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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
ANGELA JAY MASONRY & CONCRETE, INC.,	
Petitioner,	
	DOCKET NO. PR-06-073
To review under Section 101 of the New York State Labor Law an Order to Comply under Article 6, dated August 11, 2006	RESOLUTION OF DECISION
-against-	
THE COMMISSIONER OF LABOR,	
Respondent.	

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on October 6, 2006. The Answer was filed on October 24, 2006. Upon notice to the parties a hearing was held before Anne Stevason, Chairperson of the Board and designated hearing officer, on May 13, 2008 in Garden City, New York. Petitioner Angela Jay Masonry & Concrete, Inc. (Petitioner), was represented by Edward L. Wolf, P.C., and Respondent Commissioner of Labor (Commissioner) was represented by Maria Colavito, Counsel to the Department of Labor (DOL), Jeffrey G. Shapiro, of counsel. Each party was afforded full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues. Closing briefs were also submitted.

The Order under review finds that Petitioner failed to pay all wages due to four of its employees. The Order demands payment of $17,136.00 in unpaid wages, $4,514.48 in interest at 16% and a civil penalty of $4,285.00 for a total amount due of $25,935.48. Petitioner alleges that the four employees in question worked only part-time and were paid for all of the hours that they worked and that DOL failed in its obligation to fully investigate the four claims filed.

SUMMARY OF EVIDENCE

Petitioner is a company engaged in construction, demolition, concrete and masonry work. On January 14, 2005, four laborers (Claimants) who worked for Petitioner filed claims with DOL for unpaid wages. In their claims, Claimants allege that they worked for Petitioner without being paid from October 17, 2004 until December 18, 2004; that they worked 48 hours a week; and that their promised rate of pay was $12 per hour.

At the hearing on the Petition, the parties stipulated that Petitioner did not maintain the required books and payroll records for its employees for the relevant period of time. DOL Investigator Frederick Seifried (Seifried) testified on the DOL procedures when a claim for unpaid wages is filed and on the specific investigation conducted in this case. Once a claim is filed with DOL, it is sent to Albany for docketing, and a letter is sent to the employer notifying it that a claim has been received and requesting that the employer respond and provide evidence that payment was made or is not due. In this case, on May 22, 2005 Petitioner responded that the Claimants were never on his payroll and that he only had day laborers for a few days.

If the claim is not resolved at that point, it is then referred to a field office for investigation. Seifried was the investigator assigned to this case. On June 29, 2005, Seifried visited the employer at his place of business, which was also his residence, with the aim of interviewing other employees, speaking with the employer and reviewing payroll records. No employees were present, but Seifried did interview John Parente, the owner, who stated that the Claimants had been employees but that they worked for him for only a couple of weeks and that they had been paid. An appointment was set up for Petitioner to deliver the payroll records to DOL by July 15, 2005. Petitioner did not produce the records, but instead sent a letter through counsel requesting further information on the claims and authority for the requirement that Petitioner respond to DOL's request for information. In response, DOL sent a letter citing the various sections of the Labor Law and regulations which require an employer to keep payroll records and provide them to DOL upon request. DOL made two more requests for records, and on August 31, 2005 records were finally produced. These consisted of cash receipts and cash disbursement journals and were deemed by DOL to be unresponsive to its request.

Thereafter, on February 6, 2006, pursuant to Petitioner's request, a meeting was held between Petitioner and DOL. Present were Petitioner's counsel, DOL representatives and three of the four Claimants. The claims were discussed. Petitioner's counsel averred that Claimants were paid daily since they were day laborers. On February 8, 2006, Petitioner submitted an affidavit from its foreman, Juan Carlos Matute, stating that the Claimants worked only one to two days per week and never 8 hours per day or 6 days per week. On May 8, 2006 DOL sent a demand for payment of the unpaid wages in the amount of $17,472.00. On August 11, 2006, the Order under review was issued.

