STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

ANNE P. STEVASON
Chairman

Susan Sullivan-Bisceglia
J. Christopher Meagher
Mark G. Pearce
Jean Grumet
Members

Sandra M. Nathan
Deputy Counsel

Devin A. Rice
Associate Counsel

Empire State Plaza
Agency Building 2, 20th Floor
Albany, New York 12223
Phone: (518) 474-4785 Fax: (518) 473-7533

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: FRANBILT, INC. AND/OR THOMAS J. BARNES, AND/OR MICHAEL J. BURNS, Petitioners, To review under Section 101 of the New York State Labor Law: An Order to Comply with Article 19 of the Labor Law, dated May 26, 2006, -against- THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR-07-019 RESOLUTION OF DECISION

WHEREAS:

Petitioners Franbilt, Inc., Thomas J. Barnes (Barnes) and Michael J. Burns (Burns) commenced this proceeding on April 20, 2007 by filing 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 (Board Rules) (12 NYCRR part 66). The Petitioners ask the Board to review an Order to Comply with Article 6 of the Labor Law (Order) that the Commissioner of Labor (Commissioner) issued against them jointly and severally on February 27, 2007.

The Order finds that the Petitioners failed to pay wages to 50 employees from January 8 to January 19, 2007 and directs payment to the Commissioner of wages due and owing in the amount of $85,972.27, together with continuing interest at 16% calculated to the date of the Order in the amount of $1,119.37, and a 200% civil penalty in the amount of $171,944.54, for a total amount due of $259,036.18.

By motion dated May 9, 2007, the Commissioner moved to dismiss the Petition. The motion was granted with respect to the corporate Petitioner Franbilt, Inc., but denied as to the individual Petitioners Barnes and Burns (*Matter of Franbilt, Inc. et al.*, PR 07-019 [interim Board decision of January 23, 2008). Therefore, only the liability of the individual Petitioners is at issue in this decision.

The Board held a hearing in Buffalo, New York on March 23, 2008 before the Board's Associate Counsel, Devin A. Rice, the assigned hearing officer in this case. Also present was Board Member Mark G. Pearce, Esq. Petitioners Barnes and Burns each appeared *pro se*, and the Respondent Commissioner was represented by Maria Colavito, Counsel to the New York State Department of Labor (DOL), Jeffrey G. Shapiro of counsel. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, submit post hearing briefs and raise relevant arguments.

Jeanette Prohaska, Franbilt's human resources manager, and Mark Johnson, a Franbilt project and engineering manager, testified for Burns, who also testified on his own behalf. Barnes called no witnesses, but did testify on his own behalf. DOL Labor Standards Investigators Jeanette Castagnola and John Silverwood testified for the Commissioner.

At the close of the Petitioners' case, the Commissioner moved to dismiss the Petition. We have considered all the arguments made by the Commissioner and deny the motion.

SUMMARY OF EVIDENCE

Franbilt, Inc. is a fabrication and machine company located in Lockport, New York. Thomas J. Barnes is the sole owner and shareholder of Franbilt, Inc. In 2006, Kiewit Constructors, Inc[1]. contracted with Franbilt to fabricate components for a bridge construction project in Brooklyn, New York. As a result of the demands of the bridge project, starting in October 2006, Kiewit managers moved into Franbilt's shop. These Kiewit managers included a project manager, a quality assurance manager and a machinery supervisor. From October 2006 to January 19, 2007, there were four to five Kiewit managers working full time at Franbilt supervising the bridge project. Work on the project consumed 94% of Franbilt's employees' time and 100% of Franbilt's operations. On January 19, 2007, Franbilt laid off its entire work force of approximately 50 employees after failing to pay two weeks of wages.

As owner and chief executive officer of Franbilt, Inc., Thomas J. Barnes managed the day to day affairs of the business and had final decision making authority in personnel matters. He negotiated the contract with Kiewit for Franbilt to fabricate bridge components for the bridge project. During the time period leading up to the closing of Franbilt's doors, he was aware of Franbilt's financial situation and conducted frequent negotiations with Kiewit and outside sources in order to secure funding for payroll and vendor invoices.

Michael J. Burns' role with Franbilt changed starting in approximately October 2006 due to Kiewit's presence at the Franbilt shop. Burns' job duties changed from that of chief financial officer and chief operating officer to "Kiewit Liaison." Burns' duties as Kiewit liaison included

[1] All parties at the hearing stipulated that Kiewit Constructors, Inc. was an employer of Franbilt's employees during the time period relevant to the Order under review. However, no representative of Kiewit was present at the hearing to contest such stipulation, nor was Kiewit named in the Order or otherwise a party to this proceeding.

meeting with Kiewit project managers to review the project schedules and financing. From December 21, 2006 to January 19, 2007, Burns' role was diminished even further to that of project accountant preparing job cost schedules, job cost analysis and project profitability studies for review and approval by Kiewit.

GOVERNING LAW

Standard of Review

In general when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in [the petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103).

Pursuant to the Board Rules 65.30 (12 NYCRR 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioners to prove that the Order is not valid or reasonable.

Definition of Employer under Article 6 of the Labor Law

"Employer" is defined in Article 6 of the Labor Law as "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 U.S.C. § 230 [g]), and 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 test . . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v. The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v. RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the 2nd Circuit Court of Appeals stated the test used for determining employer status by explaining that:

> "Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire 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 economic reality test "no one of the four factors standing alone is dispositive. Instead, the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive" (*Id.* [internal citations omitted]).

