

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:	
	:	
Mohammed Aldeen and Island Farm Meat Corp.	:	
(T/A Al-Noor Live Poultry),	:	
	:	
Petitioners,	:	
	:	DOCKET NO. PR 07-093
To Review Under Section 101 of the Labor Law:	:	
An Order to Comply with Article 19 and an Order to	:	<u>RESOLUTION OF DECISION</u>
Comply under Article 6 of the Labor Law, dated	:	
October 19, 2007,	:	
	:	
- against -	:	
	:	
THE COMMISSIONER OF LABOR,	:	
	:	
Respondent.	:	

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APPEARANCES

Odofile and Associates, P.C., Anthony C. Odofile, of Counsel, for Petitioner.

Maria L. Colavito, Counsel to the New York State Department of Labor, Jeffrey G. Shapiro, of Counsel, for Respondent.

WITNESSES

Mohammed Aldeen, Ismael Ahmed, L.C., A.B., and A.M. for Petitioner; Rashid Hart, Labor Standards Investigator, and Paul Kalka, Senior Labor Standards Investigator, for Respondent.

WHEREAS:

Petitioners Mohammed Aldeen and Island Farm Meat Corp. (T/A Al-Noor Live Poultry) (collectively Petitioner) filed a Petition with the Industrial Board of Appeals (Board) on December 14, 2007 seeking review of two Orders issued against it by the Respondent Commissioner of Labor (Commissioner) on October 19, 2007.

The first Order (Wage Order) directs Petitioner to comply with Article 19 of the Labor Law by payment to the Commissioner of unpaid wages and overtime owed five employees in the amount of \$63,741.00, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of \$5,214.35, and a civil penalty in the amount of \$63,741.00, for a total amount due of \$132,696.00. The second Order (Penalty Order) directs Petitioner to

comply with Article 6 of the Labor Law by payment to the Commissioner of penalties totaling \$2,000, for failure to provide wage statements to its employees in violation of Labor Law §195(3) (\$1,000), and failure to maintain payroll records for its employees in violation of Labor Law § 195(4) (\$1,000).

The Commissioner's Answer was filed on January 8, 2008. By decision dated March 28, 2008, the Board granted the Commissioner's motion to dismiss certain allegations of the Petition as a matter of law. *See In the Matter of the Petition of Mohammed Aldeen, et al*, Interim Decision, PR 07-093 (March 26, 2008).

Upon notice to the parties, a hearing was held on May 14 and 20, 2008 in the Board's New York City office before J. Christopher Meagher, Member and the Board's designated Hearing Officer in this appeal, Anne P. Stevason, Chairman, and Devin A. Rice, Assistant Counsel.

The Petition alleges that the Orders are invalid and unreasonable because: (1) Petitioner paid the correct minimum wage and overtime to its employees throughout the five year period covered by the Orders; (2) the Commissioner's findings are contrary to the evidence DOL's investigators received when they interviewed Petitioner's employees; (3) the Commissioner erred in failing to consider Petitioner's records showing that it paid its employees above minimum wage; (4) the Commissioner's calculation of wages owed applied the wrong commencement dates for some employees, exaggerated the hours worked by each employee, and applied the wrong statute of limitations, and; (5) the Commissioner incorrectly used the minimum wage that came into effect in 2007 in calculating the wages owed from 2002 to 2007, when the applicable minimum wage in those years was substantially less.

The Answer denies the material allegations of the Petition and asserts that the Commissioner's investigation, calculation of wages owed, and Orders were valid and reasonable in all respects.

SUMMARY OF EVIDENCE

Petitioner operates a business located in Brooklyn, New York that slaughters and sells live poultry and livestock. The Commissioner's Orders cover five employees, L.C., A.B., A.M., V.G.M., and J.S., who worked for Petitioner during portions of the period from April, 2002 to May, 2007.

Each of the employees worked six days per week weighing, slaughtering, or gutting poultry and livestock and cleaning the worksite. Petitioner Aldeen is the owner and manager of the business. His duties include hiring, firing, scheduling, and paying the employees. For all relevant purposes, Petitioner(s) are an employer within the meaning of the Labor Law.

In April, 2007, DOL initiated an investigation of Petitioner to insure that its employees were correctly paid minimum wage and overtime. At the conclusion of its investigation the Commissioner issued the Orders under review.

LSI Rashid Hart testified that he and LSI David An made an initial site inspection of Petitioner's operation on April 10, 2007. Hart reviewed general information with Petitioner Aldeen and requested payroll records required by the Labor Law. In a report summarizing the investigation, Hart stated that Petitioner said that he never kept time records for his employees since the inception of the company in the mid -1990's. Hart testified that Petitioner said that he needed to speak with the company accountant, Mr. Kodjo, concerning the demand for records and that Hart should directly contact the accountant for any records. Hart then issued Petitioner a notice of revisit for April 17, 2007, with a demand that any payroll records be produced at that time.

