STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: JEFFREY W. ASH (T/A NORTHEAST HOME THEATER), Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law and An Order under Article 19of the Labor Law, both dated July 23, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-207 RESOLUTION OF DECISION

APPEARANCES

Jeffrey W. Ash, *pro se* Petitioner.

Maria L Colavito, Counsel, NYS Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WITNESSES

Jeffrey W. Ash for Petitioner.

Senior Labor Standards Investigator Lori Roberts; and Tina Napolitano for Respondent.

WHEREAS:

On July 30, 2009, Petitioner Jeffrey W. Ash filed a petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Rules) (12 NYCRR Part 66), seeking review of two Orders that the Commissioner of Labor (Commissioner or Respondent) issued against him on July 23, 2009. The first order is an Order to Comply with Article 6 of the Labor Law (Wage Order) which finds that Petitioner failed to pay wages earned to claimant Tina Napolitano (Claimant) from February 1, 2008 through February 7, 2008, and demands payment of

$207.35 in wages due and owing, interest at the rate of 16% calculated to the date of the Order in the amount of $48.35, and a civil penalty in the amount of $207.35 for a total amount of $463.06. The Commissioner also issued an Order under Article 19 of the Labor Law (Penalty Order) finding that Petitioner failed to keep and/or furnish accurate payroll records for the period February 1, 2008 through February 7, 2008, in violation of § 661 of the Labor Law as supplemented by 12 NYCRR 142 2.6, and demands payment in the amount of $500.00.

The petition challenges the Orders on the grounds that Petitioner was not Claimant's employer, and that the business that employed Claimant, Northeast Home Theater, was owned and operated by Petitioner's former wife, Mary Ash.

The Commissioner's answer alleges that Claimant identified Petitioner as the person who operated and managed Northeast Home Theater and denies the petition's allegations.

SUMMARY OF THE EVIDENCE

Northeast Home Theater is a company that sold music and satellite equipment and was located in a building behind Petitioner's and Mary Ash's residence. According to Petitioner, Mary Ash was the sole owner and operator of Northeast Home Theater. Petitioner owned a different company, Northeast Satellite Sales, which operated out of the same location as Northeast Home Theater but was not active during the claim period. He also testified that he was not involved in Northeast Home Theater; and, that he was not claimant's employer. His only active business at the time was Ashville Game Farm. Petitioner produced various documents, which he claimed demonstrated that Mary Ash owned and operated Northeast Home Theater.1

Claimant testified that she became aware, through a local newspaper, of a clerical opening at Northeast Home Theater, which she believed to be identical to Northeast Satellite Sales. She made a phone inquiry about the job, and went to the building behind the Ash residence where the theater and sales companies were located. When she arrived she met Petitioner, who described the position she was seeking. She also met Louise Fairbanks, who would be responsible for her training. Petitioner testified that Fairbanks did work for both

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[1] These documents include the following: Certificate of Discontinuance of Business for Northeast Home Theater dated September 16, 2008, signed by Mary Ash, that states "I no longer operate this business and I do not want my husband to operate it;" "Business Certificate" dated July 6, 1995, listing Mary Ash as "conducting or transacting business" under Northeast Home Theater; an undated "Resale Certificate" listing Northeast Home Theater as "seller" that is signed by Mary Ash as "owner, partner, or officer of corporation authorizing the purchase;" Department of Tax and Finance document dated January 6, 2006, listing "Mary Ash, Northeast Home Theater" as being authorized to collect sales and use taxes under New York State Tax Law; Banknorth bank statement dated April 4, 2009, listing "Mary L. Ash DBA Northeast Home Theatre;" "Certificate of Liability Insurance" dated March 3, 2003, listing "Northeast Home Theater, Mary L. Ash" as the insured; and, an undated "Application for Registration as a Sales Tax Vendor" listing Mary Ash as "Owner," and "Trade name" as "Northeast Home Theater" for a business that began June 26, 1995.

Northeast Home Theater and Ashville Game Farm but that she was only paid by Northeast Home Theater.

