

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
RICARDO J. AHRENS	:
(T/A AHRENS CONSTRUCTION),	:
	:
Petitioner,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 6 of the Labor Law,	:
dated September 7, 2007,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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DOCKET NO. PR 07-062

RESOLUTION OF DECISION

APPEARANCES

Oscar Campana, Representative for Petitioner.

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

WITNESSES

Ricardo Ahrens and Hector Vallejo, for Petitioner; Angela Dean, Senior Labor Standards Investigator ("SLSI") and Hector Vallejo, for Respondent.

WHEREAS:

The Petition for review in the above-named case was filed with the Industrial Board of Appeals (Board) on October 10, 2007. Petitioner Ricardo Ahrens (T/A Ahrens Construction) (Petitioner) seeks to vacate an Order to Comply with Article 6 of the Labor Law (Order) that the Commissioner of Labor (Commissioner) issued against Petitioner on September 7, 2007.

The Order directs Petitioner to pay to the Commissioner the unpaid wages owed employee Hector Vallejo (Claimant) in the amount of \$3,000.00, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of \$653.58, and a civil penalty in the amount of \$1,500.00, for a total amount due of \$5,153.58.

The Petition alleges that the Order is unfair because: 1) the Claimant was hired by Petitioner as an independent contractor, and; 2) Petitioner paid the Claimant all wages due. The respondent Commissioner filed an Answer to the Petition, denying its material allegations and interposing as an affirmative defense that the Petition contains insufficient and conclusory allegations.

Upon notice to the parties, a hearing was held on October 7, 2008 before J. Christopher Meagher, Member of the Board and the Board's designated hearing officer in this case. Each party was afforded full opportunity at the hearing to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

SUMMARY OF EVIDENCE

Petitioner, Ricardo Ahrens, is a construction contractor, doing business as Ahrens Construction in Queens, New York. For all relevant purposes, Petitioner is an employer within the meaning of the Labor Law.

The Order under review in this case concerns work performed by the Claimant, Hector Vallejo, for Petitioner from March 22, 2006 to April 28, 2006 at an apartment complex in Queens, New York. Petitioner had contract(s) with apartment owner(s) at the complex to remodel apartments with new walls, floors, kitchen cabinets, doors, and tile.

Claimant was called by both Petitioner and DOL to testify. Claimant testified that he was hired by Petitioner on February 20, 2006 to perform plastering, painting, and carpentry at the project at the rate of \$130 per day. After two weeks Petitioner raised Claimant's pay to \$150 per day. Claimant testified that, along with six other workers on the crew, he did plastering, painting, and renovation work in three apartments at the site.

Claimant testified that Petitioner paid the crew regularly for the first few weeks but then stopped paying them altogether. Claimant explained that he and the other workers kept working for Petitioner because they believed Petitioner's assurances that the crew would eventually be paid. After several weeks without being paid, however, the crew met with Petitioner about their wages. They decided to stop work because they believed Petitioner was making excuses about paying them. Claimant testified that he performed plastering, painting, and carpentry work for Petitioner at the agreed rate of \$150 per day for the period March 22, 2006 to April 28, 2006 but was not paid for such work. Claimant further testified that, at a meeting with Petitioner and the apartment house owner named Chris McCartin, Claimant was hired by that owner to complete work that was unfinished under the owner's contract with Petitioner. Claimant performed this work at the end of May, 2006. The owner paid Claimant two payments of \$1,250 and \$500 and deducted the payments from his contract with Petitioner. Receipts submitted into evidence by Petitioner corroborate this arrangement and that the work was performed after the period of Claimant's unpaid wage claim.

Claimant filed a claim against Petitioner with DOL on June 1, 2006. Claimant claimed four weeks unpaid wages (\$150 per day, five days per week, for four weeks) totaling \$3,000

for the period March 22, 2006 through April 28, 2006. Claimant testified that this amount was an estimate at the time of the claim of his hours and of what he was due from Petitioner. Claimant added that he probably worked more hours and was due more from Petitioner than the amount claimed.

SLSI Angela Dean testified concerning DOL's investigation of Claimant's wage claim. Ms. Dean's duties include overseeing the work of Labor Standards Investigators, conducting investigations of more complex claims, preparing cases for proceedings such as this appeal, and preparing matters for orders to comply or criminal prosecution.

