

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:	
	:	
HAND HELD FILMS, INC.,	:	
	:	
Petitioner,	:	
	:	
To Review Under Section 101 of the Labor Law:	:	DOCKET NO. PR 06-092
An Order to Comply With Article 19 of the Labor Law :	:	
dated September 22, 2006,	:	<u>RESOLUTION OF DECISION</u>
	:	
- against -	:	
	:	
THE COMMISSIONER OF LABOR,	:	
	:	
Respondent.	:	

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APPEARANCES

Marc Paturet, *pro se* Petitioner.

Maria L. Colavito, Counsel to the New York State Department of Labor, Benjamin T. Garry of Counsel, for Respondent.

WITNESSES

Marc Paturet, President of Handheld Films; Mariusz Ukowski, Bogdan Jazgarski Grauberg, Dawn Hughes, Carlos Suarez.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on November 21, 2006 and amended January 3, 2007. Upon notice to the parties a hearing was held on October 10, 2007 and November 21, 2008 before Board Member Susan Sullivan-Bisceglia in New York City. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues.

The Commissioner issued the Order to Comply that is under review in this proceeding on September 22, 2006. The Order directs compliance with Article 19 of the Labor Law, payment to the Commissioner for wages due and owing to a named employee (Complainant) in the amount of \$1,858.40 for unpaid overtime from February 8, 2002 to March 29, 2003, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the

amount of \$1,036.22, and assesses a civil penalty in the amount of \$465.00, for a total amount due of \$3,359.62.

SUMMARY OF EVIDENCE

Petitioner Hand Held Films, Inc. is a motion picture equipment rental company doing business in New York City. Marc Paturet is the president of the company. The Complainant filed a claim against Petitioner with the Department of Labor (DOL) for unpaid overtime.

Petitioner hired Complainant in February 2002 and terminated Complainant on April 18, 2003 when his employment was terminated. He was paid a salary of \$36,400.00 per year from February 2002 until January 24, 2003 and \$40,000.00 per year from January 25, 2003 until April 18, 2003.

Paturet testified that Complainant was a manager, replacing a manager who left shortly after Complainant started work; was paid by salary, the highest salary in the company; had management duties including supervising two other employees over 50% of the time and, therefore, was exempt from overtime requirements. Paturet stated that the reason that there were no time records for Complainant and that his pay stubs did not include hours worked was that Complainant was considered an exempt employee. Paturet also contested the hours claimed to have been worked by Complainant. Paturet stated that Complainant often took long lunches, did his own work at the company, and took vacations that were not reflected in the audit that DOL conducted. Paturet had wanted to meet with DOL to go over all of the hours claimed but never got that opportunity. Paturet objected to the vague nature of the overtime computations.

Complainant testified that he heard about the job at Hand Held Films through a newspaper ad, a copy of which was produced at hearing, which indicated that the company was looking for a "camera technician, with no experience necessary, training available." The advertisement did not mention any managerial duties or salary. He interviewed and was offered the position of assistant camera technician. His initial duties were to work on extension cables and replace batteries. He testified that although he would eventually train or help other employees, he did not supervise any employees or establish schedules for other employees. He testified that he was given a key to the office and was often at the office late to complete his duties or respond to customer issues.

The Complainant claims that although he was hired to work 8 hours per day, Monday – Friday, at the request of Petitioner, he actually worked between 40 – 54 hours per week or an average 44 hours per week; he would very often work Saturdays and Sundays and do whatever it took to get the job done to provide service to customers.

Mr. Bogdan Jazgarski Grauberg testified on behalf of the Respondent. He was the service manager for Hand Held Films, Inc., and worked with Complainant who, Grauberg testified, was a camera technician. He testified that Complainant normally worked 8:00 a.m. – 5:00 p.m. with one hour lunch but there were times when he worked more than 8 hours per day and Saturdaysto finish the job. He testified that when he became aware that Complainant

was not being paid for the overtime hours that he worked, he suggested that Complainant keep track of his overtime hours in a calendar

Ms. Dawn Hughes, Labor Standards Investigator, testified on behalf of DOL. On October 27, 2005, Ms. Hughes conducted an initial visit to the offices of Hand Held Films at 315 West 36th Street in New York City. Ms. Hughes testified that she spoke with Paturet, who was very cooperative. He identified himself as the President of Hand Held Films, Inc, and did not dispute the claim by Complainant. He agreed to another site visit tentatively for November 15, 2005 to inspect payroll records for all employees including Complainant. Ms. Hughes provided Petitioner with a Notice of Revisit which specifically set forth the information requested at the next site visit- payroll records for the time period of February 1, 2002 to December 31, 2004, time cards, W-2s, record of all wages paid, reflecting deductions, gross and net wages earned.