According to Claimant, Petitioner spent approximately 45 minutes showing her a game farm that he owned and operated, and afterwards took her back to the office where he told her that she was hired. She began work immediately, and worked for four or five hours with Fairbanks. Claimant maintained that Petitioner told her to return the next day.

Claimant testified that during her second day she continued to work with Fairbanks until Petitioner told her to clean the office. Claimant also testified that she had no contact with Mary Ash until her third work day when they were introduced in Mary Ash's home but that Mary Ash never supervised or instructed her.

On her fourth work day, Mary Ash told Claimant that she was needed to work nights and Saturdays, which caused Claimant to tell Petitioner that she did not want the job. According to Claimant, Petitioner then told her that if she wasn't going to take the job she would not be paid for the time she had worked. According to Claimant, when she complained, Petitioner told her that he would talk to Mary Ash, and that they would decide if they were going to pay her. Claimant also testified that her husband contacted Petitioner who offered to pay Claimant $100 for her work, which Claimant refused.

Petitioner denied having any conversation with Claimant, or her husband, about her pay. He also did not remember if "there [was] a time when [Claimant] was discharged or quit," and testified that while he knew Claimant worked with Fairbanks, he did not know for how long. He stated that he recalled meeting Claimant when she first came to the Northeast Home Theater's office, and knew that she was going to be a secretary, but was "not really sure exactly – about the details on it . . . ."

Department of Labor Senior Labor Standards Investigator Lori Roberts testified that on May 15, 2009, she spoke to Petitioner regarding the claim and that he stated that he owned Northeast Satellite, but that his former wife, Mary Ash, owned and operated Northeast Home Theater. As a result of that conversation, by letter dated May 15, 2009, Roberts informed Mary Ash of Claimant's claim. Mary Ash responded by letter dated June 1, 2009, stating that she "discontinued doing business as Northeast Home Theater several years ago," and that her Petitioner husband, had "been using the name without [her] authority." She also stated that she knew "nothing of this employee [Claimant]."

By letter dated June 5, 2009, Roberts informed Petitioner that he had been named as the "responsible person and hiring and firing authority" and that to resolve the claim he had to remit payment in the amount of $207.35. Petitioner did not respond to the June 5th letter. Roberts maintained that she concluded that Petitioner was Claimant's employer because he was named on the Claimant's claim form and that an "Accurint" search indicated that Petitioner was Claimant's employer.

Roberts described Accurint as a search tool that labor standard investigators use to "track down information regarding businesses and people." One Accurint document

identified Ashville Game Farm, Northeast Auto, and Northeast Satellite Sales as "Associated businesses" of "NORTH EAST HOME THEATER," and that all shared the same address. Petitioner and Mary Ash are listed under "Business Contacts," and under "Contact Title" as "Owner [s]." Roberts testified that another Accurint search was done under Petitioner's name and that search indicated that Petitioner was the owner of Northeast Home Theater, as well as Ashville Game Farm and Northeast Auto.

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that "any person...may petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter" (Labor Law 101 §[1]). It also provides that a Commissioner's order shall be presumed "valid" (*Id.* §103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an Order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Rules § 65.30 at 12 NYCRR § 65.30). ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angelo v Natl. Fin. Corp.,* 1 AD 3d 850, 854 [3d Dept 2003]).

It is therefore Petitioner burden to prove, by a preponderance of the evidence, that the Petitioner was not Claimant's employer.

Definition of "Employer" under Article 6 of the Labor Law

"Employer" is defined in Article 6 of the Labor Law as including "any person, corporation, limited liability company or association employing any individual in any occupation, industry, trade, business or service" (Labor law § 190 [3]). "Employed includes permitted or suffered to work" (Labor Law § 2 [7]). Under Labor Law § 2 (6) the term "employer' is not limited to the owners or proprietors of a business, but also includes agents, managers, supervisors, and other subordinates.

