident occurred on October 29, 2005. At the time that claimant stopped working for Brite he had not been paid for September or October, except that he had been given an advance on August 25, 2005. However, since that time, claimant was given a $2,000 check, a judgment was issued against him by Brite for $1,794.44, and $510.00 in parking tickets were paid by Brite. Drivers are responsible for their parking tickets. Claimant never submitted an invoice for October and Qureshi admitted to not paying claimant for his October trips.

Petitioner submitted its own records of the trips that claimant completed during September 2005 but did not produce the records for October 2005 and admitted that claimant's record of the trips completed in October was mostly correct.

Respondent's Case

Mirza Khan filed a claim with DOL against Farhat Qureshi and Brite Limousine on November 15, 2005. The claim was for wages due for the period of September 1, 2005 through November 6, 2005. Claimant alleged that he made $13 per hour and was due $5,580.50 in unpaid wages. The claim provided that Brite refused to pay the wages because of an accident which occurred on October 29, 2005 which resulted in expenses that Brite had to incur for towing, repairs and loss of time. The claim also indicated that claimant had been working for Brite since September 2003. Included with the claim was a list of trips completed by claimant, along with the amount owed for each trip, as well as a breakdown of the number of hours worked during the period in question.

The initial claim of $5,580.50 was reduced by $2,000 when claimant informed DOL that he was paid that amount by petitioner. The claim and attached documentation was sent to the petitioner with a request for records and/or payment a number of times but no records or payment was received. The amount of wages found due in the Wage Order was, therefore, calculated based on the claimant's statements and claim, along with the documentary proof provided.

ANALYSIS

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

A. Burden of Proof

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

B. Claimant is an Employee and not an Independent Contractor.

Petitioner did not meet its burden to prove that the determination that the claimant was an employee under Labor Law article 6 was invalid or unreasonable (*see* Labor Law § 101; Board Rules 65.30, 12 NYCRR 65.30). The protections of Article 6 extend only to employees and "[a]lthough the definition of employee is broad, independent contractors are not included

[citations omitted]." *Bhanti v Brookhaven Mem. Hosp. Med. Center,* 260 AD 2d 334, 335 (2d Dept 1999). Labor Law § 190.2 defines an employee as "any person employed for hire by an employer in any employment."

The determination of whether an individual is an independent contractor or an employee is a fact-based inquiry with the burden on the employer to prove that the individual who is performing service is exempt from the protections of New York and federal labor laws. In addition to the right to control, courts have considered other factors. Under the Fair Labor Standards Act and the New York Minimum Wage Act, courts employ an "economic reality" test. *See e.g. Ansoumana v Gristede's Operating Corp.*, 255 FSupp 2d 184 (SDNY 2003), *Brock v Superior Care, Inc.*, 840 F2d 1054 (2nd Cir 1988). The economic reality test relies on five factors:

> "(1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss and their investment in the business; (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 factor is dispositive; the 'ultimate concern' is 'whether, as matter of economic reality, the workers depend upon someone else's business to render service or are in business for themselves.' *Brock,* 840 F.2d at 1059."

Ansoumana, 255 FSupp 2d at 190.

The petitioner argues that the claimant was an independent contractor because he was not paid by the hour; could accept or reject an assignment; was not on any schedule; and other than automobile insurance, claimant paid his own expenses. In addition, claimant could work for other companies and could lease petitioner's car for that purpose.

However, the evidence also shows that the petitioner owned the car driven by the claimant. Claimant drove jobs assigned to him by petitioner and worked for petitioner since 2003. Claimant's only investment was his time and service; he had no opportunity for profit and loss. Also, there was no evidence that claimant was in business for himself.

Finally, petitioner was in business to provide limousine transportation, and the claimant who drove the limousines was an integral part of that business. Therefore, we find that claimant is an employee.

C. Brite may not make deductions from the wages due to Claimant.

Article 6, Labor Law § 193 (1) prohibits employers from making any deduction from the wages of an employee, except deductions that are made in accordance with the provisions of any law, rule or regulation or are authorized in writing by the employee and are for the benefit of the employee, and are limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.

There is no provision for deductions for parking tickets, judgments, or car repairs. Therefore, petitioner may not deduct these items from the wages due to claimant.

D. Wages are Due to the Claimant.

An Employer's Obligation to Maintain Records

Labor Law § 195 as well as 12 NYCRR, § 142-2.6 require employers to keep employment records:

> "(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee:
> (1) name and address;
> (2) social security number;
> (3) the wage rate;
> (4) the number of hours worked daily and weekly, ...;
> (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
> (6) the amount of gross wages;
> (7) deductions from gross wages;
> (8) allowances, if any, claimed as part of the minimum wage;
> (9) net wages paid; and
> (10) student classification.
> " . . .
> "(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

Section 142-2.7 of Title 12 further provides:

> "Every employer . . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid, and to provide its employees with a wage statement every time an employees is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides, in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to

> filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

In the absence of employer's payroll records, DOL may issue an order to comply based only on employee complaints. In the case of *Angello v. National Finance Corp.*, 1 A.D.3d 850, 768 N.Y.S.2d 66 (3d Dept. 2003), DOL issued an order to an employer to pay wages to a number of employees. The order was based on the employees' sworn claims filed with DOL. The employer had failed to keep required employment records. The employer filed a petition with the Board claiming that the claims and therefore, the order, were overstated. In its decision on the petition, the Board reduced some of the claims. The court, on appeal, held that the Board erred in reducing the wages since the employer failed to submit proof contradicting the claims. Given the burden of proof in Labor Law § 196-a and the burden of proof which falls on the Petitioner in a Board proceeding, 12 NYCRR 65.30, "the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees" (*Id.* at 854).

In this case, the order was based on the claim filed. There was no employer record of hours worked. Although it appeared that claimant was paid on a trip basis, there also appeared to be an hourly component to his work which was based on approximately $13.00 per hour. The claim is for $5,850.50[1] based on the hours worked, which correspond to the invoices submitted by claimant. There appears to be one invoice missing for the time period of October 16, 2005 to October 28, 2005. Given the lack of employer records, it was reasonable for DOL to rely on the estimate of wages due calculated by claimant on his claim form per Labor Law § 196-a.

Civil Penalty

The Wage Order assessed a civil penalty in the amount of 75% of the wages. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of a 75% civil penalty were proper and reasonable in all respects.

Interest

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

E. Penalty Order

The penalty order found that the petitioners violated Labor Law § 661 and 12 NYCRR 142-2.6 by failing to furnish true and accurate payroll records for each employee for the period from March 4, 2006 through May 12, 2007, and imposed a $1,000.00 civil penalty for such

[1] As stated above, this amount was reduced by $2,000 to $3,850.50 when claimant was paid that amount by petitioner after the claim was filed.

violation. Since petitioners failed to keep and/or furnish the required records, this penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply with Article 6 (wages) is affirmed; and

2. The order under Article 19 (penalty order) is affirmed; and

3. The petition for review be, and the same hereby 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
October 2, 2013.