Hart testified that he made repeated efforts to reach Petitioner's accountant between the initial and revisit but to no avail. On April 17, 2007, Hart and another investigator revisited Petitioner's establishment. No payroll records were produced. Hart testified that he told Petitioner Aldeen that it was imperative for DOL to reach the accountant and review any records Petitioner had before DOL began its own computations of potential wages owed the employees. In the report summarizing the investigation, Hart stated that Petitioner told the investigators that no records were available but that the accountant would fax them banking information and a summary of the employees' pay and schedules.

Hart testified that after the revisit he reached the accountant by phone. Hart testified that Mr. Kodjo stated in the phone conversation that no time records existed because Petitioner was a small business, knew when the employees came and went, and there was no need for documentation of actual hours worked. Hart requested that the accountant confirm this information in writing. Kodjo replied that he would "fax something" to Hart. On April 19, 2007, Hart received a faxed reply from Petitioner's accountant confirming that no payroll records existed. It stated that the employees were paid weekly and "mostly in cash" and that "[t]here are no time cards or time required".

Because of the absence of payroll records from Petitioner, DOL determined that any potential underpayments due Petitioner's employees would be calculated based on the interviews obtained from those employees. Interviews were conducted in person and by phone.

Hart testified that LSI An interviewed some of Petitioner's employees at the initial inspection on April 10, 2007 but was unable to complete the interviews because of the conditions in the work area. An made a record of the interview he completed with J.S. and recorded it in DOL's investigative file. On another occasion, Hart visited the establishment after inspecting another poultry market and attempted to interview A.B. and another employee. However, the employees didn't want to talk with him outside the worksite "because they might see me". On both visits, after having been unsuccessful in completing interviews at the worksite, the investigators gave the employees their business cards and requested that they follow up by contacting DOL to discuss their wages and hours and report any complaints they might have.

Investigator Hart testified that employees A.B., A.M., V.G.M., and L.C. contacted DOL in follow up and left messages with phone numbers for the investigators to return their calls. In each instance, Hart called the number provided by the employee, confirmed the identity of the employee he spoke with, and identified himself as an investigator from DOL.

Hart then conducted an interview with the employee concerning his respective wages and hours in Petitioner's employment.¹ Before asking questions, Hart told each employee that he was from a governmental agency; that the questions he would be asking had nothing to do with the employee's immigration status; that the employee should be truthful and not make up anything if he didn't know the answer; that the information provided would be used to insure that the employee was lawfully paid minimum wage and overtime under the Labor Law; and that if the employee had any complaints about being underpaid he should so inform the investigator. Hart contemporaneously recorded the employee's answers in an interview report ("Interview Sheet") made by DOL for such purpose. The reports were made on April 18, May 17, and May 29, 2007. Hart then entered the reports in the investigative file.

In the interview sheets, Hart recorded the period of time the employees said they had worked for Petitioner ("Starting Date"), the hours worked each day ("Scheduled Hours"), and the wages they were paid for such work ("Salary"). Hart recorded that the employees worked six days per week; each had a thirty minute and in one case a twenty minute lunch break; worked hours ranging from 57 to 63 hours per week; and were paid in cash with no cash portion statements provided.²

Investigator Hart testified that the information provided by the employees was entered into a computer program that calculated the amounts of underpayment for each employee. The program began with the amount of time worked each day by each employee, less the described lunch period. The daily hours were multiplied by the number of days each week to give the number of total weekly hours. Also entered into the program was the amount of the employee's claimed weekly wages. The program then considered the statutory minimum wage as of the week in question and the spread of hours provided by 12 NYCRR § 142-2.4, calculated the minimum that the employee was entitled to receive, and compared it to both the amount actually paid and the "derived" or "regular" rate of pay as calculated pursuant to 12 NYCRR § 142-2.16. The program then subtracted the amount the employee actually received from the amount he should have received to arrive at the underpayment owed each employee.

The computer audit covered the period April 7, 2002 to May 26, 2007 and applied the correct statutory minimum wage for each year throughout this period.³ Petitioner's allegation in the Petition that the Commissioner misapplied the 2007 minimum wage to earlier years is in error.

After being issued a Notice of Labor Law violation, Petitioner requested and DOL scheduled a Compliance Conference for July 12, 2007 where Petitioner could be heard. The

¹ Each of the employees is Spanish speaking. LSI Hart is bilingual in Spanish and English and conducted the interviews in Spanish.

² For instance, L.C.'s starting date was November, 2006; his hours 8:00 A.M. to 6:00 P.M., with Tuesdays off; his lunch break 12 to 12:30 PM; and his salary \$520 per week, in cash with no cash portion statement. A.B.'s starting date was October, 2006; his hours 8:00 AM to 7:00 PM, with Wednesdays off; his lunch break 12 to 12:30 PM; and his salary \$400 salary per week, in cash with no cash portion statement. A.M.'s starting date was "3 years"; his hours 9 AM to 7 PM (but "[s]ometimes the owner makes me stay until 8 pm but my pay remains the same"), with Mondays off; his lunch break 1 to 1:20 PM; and his salary \$280 per week in 2004, \$380 in 2005, \$400 in 2006, and \$420 in 2007, in cash with no cash portion statement.