SLSI Dean testified that the investigative file revealed that DOL issued Petitioner a notice (i.e. initial "collection letter") on June 8, 2006 notifying Petitioner that a wage claim had been filed against it by the Claimant, the details of the claim, and that if Petitioner agreed with the claim it should remit payment to the Commissioner within ten days. DOL further advised that if Petitioner disagreed with the claim, it should respond in writing stating the basis of its dispute, and substantiating its reasons with payroll records, contracts, and documentation demonstrating payment of the wages claimed by Claimant. Petitioner did not respond to the notice. Ms. Dean further testified that the file revealed that DOL then sent Petitioner a second notice on January 16, 2007, and a "Final Notice" on March 19, 2007, both reiterating the claim and advising Petitioner that unless it responded it could be subject to criminal prosecution and civil action, including assessment of interest and penalties. The Final Notice also attached a "Recapitulation Sheet" again specifying the period of the claim and the amount of wages due. The file also revealed that the investigator assigned to the case attempted to obtain information from Petitioner by visiting Petitioner's business on December 22, 2006, and by leaving a phone message on Petitioner's voice mail on May 31, 2007, both to no avail. Finally, the file revealed that a postal tracer initiated by DOL confirmed on February 20, 2007 that mail was being delivered to Petitioner's business address, which was the address listed in the claim and used by DOL to issue notices and attempt a field visit.

Ms. Dean further testified that Petitioner never responded to any of DOL's investigative efforts and never submitted the requested documentation establishing that Claimant was paid the wages claimed.

Based on Petitioner's failure to respond to DOL's investigation and to submit payroll records or documentation establishing that Claimant was paid the wages claimed, the Commissioner issued Petitioner the Order under review on September 7, 2007. The Order directed Petitioner to pay the Commissioner unpaid wages on behalf of Claimant in the amount of \$3,000, interest to the date of the Order in the amount of \$653.58, and a 50% civil penalty in the amount of \$1,500. Ms. Dean testified that the file revealed that the penalty was based on the size of Petitioner's business; the amount of wages owed over \$1,000; Petitioner's failure to produce payroll records substantiating payment; and most significantly, Petitioner's absence of good faith demonstrated by its evasion of DOL's efforts to resolve the claim or respond to DOL's investigation.

Petitioner testified that he had an agreement with Claimant to do work plastering and painting on the apartment project but that Claimant was fully paid for his work. Petitioner testified that he paid Claimant in cash but did not bring payroll records to the hearing because Claimant was not his employee. Petitioner explained that his company is not a big company,

employs only himself and one other person, and that he is not able to hire a lot of other employees. Petitioner submitted no other evidence concerning his claim that Claimant was an independent contractor.

Petitioner further testified that he paid Claimant on time for several weeks but then had a problem with the apartment owners paying him. He told Claimant to be patient, to wait until Petitioner was paid by the owners, and then always paid Claimant and the other workers a few days after the pay date. Petitioner also disputed Claimant's version of not being paid for the period of the wage claim. Petitioner testified that after the crew stopped working over not being paid on time, Petitioner arranged for Claimant to finish a job in the second of two apartments the crew was working in. Despite being asked to leave the job by the owner, Petitioner said he arranged to have Claimant continue working under Petitioner's permit and insurance coverage and be paid directly by the owner. According to Petitioner, the Claimant was paid every week for such work. Petitioner did not submit any contracts or receipts to substantiate this arrangement, however.¹ Finally, Petitioner testified that since he still owed Claimant for a few days work, he arranged for Claimant to do plastering and painting on a third apartment job Petitioner had with owner Chris McCartin. This arrangement is purportedly reflected in the receipts described above that were submitted by Petitioner.

GOVERNING LAW

A. 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". See Labor Law § 101 (1). It also provides that an order of the Commissioner "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". See 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. See 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"); *Angello v. Natl. Fin. Corp.*, 1 AD3d 850, 854 (3d Dept 2003).

It is therefore Petitioner's burden in this case to prove by a preponderance of evidence the allegations in its Petition that the Commissioner's determination in the Order is invalid or unreasonable because Claimant was an independent contractor and because Petitioner paid Claimant all monies due.

B. Recordkeeping Requirements

Labor Law §§ 195(4) and 661 require employers to maintain payroll records. Section 661 requires employers to make such records available to the Commissioner:

¹ Claimant testified in rebuttal that he was never paid under this arrangement but that it was between Petitioner and another worker.

“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 Commissioner’s regulations at 12 NYCRR 142-2.6 also provide 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.

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

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. *See* Labor Law § 196-a.; *Angello v. National Finance 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 (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. Clements Pottery Co.*, 328 U.S. 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."

Citing to *Anderson v Mt. Clemens*, 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. That result should not pertain here."

D. Definition of "Employee" Under Article 6 of the Labor Law

In determining whether an individual is an employee covered by the Labor Law, or an independent contractor without wage and hour protections, "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). The 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. *Id.* at 1058-1059. No one factor is dispositive. *Id.* at 1059.