Like New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 U.S.C. § 203 [g]). It is well settled that "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same as the test . . . for analyzing employer status under the Fair Labor Standards Act (*Shim v Millenium Group*, 2010 US DIST LEXIS 6407 [EDNY 2010]; *Chu Chung v The Silver Palace Rest., Inc.,* 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

Under the expansive definition of "employ" an employer may have more than one employer. *Zheng v Liberty Apparel Co., Inc.,* 355 F3d 61 (2d Cir 2003); *Moon v Kwon,* 248

F Supp 210, 237 (SDNY 2002); *Rutherford Food Corp. v McComb,* 331 US 722 (1947). For example, in *Jiao v Chen,* 2007 US Dist LEXIS 96480 (SDNY, March 30, 2007), the Court found that an individual was personally liable as an employer of an underpaid worker and that such liability "would not be affected" by a finding that the business that the individual owned, but not named as a defendant in the case, could also be considered as the employer. The Court explained that "it is possible for multiple entities to function as 'joint employers' for the purposes of the statute" (*id* at 32; *cf. Zheng,* 355 F3d 61 [an employee may have more than one employer]. *See also, In the Matter of the Petition of Robert Lovinger and Miriam Lovinger,* PR 08-059, [March 4, 2010] (two individuals liable for unpaid wages regardless of whether a corporation could also have been held liable.)

In *Herman v RSR Sec. Servs. Ltd.,* 172 F3d 132, 139 [2d Cir 1999], the Second Circuit Court of Appeals articulated the test for determining employer status:

> "Because the stature defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the "economic reality" test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted)."

When applying the test "[n]o one of the four factors standing alone is dispositive. Instead, the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive" (*Id.* [internal citations omitted]).

FINDINGS

Petitioner is an "Employer" Under the Labor law

We find that Petitioner was an "employer" under the "economic reality" test and affirm the Orders below.

Petitioner argued that he was not Claimant's employer as his former wife, Mary Ash, owned and operated Northeast Home Theater during the claim period. In support of his position, Petitioner relied on various state and bank documents which allegedly showed that Mary Ash owned Northeast Home Theater. However, the issue of whether Mary Ash owned this company is not dispositive of whether Petitioner was Claimant's employer. If Petitioner fit the standards outlined above, he is defined as an employer regardless of who owned and operated Northeast Home Theater.

Petitioner's direct testimony regarding Claimant's employment was limited to his statement that "Tina [Claimant] was under the instructions . . . through Louise Fairbanks, who was employed by Mary Ash." This statement, standing alone, does not meet Petitioner's burden to show that he was not Claimant's employer.

Further, Petitioner's testimony on cross examination was, at times, evasive or uncertain. He did not know if he ever signed contracts for Northeast Home Theater; whether he had an ownership interest in Northeast Home Theater; whether he spoke to Claimant when she first arrived at the office, and if he did, what he said to her; when she was hired; or, whether he ever represented that he was an owner of Northeast Home Theater.

Moreover, some of Petitioner's testimony was inconsistent with his prior contentions. For example, he testified that he did not remember if there was a time when Claimant was discharged or quit, yet he stated in his petition that "Mary Ash . . . hired and fired [Claimant] . . . ."

By comparison, Claimant's testimony was more specific and detailed. Claimant credibly testified that Petitioner described the position to her; told her that she was hired; directed her to return after her initial work day; and, told her to clean the office. In addition, she credibly testified that it was not until her third work day that she even met Mary Ash, and not until her fourth and final work day that Mary Ash described Claimant's work schedule.

We also find reliable Claimant's testimony that Petitioner said that "he couldn't pay [her] for training;" that he and Mary Ash would decide if she was to be paid; and, that he offered, through Claimant's husband, $100 for her work.

Considering the "totality of circumstances," and the standards of the "economic reality" test, Petitioner was Claimant's employer as he hired Claimant, had a role in supervising her, was responsible for the determination that she would not be paid for her work, and offered to pay her $100 for her work.

For these reasons, we find the Commissioner correctly determined that petitioner Jeffrey W. Ash was the Claimant's employer during the time period covered by the Orders.

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NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 6 of the Labor Law and the Order under Article 19 of the Labor Law, both dated July 23, 2009, are affirmed in all respects, and;

2. The Petition is denied.

Anne P. Stevason, Chairman

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
April 27, 2011.