³ See Labor Law § 652 and 12 NYCRR § 142 (miscellaneous industries) (\$5.15 for 4/7/02-13/31/04; \$6.00 for 1/1/05-12/31/05; \$6.75 for 1/1/06-12/31/06; and \$7.15 for 1/1/07-5/26/07).

notice specifically advised Petitioner to bring all payroll records for the past twelve months and any other material it wished to be considered.

Investigators Hart and Kalka testified that Petitioner failed to produce any payroll records at the conference. Hart testified that he demonstrated the basis for DOL's determination of wage underpayments to Petitioner and his accountant. Hart explained that the employees' regular rates of pay were determined by dividing their total weekly earnings by their total weekly hours. When this was done, it showed that the employees were not correctly paid overtime for work over forty hours, and in some cases not paid minimum wage. The investigators testified that Petitioner and his accountant disputed DOL's method of calculation, insisted that Petitioner had paid its employees correctly regardless of the law, and that it would continue to do so. Petitioner and the accountant said that it owed nothing to its employees.

The Commissioner issued Petitioner the two Orders under review on October 19, 2007. The Wage Order assessed Petitioner a 100% penalty totaling \$63, 740.65. The Penalty Order assessed Petitioner a \$1,000 penalty for each record violation, for a total of \$2,000.00. Investigator Kalka testified that the 100% wage penalty was based on the large underpayments due each of the five employees; the length of time Petitioner had been in business; and Petitioner's lack of cooperation throughout the investigation, including its recalcitrant behavior at the Compliance Conference. The record violation penalties were based on Petitioner's failure to produce any wage statements or payroll records whatsoever.

At the hearing, Petitioner submitted the testimony of Petitioner Aldeen, its present accountant, Ismael Ahmed, and employees L.C. and A.B. in its direct case to substantiate the claims in its Petition that Petitioner paid its employees minimum wage and the Commissioner ignored its records and misrepresented what its employees told the investigators. Petitioner submitted the testimony of employee A.M as rebuttal to the Commissioner's witnesses.

Petitioner Aldeen testified that he paid his employees a little more than the minimum wage throughout the period covered by the Commissioner's audit. Petitioner conceded that the five employees covered by the Wage Order were paid in cash and that he never made wage deductions. To substantiate his claims of payment, Petitioner, for the first time, produced copies of alleged employee time sheets and payroll journals for the period May 3, 2004 through April 7, 2007. The originals were not produced.

Petitioner testified that he "always" made daily and weekly time sheets for his employees from 2000 forward from blank time sheets his accountant had given him. At the end of each week he would deliver the time sheets to Mr. Kodjo, whose office was only two blocks away. Kodjo would then make a payroll journal showing the weekly hours and pay of each employee. Petitioner and Kodjo both kept copies of these records. When asked why he didn't submit the records to the investigators when requested, Petitioner stated that he repeatedly tried to contact Mr. Kodjo for advice on what records to turn over but couldn't find him. Petitioner suggested that the accountant had "disappeared". Petitioner then hired a new accountant, Mr. Ahmed, and gave him a copy of the records compiled under Kodjo's tenure. According to Petitioner, he and Ahmed tried to show the records to the investigators at the Compliance Conference but Hart refused to look at them, telling Petitioner "It's not [my] job". Petitioner conceded that his alleged time sheets do not reflect the actual daily and

weekly hours the employees worked but only their scheduled hours. On their face the time sheets are uniform every week for three years. Each employee is scheduled for six days per week, a daily two hour break, forty hours regular time, eight hours overtime, for a total of forty-eight hours each week.

Mr. Ahmed testified that he was retained by Petitioner in July, 2007 and began to prepare weekly payroll records from that point forward. When asked on cross examination whether he attended the conference with Petitioner and DOL's investigators on July 12, 2007, Mr. Ahmed stated that the one time he and Petitioner met with DOL was after October, 2007 to review the records he had prepared. It is undisputed that DOL initiated a second investigation of Petitioner for the period after June 1, 2007; interviewed several of Petitioner's employees at the worksite and met with Petitioner and his new accountant in November and December, 2007; and found Petitioner's recordkeeping in substantial compliance from June, 2007 forward. DOL did not issue Petitioner a violation or order for the time period covered by the second investigation.

L.C. testified in May, 2008, a year after the time period covered by DOL's audit.⁴ He was still employed by Petitioner at the time of his testimony. As to L.C.'s wages and hours, Petitioner's attorney first asked L.C. when he "started working" for Petitioner and how much he was paid weekly. L.C. replied "September, 2005" and "\$520". This starting date is more than a year before the time frame of the audit. Petitioner's attorney next asked, without reference to specific time frame, how many days "did you work". L.C. responded "I worked" six days a week. L.C. was next asked how many hours a week "did you work, or do you work" and replied "I work" from forty-eight to fifty hours, tops.

On cross examination, DOL's attorney also asked L.C. about the general hours that he worked, or would work, without reference to specific time frame. L.C. first made reference to his hours when he referred to a paper he signed that contained "more or less how many hours we had earned". Counsel asked L.C. what he meant and L.C. replied "Well, we had enough work. We began working seven in the morning" and at two "I would have" two hours off. Counsel asked L.C. when "did you get" this break and L.C. replied "every day I have" two hours off. Counsel further asked what time "would you take" or "did you take" the two hours and L.C. said "two to four." Counsel inquired "did you" go back to work at 4:00 and L.C. replied that "[s]ometimes I would work" two more hours and leave. L.C. added that "sometimes" he would work more than the last two hours, when there was a lot of work, and then would start later the next day. "Sometimes" it was less.