At the hearing, Matute testified for Petitioner. Matute testified that he was a foreman employed by Petitioner for approximately 10 years. In October 2004, the company was working in Yonkers, New York. Day laborers were working on the site. The company was on the job site five to six months. Matute and Parente commuted to the job site, arriving approximately 7:00 a.m. each day and worked five, six or seven hours per day. They did not work eight hours per day or six days per week in the winter because it was too cold. Contrary to his affidavit, where Matute stated that he had the responsibility for paying the Claimants, at the hearing, he testified

that Parente paid them in cash, once a week. He then testified that they were paid daily. Petitioner did not introduce any evidence of the number of hours that Claimants actually worked, the amounts that Claimants were paid or the duration of their employment. Parente did not testify.

DISCUSSION

Standard of Review and Burden of Proof

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 [1]). Pursuant to the Board's Rules of Procedure and Practice 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 under review is not valid or reasonable.

An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 142-2.6 provides, in pertinent 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) 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; net wages paid; and
> (9) student classification.
> "...
> "(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

§ 142-2.7 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 the employee 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 payroll records, DOL may issue an order to comply based on employee complaints only. 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 *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."

Anderson further opined that the 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.

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."

FINDINGS

The Board, having given due consideration to the pleadings, hearing testimony, documentary evidence and legal argument makes the following findings of fact and law.

Petitioner acknowledges that it had the burden of disproving the employee's claims for wages since it did not maintain required payroll records. It had the burden of proof before DOL in its investigation and it had the burden again before the Board.

Although Petitioner argues that DOL's investigation was inadequate and unduly credited Claimants' claims, DOL was required to put the burden on the employer to disprove the complaints, per Labor Law § 196-a. DOL's investigation involved interviewing the employer and the employees concerning the claims. Petitioner was given notice of the specific claims and an opportunity to be heard on those claims. Since Petitioner failed to keep the required records, it was up to it to come up with evidence rebutting the claims. Petitioner was given many opportunities by DOL to present evidence as to the hours worked or amounts paid to Claimants. Petitioner responded with inconsistent statements concerning whether Claimants were paid daily or weekly and by whom and with threats of contacting government authorities concerning the Claimants' immigration status. In his letter of May 22, 2005, Parente wrote that he employed a few day laborers for a few days. He later told the DOL investigator that he employed Claimants for about one and one-half weeks and paid them in cash. The affidavit of Petitioner's foreman Matute stated that the Claimants only worked one to two days per week, never for eight hours and were fully paid and made no mention that the Claimants only worked for a couple of weeks Petitioner questioned how Claimants could live for two months without wages and claimed that the winter weather prevented them from working eight hours per day. However, it failed to provide any proof of what the actual weather was on the days in question or of how many hours Claimants actually worked. Petitioner cannot shift its burden to DOL with arguments, conjecture or incomplete, general and conclusory testimony.

Once the order was appealed to the Board, Petitioner had the burden of disproving the amount sought in the employee claims. *(See Angello v. National Finance Corp., supra.)* Petitioner maintains that it met its burden with the testimony of Matute and that the burden then shifted to DOL. However, given the inconsistencies and lack of specificity in Matute's testimony, as detailed above, we do not find it credible or sufficient to disprove the complaints of the employees or to meet Petitioner's burden of proving that the Order was invalid or unreasonable. (*See, e.g. Matter of the Petition of Michael Fischer [d/b/a Mefco Builders] v. Commissioner of Labor,* PR 06-099 [April 25, 2008]; *Matter of the Petition of Zodiac Kids, Inc. v. commissioner of Labor,* PR 06-074 [March 28, 2008]).

We find that the Order for payment of unpaid wages is not invalid or unreasonable. .

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Orders assess civil penalties in the amount of 25% of the wages ordered to be paid. 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, 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. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars . . . 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."

The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of the civil penalty amount in the Order is 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 § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 6, dated August 11, 2006, is affirmed; and

2. The Petition for review is hereby denied.

Anne P. Stevason, Chairman

Susan Sullivan-Bisceglia, 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
September 24, 2008