At the next site visit of November 15, 2005, Ms. Hughes interviewed two other employees, who Paturet identified as doing the same job as Complainant. First she spoke with Piotr Dawdo, who identified himself as a floor manager who supervised employees by telling them what work needed to be done. Dawdo supervised the middle technician who was in training and facilitated meetings with employees. Dawdo said that during the period of March 2002 - March 2003, when he worked overtime (over 40 hours per week) he was paid \$50.00 to \$100.00 cash bonus.

Ms. Hughes then spoke with Greg Rudnay, who stated he was a technician and had started in the fall of 2002 as a junior technician. He stated that the claimant would stay after 6:00 pm some days to resolve emergencies and/or to fix equipment and that at times the claimant would work over 40 hours per week. When Ms. Hughes asked Paturet for employment records, he provided her with summary sheets that he prepared for her that summarized the records from his calendar (the calendar was never produced). Paturet never provided any employment records that were created contemporaneously with the employment - only summary sheets created in response to Ms. Hughes' requests.

After the site visit, Ms. Hughes contacted Complainant and advised him that he might need to get additional evidence to prove his claim; specifically employee witness statements. Thereafter, Complainant provided a letter from Service Manager BJ Grauberg and Rental Manager Douglas Gordon for Hand Held Films, Inc. Mr. Grauberg stated that Complainant was a technician who was his immediate subordinate, performed excellent service and would work extra hours and days, as necessary, to perform service for the customers and that Mr. Paturet had an agreement with Grauberg regarding compensation for the extra hours/days of work. Mr. Gordon stated that he worked with Complainant for six months; Complainant was a hardworking, sincere person, had technical skills, maintained the equipment, and was a tremendous leader and teacher.

Ms. Hughes concluded that the records submitted by Petitioner were not true and accurate since they were not records of the Complainant actually signing in or signing out (the Complainant never signed any records or time cards indicating hours worked). Further, Ms. Hughes also testified that there was no indication or anything provided to her that established that the Claimant had any type of managerial, supervisory or other responsibilities that would exempt him from being considered eligible for overtime. On April 27, 2006, Ms. Hughes

performed another site visit and provided Petitioner a Recapitulation Sheet which showed a total amount owed by Hand Held Films, Inc. to Complainant of \$1,858.40, representing unpaid overtime from February 8, 2002 to March 29, 2003. On May 5, 2006, Ms. Hughes sent Petitioner a letter to reiterate the amount owed on the Recapitulation Sheet and to advise him that he had to submit full payment to the Commissioner of Labor by May 29, 2006. On May 12, 2006, Petitioner requested a district meeting.

On June 6, 2006 Paturet and Mr. Philip Rogoff, Senior Labor Investigator, participated in a compliance conference. Paturet stated that the Claimant was a manager who supervised two or more employees over 50% of his time and therefore, was exempt from any employer obligation to pay for overtime worked. Mr. Rogoff concluded that the claim and the employee interviews in support of the Claimant's position supported a finding that the employer violated the Labor Law by failing to pay overtime and failing to keep accurate records. Paturet stated that he would not pay anything unless ordered to do so by the court.

Thereafter, on June 19, 2006 a Notice of Labor Law Violation was sent to Hand Held Films, Inc. for violation of Article 19-A, failure to pay overtime and to keep accurate records. Although, on September 22, 2006 two Orders to Comply with Article 19 of the Labor Law were issued, one finding a failure to keep and/or furnish true and accurate payroll records and the wage order finding failure to pay for overtime worked, Petitioner sought review of only the Order regarding the payment of overtime wages.

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 of Procedure and Practice (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 Petitioner to prove that the Order is not valid or reasonable.

Requirement to Pay Overtime

The Minimum Wage Order for Miscellaneous Industries provides that an employer shall pay a non-residential employee for overtime at a wage rate of 1 ½ times the employee's regular rate for hours worked over 40 in a work week subject to any applicable exemptions (12 NYCRR 142-2.2).

Record Keeping Requirements

Labor Law § 661 states in relevant part:

“Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time”

The Minimum Wage Order for Miscellaneous Industries specifies the information required to be maintained. 12 NYCRR 142-2.6 provides in relevant part:

- “(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) wage rate;
 - (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
 - (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
 - (12) student classification.”

DOL’s Calculation of Wages in the Absence of Adequate Employer Records

The law requires employers to maintain payroll records that include, among other things, its employees’ daily and weekly hours worked, wage rates, and gross and net wages paid (12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or her designated representative (Labor Law § 661; 12 NYCRR 142-2.6).