L.C. testified on direct examination that he spoke with a DOL investigator only once. When asked by the investigator how many hours he worked, L.C. said he told him that "whenever I work extra hours, I take those hours on the following week." Otherwise, the investigator "didn't exactly ask [me] how many hours I worked". On cross examination, L.C. testified that he spoke with investigators twice, but not on the phone. When asked to recall the date of when he spoke with the investigator, L.C. could not recall and said that he has "a very bad memory."

⁴ The Wage Order and audit, based on Hart's interview report of L.C., found an underpayment to L.C. of \$2,093 for the period 11/19/06 to 5/26/07. The audit was based on a weekly salary of \$520; and hours of 8 AM to 6 PM, with a half hour break, six days per week.

Aside from the work schedules Petitioner submitted for its employees, Petitioner submitted no other evidence concerning L.C.'s actual hours worked than L.C.'s testimony set forth above. These purported schedules show that on each day of his employment L.C. was supposed to work from 8:00 AM to 12:00 PM, with a two hour break, and from 2:00 PM to 6:00 PM, in contradiction to the hours L.C. testified to above.

A.B. also testified in May, 2008, a year after the period of time covered by the audit.⁵ A.B. was still employed by Petitioner at the time of his testimony. On direct examination, A.B. could not specifically recall how long he had been employed, stating that because he was having problems with his wife during the period in question, "I don't remember very well". Directing A.B. to his wages and hours, Petitioner's attorney next asked "how much were you paid" when [you] "started working". A.B. replied "\$420". Counsel then asked in sequence, without reference to a specific time frame, what A.B. "did do" for Petitioner, how many days a week he "did" work, and what time he "did" start in the morning. A.B. replied that he opened chickens, worked six days, and started at 8:00 AM. Counsel then asked A.B. in sequence, again without specific time reference, when "do" you normally end each day, "do" you take breaks, how long "does" your break last, and "is" there a specific time you "take" your break each day. A.B. answered that his workday ends "at five" and the break was "two hours". As to the time of the break, A.B. testified "I have lunch from one to two, and I take an additional hour to rest". Finally, A.B. was asked "Now, how many hours do you usually work each week?" A.B. replied "[f]orty-eight hours".

On cross examination, DOL's attorney asked A.B. to confirm his testimony on direct examination concerning his hours, also without reference to specific time frame. A.B. was asked to confirm that he said he "start[s]" or "would start" at 8:00 AM and "leave" at 5:00 PM. A.B. answered "Yes." Counsel next asked A.B. to confirm that he "took" a two hour break every day. A.B. replied that he was "still taking" a two-hour break. A.B. was next asked to confirm that he "work[s]" a forty-eight hour week, six days a week. A.B. did so and replied "Yes, I'm working" forty-eight hours a week. Finally, counsel asked A.B. to confirm that he "work[s]" eight to five every one of the six days. A.B. replied "I work" until five, but "sometimes" only until four depending on how busy the business is.

A. B. testified on direct examination that he spoke with a DOL investigator named David. A.B. did not specify when this conversation took place. When this investigator asked how much the owner paid him, A.B. said he told him \$420.⁶ When this investigator asked how many hours A.B. worked, A.B. said he told him that he would begin at "seven" and go to "five" because he varied his workday due to the problems he was having. A.B. explained this was because "sometimes" he would leave at noontime, but be paid by the boss for the whole day, and on the following days pay him back and work an additional hour. On cross examination, however, A.B. said that he told DOL investigators that he worked from "eight" to "seven" on the occasions he was having problems. Elsewhere on cross examination, A.B.

⁵ The Wage Order and audit, based on Hart's interview report of A.B., found an underpayment to A.B. of \$4,210.75 for the period 10/15/06 to 4/14/07. The audit was based on a weekly salary of \$400; and hours of 8 AM to 7 PM, with a half hour break, six days per week.

⁶ DOL submitted an interview sheet concerning an interview of A.B. during its second investigation, recorded by investigator Jorge Alvarez on 11/20/06, listing A.B.'s weekly salary as \$420.

again linked the problems he had to his recollection, stating that “I can’t remember very well, because at that time, I was not very well in my head”.⁷

Aside from the work schedules submitted by Petitioner for its employees, Petitioner submitted no other evidence of A.B.’s actual work hours other than A.B.’s testimony set forth above. These purported schedules show that A.B. was supposed to work a forty-two hour week, not forty-eight hours, and every day from 9:00 AM to 1:00 PM and 3:00 PM to 7:00 PM, in contradiction to A.B.’s testimony above.