The Commissioner's Authority to Impose a 200% Civil Penalty

Labor Law § 218 provides, in relevant part:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions [of the Labor Law], rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty . . . . In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

FINDINGS

The Board having given due consideration to the pleadings, hearing testimony, arguments, documentary evidence and post-hearing briefs, makes the following findings of fact and law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39).

The issue before the Board is whether the individual Petitioners – Thomas J. Barnes and Michael J. Burns – were "employers" under Article 6 of the Labor Law during the period that Franbilt, Inc. failed to meet its payroll obligations from January 8 to January 19, 2007.

Thomas J. Barnes was an "employer" under Article 6 of the Labor Law

It is uncontested that Thomas J. Barnes was the owner and sole shareholder of Franbilt, Inc. during the relevant time period. Mark Johnson and Michael J. Burns each testified that Barnes had ultimate authority at Franbilt with respect to hiring and firing, and while there is no evidence that any employees were hired during the two week time-period at issue in this proceeding, Barnes' failure to exercise this power is not evidence that he did not possess such power.

Furthermore, Barnes, himself, testified that during the relevant time period he was aware of the financial difficulties facing Franbilt and was actively negotiating with Kiewit and others to secure funds for the payment of Franbilt's payroll and vendor expenses. Barnes, as the individual responsible for contracting with Kiewit and for seeking funds to keep Franbilt's doors open, clearly controlled the conditions of employment of Franbilt's employees. Finally Burns' and Johnson's testimony that Barnes had to approve all hiring decisions, including pay rates, was uncontested. Based on the totality of the circumstances, we find that Barnes was an employer under Article 6 of the Labor Law during the time period covered by the Order.

We note that throughout this proceeding Barnes argued that Kiewit Constructors, Inc. was in fact the party responsible for the unpaid wages. However, the Order did not name Kiewit and it is well settled that employees may have more than one employer. Even if Kiewit was an employer, it does not follow that others, including Barnes, were not (*see Matter of Frank Bova et al.*, PR 06-024 [November 28, 2007]).

Michael J. Burns was not an "employer" under Article 6 of the Labor Law

Mark Johnson, Thomas J. Barnes and Michael J. Burns each testified that from the end of 2006 until Franbilt closed, Burns' role at Franbilt had changed from chief financial officer and chief operations officer to Kiewit liaison. As Kiewit liaison, Burns' job duties during the time period relevant to this proceeding included the preparation of job cost schedules, job cost analysis and project profitability reports.

There is no evidence in the record that during the relevant period Burns had the authority to hire or fire employees, controlled employee work schedules or their conditions of employment, or determined the rate and method of their payment. Burns' testimony that he was no longer the chief financial officer and chief operating officer at Franbilt at the time Franbilt defaulted on its payroll obligations was corroborated by Barnes and was not contested by the Commissioner's witnesses. Furthermore, Burns and Barnes testified that Burns had no ownership interest in Franbilt, Inc., and there is no evidence in the record that Burns was a corporate officer at any time.

The only evidence submitted by the Commissioner to establish Burns' status as an employer consisted of claims for unpaid wages submitted to DOL by Franbilt employees listing Burns (and Barnes) as "responsible persons of firm," and verified supporting written depositions of Franbilt employees prepared in apparent contemplation of a criminal case stating that "I knew Michael J. Burns to be the agent of the corporation, that he was responsible for the scheduling of employees and the payment of wages and that he was actively engaged in the management and operation of the corporation's business affairs. The said Michael J. Burns did knowingly permit the corporation to continue your deponent in its employ without providing for the payment of wages when due." This hearsay evidence is insufficient to establish that Burns was, as a matter of law, an employer under Article 6 of the Labor Law, and is only probative to the extent that it demonstrates that claims for unpaid wages were made and depositions taken.

Burns met his burden of proof and produced evidence that he was not an employer during the time period covered by the Order and the Commissioner failed to contest this evidence. Accordingly, we find that Burns was not an employer and is not liable for the unpaid wages, civil penalty and interest set forth in the Order.

The Imposition of a 200% Civil Penalty Was Appropriate in this Case

Labor Law § 218 allows the Commissioner to impose a 200% civil penalty for a willful failure to pay wages. Although DOL Labor Standards Investigator Silverwood could not explain how the civil penalty was calculated in this case and there were no documents introduced to show the factors considered and computations made, we find that Barnes did not meet his burden of proof of demonstrating that the violation was not willful. The evidence demonstrates that Barnes was aware of Franbilt's tenuous financial condition and was in fact engaged in

negotiations to secure money to fund Franbilt's payroll. We also note that Franbilt defaulted on not one, but two pay periods; therefore Barnes knew, or should have known, of the possibility of default for the second pay period. (*Cf. Matter of Mid Hudson Pam Corp. v. Hartnett*, 156 AD2d 818, 821 [3d Dept. 1989].) The 200% civil penalty is reasonable.

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 underpayment t o the date of payment." Banking Law § 14-a sets the "maximum rate of interest" at "sixteen per centum per annum."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 6 of the Labor Law, dated May 26, 2006, is affirmed with respect to Franbilt, Inc. and/or Thomas J. Barnes; and

2. The Order to Comply with Article 6 of the Labor Law, dated May 26, 2006, is revoked with respect to Michael J. Burns; and

3. This matter is remanded to the Commissioner to issue an amended Order to Comply consistent with the findings of this Resolution of Decision ; and

4. The Petition for review be, and the same hereby is, denied with respect to Franbilt, Inc. and/or Thomas J. Barnes, and granted with respect to Michael J. Burns.

Anne P. Stevason, Chairman

Susan Sullivan-Biscegna, Member

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
July 30, 2008.