FINDINGS

Petitioner Violated Article 6 of the Labor Law by Failing to Pay Claimant Wages Due

We affirm the Commissioner's Order directing payment to the Commissioner of unpaid wages owed the Claimant covered by the Order. Having failed to produce time and payroll records required by Labor Law § 661 and 12 NYCRR § 142-2.6, DOL's calculation of wages must be credited unless Petitioner met its burden to negate the reasonableness of the Commissioner's determination. *See Angello v National Finance Corp.*, *supra*. The burden is not an impossible one. However, in this case Petitioner's evidence was too general and conclusory to satisfy such burden.

First, Petitioner submitted no evidence beyond conclusory testimony that his is a small business with few employees to establish that Claimant was an independent contractor, and not an employee. The bald assertion that an individual is an independent contractor, without

more, is not proof of such status. See *Brock v Superior Care, Inc.*, *supra* at 1059 (2d Cir 1988) (quoting *Real v. Driscoll Strawberry Associates, Inc.* 603 F2d 748, 755 [9th Cir 1979]) (“an employer’s self-serving label of workers as independent contractors is not controlling”). Since Petitioner submitted no specific proof to support this allegation in the Petition, it is dismissed as without evidentiary foundation.

Second, Petitioner also failed to submit specific proof beyond his general and conclusory testimony that he paid the Claimant wages due for the period of the wage claim covered by the Order, i.e March 22, 2006 through April 28, 2006. Petitioner failed to submit payroll records required by the Labor Law to DOL for this period during its investigation. None were submitted at the hearing. While Petitioner testified that he arranged to have Petitioner work in a second apartment on the job and be paid directly by the owner, he submitted no receipts or contracts to substantiate this assertion. We credit Claimant’s testimony that he was never paid under such an arrangement. Finally, it is undisputed that two payments Claimant did receive directly from the owner for plastering and painting in a third apartment were for work performed in May, 2006, after the period covered by the wage claim.

In the absence of contemporaneous payroll records for its employee, it was Petitioner’s burden at hearing to submit sufficient affirmative evidence to negate the Commissioner’s determination of wages owed. The testimony of Petitioner was simply too general and conclusory regarding payment to the Claimant during the period covered by the Commissioner’s Order to overcome the presumption favoring the Commissioner’s calculation. In the absence of such proof, the Commissioner’s determination based on “the best available evidence”, in this case DOL’s approximation of wages owed based on the wage claim filed by the Claimant employee, is deemed valid and reasonable. See *Mid-Hudson Pam Corp. v Hartnett*, *supra*.

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 § 14-A sets the “maximum rate of interest” at “sixteen percent per centum per annum.”

Petitioner did not challenge the assessment of interest made by the Order. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the interest set forth in the Wage Order are valid and reasonable in all respects.

IMPOSITION OF CIVIL PENALTIES

If the Commissioner determines that an employer has violated Article 19 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing. See Labor Law § 218 (1).

Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty based on the amount owing. Labor Law § 218 (1) continues:

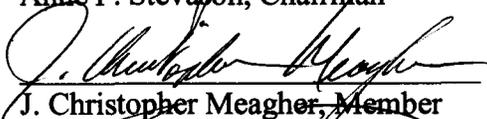
“In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of these provisions, rules, or regulations, or to an employer whose violation has been found to be willful or egregious, shall direct 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 ... 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 ... the failure to comply with recordkeeping or other non-wage requirements.”

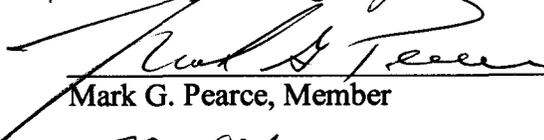
Petitioner did not challenge the Commissioner’s assessment of a civil penalty made in the Order. The Board finds that the calculation made by the Commissioner in assessing Petitioner a 50% civil penalty in the Order is valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

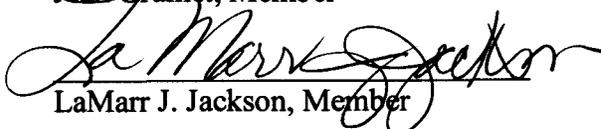
1. The Order to Comply with Article 6 of the Labor Law, dated September 7, 2007, is affirmed;
2. The Petition be and the same hereby is, denied.


Anne P. Stevason, Chairman


J. Christopher Meagher, Member


Mark G. Pearce, Member


Jean Grumet, Member


LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
August 27, 2009.