A.M. also testified in May, 2008, a year after the time period covered by DOL’s audit.⁸ He was still employed by Petitioner at the time of his testimony. On direct examination A.M. testified that he worked for Petitioner for four years. A.M. further testified that he told DOL investigators that he started work at 9:00, stopped at 7:00, and would leave at 2:00 in the afternoon to go and have lunch and be back two hours later. In response to questions from the Board, however, A.M. testified that his actual lunch was twenty-five minutes and that during the rest of the break he returned to work or waited in the store for customers to arrive. As such, this time is at the sufferance of the employer and considered employment under the Labor Law.⁹

On direct examination Petitioner’s attorney asked A.M. how much he was paid weekly when he “started working”. A.M. replied “\$400”. A.M. was asked how much he was making a week in “2006”. A.M. replied “\$440”. A.M. was further asked, without specific reference to time frame, how much was he was getting paid “last year.” A.M. replied “\$440”.

Aside from the alleged payroll journals submitted by Petitioner for its employees, Petitioner submitted no other evidence of A.M.’s actual wages other than A.M.’s testimony set forth above. These records show a progression of A.M.’s weekly salaries at variance with the progression A.M. testified to above.

Finally, LSI Hart conceded to one error in DOL’s computer audit regarding the wages owed employee A.M. for the week ending April 14, 2007. Three hours should be subtracted from the wages owed this employee. While A.M. told investigator Hart that his normal workweek since he began working for Petitioner was 9:00 A.M. to 7:00 P.M., meaning 60 hours, he stated that his hours the “last week” were 57 hours.

⁷ A.B. gave other vague and confusing testimony about speaking to DOL investigators. On direct examination A.B. said he spoke with investigators only twice, both times at the worksite, and the second time (also not specified to the time frame of either investigation) with “other people” than David. On cross examination, however, A.B. admitted that he spoke with an investigator once on the phone. He didn’t remember when, but it was with David. On cross examination, A.B. said he hadn’t spoken to anybody else but David.

⁸ The Wage Order and audit, based on Hart’s interview of A.M., found an underpayment to A.M. of \$15,912.20 for the period 4/04/04 to 4/14/07. The audit was based on a weekly salary progression of \$280 (2004), \$380 (2005), \$400 (2006), and \$420 (2007); and hours of 9 AM to 7 PM, with a twenty minute break, six days per week. Since the break was less than 30 minutes it was considered time worked. A.M. was awarded “spread of hours” pay for work in excess of 10 hours per day.

⁹ Labor Law § 2(7) defines “[e]mployed” as permitted or suffered to work. *See also Reich v Southern New England Tel. Co.*, 121 F3d 58 (2 CA 1997) (meal break during which worker performs activities predominantly for benefit of employer compensable).

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 [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).

Petitioner argues that for the Board to uphold the determination of the Commissioner, i.e. the two Orders under review, the burden is on the Commissioner to prove by substantial evidence that its employees were not paid their proper wages under the Labor Law. Petitioner relies on *Matter of Tap Electrical Contracting Service, Inc. v Hartnett*, 76 NY2d 164, 170-71 (1990) and *Matter of Sierra Telecom Services, Inc. v Hartnett*, 174 AD2d 279 (3d Dept. 1992) as authority for this standard. These cases are inapposite to Petitioner’s appeal to the Board, however. They set forth the Article 78 standard of judicial review of an agency adjudication after hearing, not the burden of proof in the hearing before the Board itself.

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 calculation of wages owed its employees in the Wage Order and the penalties imposed in the Penalty Order are invalid or unreasonable

B. 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. See 12 NYCRR § 142-2.2.

The term “regular rate” shall mean the amount that the employee is regularly paid for each hour of work. When an employee is paid on a salary or on any basis other than an hourly rate, the regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee’s total earnings. See 12 NYCRR § 142-2.18.

C. Requirement to Pay Spread of Hours

The above Order provides that employees are entitled to an additional hour’s pay at the basic minimum hourly wage rate for any day in which the “spread of hours” -- defined as the interval between the beginning and end of an employee’s workday, inclusive of meal breaks --

exceeds 10 hours. *See* 12 NYCRR §§ 142.20 and 2.4.

D. 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:

“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 requires the following information to be maintained for a period of six years. 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.

Labor Law § 195(3) and 12 NYCRR § 142-2.7 also require employers to provide wage statements to employees with every payment of wages. Labor Law §195(3) requires employers to:

“furnish each employee with a statement with every payment of wages, listing gross wages, deductions, and net wages, and upon the request of an employee furnish an explanation of how such wages were computed.”

C. Burden of Proof in the Absence of Adequate Employer Records

An employer's failure to keep adequate records does not bar employees from making wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complainant'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).

Where DOL does not have employee complaints, the same standard still applies. The Commissioner may use "the best available evidence" to determine if wages are due when the employer fails to maintain records required by the Labor Law. In *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3rd Dept. 1989), the Appellate Division upheld the Commissioner's determination of wages due some forty-three employees from a variety of evidence, including complaints from two of the employees, lists of employees, and interviews of others. The Court held, "[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." (emphasis added) The court based its decision, in part, on the remedial nature of the prevailing wage statute and "its public purpose of protecting workmen." *Id.* at 821. The same standard applies under federal law where the Department of Labor brings action in a representative capacity to collect unpaid wages on behalf of classes of employees. *Martin v Selker Bros. Inc.*, 949 F2d 1286, 1296-99 (3 CA 1991).