An employer’s failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints 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 (Labor Law § 196-a). As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3rd Dept 1989), “[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner’s calculations to the employer.”

In *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-88 (1949), *superseded on other grounds by statute*, 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 as contemplated by the Fair Labor Standards Act.”

Anderson further opined that a court may award damages to an employee, “even though the result be only approximate. . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . . the Act.” *Id.* at 688-89.

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 Rule 65.39 (12 NYCRR 65.39).

The Petitioner Violated Article 19 of the Labor Law By Failing to Pay Overtime

We find that the Complainant worked at least 44 hours per week for a weekly salary of \$770.00, and that in the absence of credible payroll records, it was reasonable for DOL to calculate the overtime wages due to the Complainant based solely on the Complainant’s recollection of the hours that he worked (*see* Labor Law § 196-a; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d at 821).

Although the Petitioner alleges that the Complainant is not owed overtime because he was a manager excluded from the coverage of the minimum wage order, we are not persuaded. 12 NYCRR 142-2.16 (2003) exempts from coverage any person:

- “(a) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof;
- (b) who customarily and regularly directs the work of two or

- more other employees therein;
- (c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status or other employees will be given particular weight;
- (d) who customarily and regularly exercise discretionary powers; and
- (e) who is paid for his services in a salary of not less than (1) \$386.25 per week on and after March 31, 2000 [through December 31, 2004], inclusive of board, lodging, other allowances and facilities”¹

This exemption is to be narrowly construed against the employer, who “bears the ultimate burden of establishing that its employee falls within the exemption” (*Wetzel Services v. Industrial Bd. of Appeals*, 252 AD2d 212, 214 [3d Dept 1998]). In addition, in order to qualify for the exemption all five factors must be present.

i. Primary Duty

The Complainant’s primary duty was not the management of the Petitioner’s business, it was providing technical assistance – manual labor on camera equipment. He worked on extension cables and batteries, and later in his tenure ordered parts. When hired, the Complainant had no prior experience and was merely responding to an employment advertisement which read “no experience necessary – training provided.”

ii) Customarily and regularly direct the work of two or more other employees

Petitioner also failed to meet the second criterion. The evidence establishes that the Complainant did not supervise any employees – he would merely help them on occasion with technical issues. Furthermore, there is no credible evidence that the Complainant set the schedules, job duties, or rates of pay for any of the Petitioner’s employees.

iii) Authority to hire and fire

We find that the Complainant did not have the authority to hire or fire employees. No where in the testimony or investigation do we find any mention of the authority of the Complainant to hire or fire any employees.

iv) Customarily and regularly exercise discretionary powers

The factors to consider when determining whether an employee regularly exercises discretionary powers include, but are not limited to:

¹ When the Wage Orders were revised in 2005, this section was renamed and can now be found at 12 NYCRR 142.2.14(c) (i).

“Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances” (29 C.F.R. 541.202 [b] [2005]).

Although after a period of time Complainant had the authority to order supplies without approval of management, there was no evidence that it was anything other than routine. In any event, the Petitioner failed to satisfy the other factors in the exemption.

v) *Earn a salary of not less than \$386.25 a week*

It is undisputed that the Complainant earned more than \$386.25 a week. However, in order to qualify as an exemption from the overtime requirements of the minimum wage order, the Petitioner must show that all of the factors set out at 12 NYCRR 142-2.16 (2003) applied to the Complainant.

The Petitioner failed to meet its burden to establish that the Complainant was an executive employee, and accordingly we find that the Complainant was subject to the Minimum Wage Order.

Complainant's claim and subsequent testimony that he worked an average of 44 hours per week was sufficient to support the amount of overtime wages found due and owing in the Order to Comply, given the absence of employer records. It is to be noted that the evidence showed that the audit which formed the basis of the Order did not include weeks during which Complainant was on vacation.

CIVIL PENALTIES

The Order to Comply assessed a civil penalty, in the amount \$465.00. The Board finds that the considerations and computations required to be made by the Commissioner in

connection with the imposition of the civil penalty amount set forth in the herein Order are proper and reasonable in all respects.

INTEREST

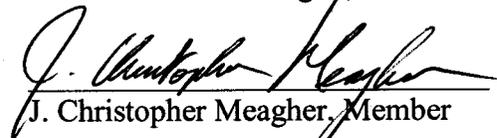
Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include “interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of underpayment to 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 19 of the Labor Law, dated September 22, 2006, under review herein, is affirmed; and
2. The Petition be, and the same hereby is, dismissed.


Anne P. Stevason, Chairman

Absent
Susan Sullivan-Bisceglia, Member


J. Christopher Meagher, Member

Absent
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
May 20, 2009.