In *Anderson v Mt. Clemens 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."

The legislative intent of the Unpaid Wage Prohibition Act, which includes Labor Law § 196-a, was set forth in Laws of 1997, Ch. 605, and states, in pertinent part: "The legislature finds . . . that too often the working people of our state do not receive the full wages they have

earned, and that some workers are never paid at all for their labor. . . [W]e must ensure that working people are paid what they earn.”

The remedial purpose of the Unpaid Wage Prohibition Act mirrors that of the prevailing wage statute and federal law. We therefore follow the precedent set in *Mid-Hudson Pam Corp.* that where an employer fails to keep records, DOL may use the best available evidence to calculate back wages due and “to shift the burden of negating the reasonableness of the Commissioner’s calculations to the employer. . . In such a situation the amount and extent of underpayment is a matter of just and reasonable inference” *Mid-Hudson Pam Corp., supra* at 821.

When combined with the burden of proof that the employer normally bears in a petition before the Board to show that the Order of the Commissioner is invalid or unreasonable, the burden of disproving the amounts sought by the Commissioner in its Order, whether based on employee claims or not, and using the best available evidence, rests with the employer. To hold otherwise would reward the employer’s disregard of its statutory obligation to maintain employee records.

FINDINGS

Petitioner Violated Article 19 of the Labor Law by Failing to Pay Minimum Wage and Overtime

With the modifications that follow, we affirm the Commissioner’s Wage Order directing payment to the Commissioner of unpaid wages and overtime owed the five employees covered by the Order. Having failed to produce credible 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, conclusory, and unreliable to satisfy such burden.

1. Wages due J.S. and V.G.M.

Petitioner submitted the testimony of Petitioner Aldeen and its alleged payroll records to support its contentions that it correctly paid its employees minimum wage and overtime and that the Commissioner ignored such records. Petitioner submitted no other evidence challenging the determination of wages owed employees J. S. and V.G.M.

We find Petitioner Aldeen’s testimony to be overly general, conclusory, and not credible. We also find that Petitioner’s payroll records are false. First, Petitioner did not rebut the numerous admissions by Petitioner and his former accountant to DOL during its investigation that no payroll records existed. Second, Petitioner repeatedly refused to produce records to DOL when requested. His explanation for not doing so is not credible. Petitioner’s alleged time records include the weeks from April 10 to May 31, 2007 when Petitioner testified he was personally delivering the time sheets to his accountant each week to make payroll journals from. The accountant could therefore not have been unavailable for advice as

Petitioner testified. Third, Petitioner's assertion that he and his new accountant, Mr. Ahmed, tried to show records to DOL but were ignored is also not credible. We credit the investigators' testimony that Petitioner failed to produce any payroll records at the Compliance Conference. Petitioner's new accountant also failed to corroborate this assertion. Lastly, there are no records for the first two years of the audit from April, 2002 to May, 2004. The incompleteness, uniformity of hours, no correlation to actual hours worked, and numerous discrepancies on the face of the records further demonstrate that they are not authentic records of actual hours worked and wages paid.

Petitioner argues that the Order is unreasonable because it is based on unreliable hearsay. Specifically, it disputes LSI Hart's credibility and the probative value of his telephone interviews. However, we find that investigator Hart's testimony concerning the investigation and the statements he recorded was clear, consistent, and credible. In the absence of employer records, DOL may make reasonable inferences and "is permitted to calculate back wages due to employees by using the best available evidence". *In the Matter of Mid-Hudson Pam Corp.*, *supra* at 821. The interviews of J.S. and V.G.M. were consistent with the interviews of the other employees, were the best available evidence, and created a reasonable inference as to the amount of back wages due to these two employees. This evidence was never rebutted.

We therefore find that Petitioner failed to meet its burden to prove that the Order was unreasonable or invalid regarding the wages due J.S. and V.G.M.

2. Wages due L.C. and A.B.

In *Anderson v Mt. Clemens Pottery Co.*, *supra*, the Supreme Court set forth the burden shifting applicable when an employer fails to maintain required records of actual wages and hours. When an employer has not kept such records, an employee suing for lost wages may carry his burden by submitting "sufficient evidence from which violations of the [FLSA] and the amount of an award may be reasonably inferred." *Id.* at 687. The burden then shifts to the employer to come forward with evidence "of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-88. If the employer fails to produce such evidence, the court may then award damages to the employee, "even though the result may be approximate." *Id.* at 688.

The Court in *Mt. Clemens* further defined the nature of evidence the employer must produce to establish the "precise" amount of work performed *or* to "negative the reasonableness" of the inference drawn from the employee's evidence. In finding that employees were entitled to compensation for preliminary activities after arriving at their places of work, the Court rejected the trial court's refusal to award such compensation -- not because it was not compensable work -- but because the amount of time spent doing these activities had not been proven by the employees with any degree of reliability or accuracy. The Court held that employees cannot be denied recovery on such basis. "Unless the employer can provide *accurate estimates* [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time." *Id.* at 693. (emphasis added) *See also Brock v Seto*, 790 F2d 1446, 1448-49 (9 CA 1986) (quoting *Mt. Clemens*, at 693) (unless employer provides "*accurate estimates*" of hours worked, District

Court permitted to approximate award based on reasonable inferences from the employees' testimony). (emphasis added)

Unless the employer produces sufficient evidence that accurately estimates the hours of its employees, it necessarily has not negated the approximate estimation of such hours reasonably inferred from the employees' evidence. It was thus Petitioner's burden in this case to submit sufficient proof so as to provide an *accurate* estimate of the hours worked by L.C. and A.B. for the specific periods of their respective audits by the Commissioner. It failed to do so. The testimony of both L.C. and A.B. was overly general and non-specific to the respective time periods of the Commissioner's audit; was flawed by both employees' admitted poor recollections; and was contradicted by Petitioner's proffered work schedules and payroll journals for the relevant time periods.¹⁰ As such, Petitioner did not provide a reliably *accurate* estimate of hours and wages from their vague and contradictory testimony.

L.C., for instance, testified that he started working for Petitioner in September, 2005, a full year before the Commissioner's audit covering the period November 19, 2006 to May 26, 2007. He was still employed when he testified in May, 2008, a full year after the relevant period. L.C.'s testified about the general schedule of hours that he worked when he started for Petitioner, that he does work, or that he would work at some vague time past or present. It is impossible from this testimony to determine whether the witness was referencing the first year of his employment before the audit, the last year after the audit, or when. Such testimony is simply too nebulous to provide a reliably accurate estimate of hours worked during the six month period covered by the Commissioner's calculation. L.C.'s vague testimony that he "sometimes" worked the last two hours of the day, but not consistently, makes any degree of accuracy problematic. And the witness' admission that he has "a bad memory" for the period in question makes an estimate from his testimony suspect. Finally, Petitioner proffered a schedule of L.C.'s hours for the period of the audit that is at variance with that testified to by its witness. This contradiction is held against Petitioner's proof on the issue.

A.B. also testified in May, 2008, a full year after the time period of his audit from October 15, 2006 to April 14, 2007. He was still employed by Petitioner. A.B. testified about the salary he was paid when he started, and without reference to specific time frame, about the general hours that he does work and is working. Like L.C., it is impossible to determine from this vague testimony what time frame the witness was referencing. The majority of A.B.'s testimony suggests the present. Petitioner did not submit any wage statements or payroll records reliably establishing what A.B.'s salary was during the time period of the audit. A.B.'s testimony is simply too nebulous to support an accurate estimate of A.B.'s hours worked, or salary paid, during the six month period of the audit and thereby cannot overcome the presumption favoring the Commissioner's calculation. This witness' admission that he does not "remember very well" and was "not very well in my head" for the period in question also makes any estimate of his wages or hours for the period unreliable. Finally, Petitioner proffered a schedule of hours for A.B. that is inconsistent with that testified to by its witness. Any estimate of hours for the period of the audit is thereby suspect.

¹⁰ The Board has previously held that employer testimony of the general hours at a worksite was too incomplete, general, and conclusory to establish the specific hours worked by the complainant and thereby overcome the presumption favoring the Commissioner's calculation. *Matter of Michael Fischer (d/b/a MefcoBbuilders)*, PR 06-099 at pp. 3-4 (April 25, 2008). Testimony of a job foreman of his hours that was inconsistent with proffered payroll records also undermined the petitioner's proof.

Finally, Petitioner claimed in its Petition that the Commissioner misrepresented what these employees told her investigators and exaggerated their hours. Both L.C. and A.B. gave vague and confusing testimony of what they told DOL investigators concerning their work schedules. These claims confuse Petitioner's burden of proof, however. Petitioner does not meet its burden through indirect means by attacking the Commissioner's investigation. *See Angello v National Finance Corp., supra*, at 853 (assertions that Commissioner's order was not based on "credible proof" does not shift burden from employer with inadequate records). In the absence of contemporaneous payroll records for its employees, it was Petitioner's burden to submit sufficient affirmative evidence to negate the Commissioner's determination of wages owed. The testimony of these two witnesses was simply too general, non-specific in time, inconsistent, and flawed by unreliable recollection regarding their specific dates of employment, salaries, and hours during the period covered by the Commissioner's audit 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 audit approximations based on the prior investigative statements of these employees, is deemed valid and reasonable. *See Mid-Hudson Pam Corp. v Hartnett, supra*.

3. Wages owed A.M.

A.M.'s testimony concerning his hours is consistent with the Commissioner's calculation. A.M. testified that he worked for Petitioner for four years. A.M. further testified that he worked from 9:00 A.M. to 2:00 P.M., had a two hour break, and then 4:00 P.M. to 7:00 P.M. However, A.M. then clarified his testimony to concede that his lunch break was actually twenty-five minutes. For the rest of the two hour break, A.M. either worked, if the store was busy, or waited to work.

DOL's interview of A. M. indicated that he worked from 9:00 A.M. to 7:00 P.M., with a lunch break of 1:00 p.m. to 1:20 p.m. Both the interview and A.M.'s testimony indicate that he worked sixty hours per week, i.e. ten hours per day, six days per week. Where an employee's lunch break is less than thirty minutes, DOL considers the period as time worked.¹¹ Since A.M. was either working or waiting to work during the rest of that two hour "break", this time is at the sufferance of the employer and considered employment under the Labor Law.¹²

We do not credit Petitioner's general evidence of salaries for A.M. higher than the wage levels used in the audit. Petitioner's proffered payroll journals show a progression of wages at complete variance with that testified to by A.M. Petitioner submitted no wage statements or payroll records in compliance with the Labor Law to support A.M.'s bare testimony on this issue. It is insufficient to overcome the presumption favoring the Commissioner's calculation.

The Order also awards payment of "spread of hours" for A. M. However, A. M. worked ten hours per day. For an employee to receive "spread of hours" pay, 12 NYCRR §§

¹¹ See Labor Law § 162 (2) (every person "shall" be allotted a noon day meal break of at least thirty minutes).

¹² Labor Law § 2(7) defines "[e]mployed" as permitted or suffered to work. *See Reich v Southern New England Tel. Co.*, 121 F3d 58 (2 CA 1997) (meal break during which worker performs activities predominantly for benefit of employer compensable).

142.20 and 2.4 provide that the employee's total hours , inclusive of meal breaks, "exceed[s]" ten hours per day.

Finally, the calculation of wages owed A. M. should be reduced by three hours for the week ending April 14, 2007.

The Order is therefore affirmed with regard to the unpaid wages due to A. M. However, the amount due should be modified to deduct "spread of hours" pay and reduced by three hours for the week ending April 14, 2007.

4. Statute of Limitations and Statutory Minimum Wage

Petitioner's remaining challenges to the Wage Order are also baseless. The Order directs payment of back wages for the period April, 2002 to May, 23, 2007. It is not barred by any statute of limitations. *See 238 Food Corp.*, PR 05-068 (April 23, 2008) (Commissioner's administrative order for six years' back wages not barred by statute of limitations governing legal actions). The Order is also based on the correct statutory minimum wage for each year. Petitioner's claim that the Commissioner misapplied the 2007 statutory rate to earlier years is in error.

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."

The Wage Order assessed a civil penalty, in the amount of \$63,740.65, or 100 % of the wages due. Petitioner argues that the penalty must be vacated because any violation it

committed was not “willful”; it had no prior violations of the Labor Law, and; it demonstrated good faith by promptly coming into compliance with wage and recordkeeping requirements thereafter.

We find that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty set forth in the Order are proper and reasonable in all respects.

First, the penalty was not imposed for a “willful” violation since such a finding mandates (i.e. the order “shall direct”) payment of a 200 % penalty for willful or egregious violations. The Order here imposed a 100% penalty under the discretionary criteria of the statute.

Second, while Petitioner had no prior violations of the statute, investigator Kalka credibly testified that the penalty was appropriate because of the length of time Petitioner had been in business; the gravity of the wage underpayments totaling over \$63,000, and; most importantly, Petitioner’s lack of cooperation in the investigation, demonstrated by its failure to produce any records whatsoever and its recalcitrant behavior at the Compliance Conference. We find such determination to be a reasonable application of the penalty criteria of the statute. Indeed, Petitioner’s submission of false payroll records at the hearing illustrates its bad faith towards paying its employees the wages due them for the period in question.

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.”

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.

Petitioner Violated Article 6 of the Labor Law by Failing to Provide Wage Statements to its Employees and Failing to Maintain Payroll Records

Petitioner produced no wage statements for its employees required by Labor Law § 195(3) for the five year period covered by the Commissioner’s Orders. Petitioner Aldeen conceded at hearing that he never made deductions for the employees that are to be listed in such statements. The Penalty Order’s finding that Petitioner violated Article 6 by failing to provide such statements and the \$1,000 fine imposed for such violation is therefore valid and reasonable in all respects.

Petitioner failed to submit time and payroll records required by Labor Law §§ 195(4) and 661 and 12 NYCRR § 142-2.6 to the Commissioner at anytime throughout DOL’s investigation. We reject Petitioner Aldeen’s assertions that he maintained these records and

attempted to submit them to the investigators at the Compliance Conference. Petitioner's payroll records produced for the first time at hearing are not authentic records of actual hours worked and wages paid. Accordingly, the Commissioner's finding in the Penalty Order that Petitioner violated Article 6 by failing to maintain payroll records and the \$1,000 fine imposed for such violation is valid and reasonable in all respects.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

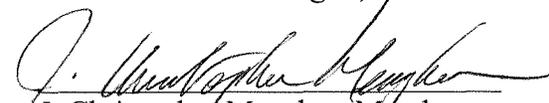
1. The Order to Comply with Article 19 of the Labor Law, dated October 19, 2007, is modified insofar as to deduct the spread of hours pay awarded to employee A..M. and to reduce the wages owed A.M. by three hours for the week ending April 14, 2007, and in all other respects is affirmed;
2. Such Order is remanded to the Commissioner to enter an Amended Order consistent with this decision;
3. The Order to Comply with Article 6 of the Labor Law, dated October 19, 2007, is affirmed in all other respects;
4. The Petition be and the same hereby is, denied.



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.