

interest at 16% and a civil penalty of \$7,200.00 for a total amount due of \$25,450.52. Petitioner alleges *that the employee* in question was paid all wages due to him except for \$1,800.00, which it admits is due and owing.

The order under Labor Law article 19 (penalty order) under review finds that Petitioner failed to keep and/or furnish required payroll records for each employee and assesses a civil penalty of \$500.00. At hearing, Petitioner admitted to this violation.

SUMMARY OF EVIDENCE

Complainant filed a claim with DOL against Petitioner, an import business, alleging that it failed to pay him his wages at the rate of \$600 per week from October 1, 2005 through March 23, 2006. The claim totaled \$14,400.00. Petitioner alleges that Complainant worked only through the end of February 2006, paid him with checks in which the payee was left blank pursuant to Complainant's request, and that only \$1,800.00 in unpaid wages is outstanding. It is undisputed that Petitioner failed to maintain legally required payroll records.

Petitioner Hakman Choi (Choi) testified that he was the general manager of the company. He further testified that after receiving two checks in September 2005, Complainant asked Choi to pay him with checks that did not include a payee since Complainant was having difficulty cashing checks due to problems showing identification. Petitioner introduced a check register which Choi maintained which contained notations which Choi said indicated what the detached check was for. Choi testified that the check register indicated that Complainant was paid 13 checks between October 7, 2005 and January 20, 2006. Although copies of the cancelled checks indicated "Juan Alberquerque" or "Cash" as payee, Choi stated that when he paid Complainant with the checks, the payee's name had been left blank. Choi also identified a deposit slip showing that \$1,300.00 was deposited into Complainant's bank account. Choi also stated that Complainant stopped working at the end of February 2006 because the business was having financial problems and that the business closed in June 2006. Choi admitted that Complainant was due wages in the amount of \$1,800.00 for three weeks worked in January and February 2006.

Juan Alberquerque testified on behalf of Petitioner that he worked for Petitioner and that he received checks from Complainant that were blank and which Alberquerque would cash for Complainant. The checks were made payable to "Juan Alberquerque." Copies of cancelled checks were introduced which indicated that Alberquerque also received checks made out to "Alberquerque, Juan" on the same dates as the blank checks. Petitioner produced a statement signed by Alberquerque stating that Alberquerque cashed checks for Complainant dated 10/7/05, 10/28/05, 11/8/05, 11/15/05, 11/18/05, and 12/2/05, each for \$600.00 and a check dated 11/25/05 for \$550.00. Alberquerque testified that the statement was prepared by Choi but that he signed it. He also stated that the handwritten addition of the 11/25/05 check for \$550.00 was not on the original statement that he signed.

Complainant testified that he started working for Petitioner in August 2005 and was not paid any wages from October 1, 2005 through March 23, 2006 except for \$300 in cash. He stated that he did not have identification problems and never asked Petitioner for blank checks.

During the time period in question he had a bank account where he could deposit his checks. However, there was a co-worker who did have identification problems. Complainant stated that he did receive one blank check for \$1,800, after he stopped working for Petitioner, which he asked a current worker to cash for him. However, the check could not be cashed due to insufficient funds in the bank. He admitted that \$1,300 was deposited into his account by Petitioner but testified that it was reimbursement for a loan to pay a phone bill and not payment for wages. Complainant requested his wages numerous times and was assured that money would be forthcoming.

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;
 - (9) net wages paid; and
 - (10) student classification.
- " . . .

“(d) Employers...shall make such records...available upon request of the commissioner at the place of employment.”

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees *and the amount of wages paid to each of them* and to provide its employees with a wage statement every time the employee is paid. This recordkeeping is required by law and 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. Nat'l Fin. Corp.*, 1 AD3d 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 asserting that the claims and therefore, the order, were overstated. In its decision on the petition, the Board reduced some of the claims. On appeal, the court held that the Board erred in reducing the amount of wages owed 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.” *Angello v. Nat'l Finance*, 1 AD3d 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 arguments makes the following findings.

Petitioner had the burden of proving that Complainant was paid the wages claimed in the claim filed with DOL. The Board finds the testimony of Juan Alberquerque that he cashed pay checks for Complainant and then gave Complainant the money to be credible. Alberquerque is no longer associated with Petitioner and testified in a straightforward manner. Although Alberquerque’s statement lists eight checks, he testified that the statement was prepared by Choi and that check #607 for \$550 was added after he signed the statement. In addition, check #529 was for \$400 and the check register indicated that it was for samples. Check #585 is listed on Petitioner’s recap as being payable to Hurricane Beauty and not Alberquerque. Therefore, based on the testimony of Alberquerque, we credit Petitioner with the payment of 5 checks for \$600 each or \$3,000 to Complainant during the period in question.

The Board finds that there were issues concerning the credibility of both Choi and Complainant. Since Petitioner has the burden of proving that Complainant was paid due to the fact that no required payroll records were kept, we find Choi’s testimony that checks made payable to “Cash” with no indication that they were negotiated by or paid to Complainant, other than notations in the check register, insufficient to meet its burden. The list of checks included checks for samples and a check made out to Hurricane Beauty which was inconsistent with Choi’s testimony that these were all pay checks for Complainant. Therefore, we do not credit these amounts as payments of unpaid wages. However, the deposit of \$1,300 into Complainant’s account was admitted by Complainant. We find Complainant’s testimony that this amount paid in March 2006 was in fact reimbursement for a loan to pay a telephone bill to be incredible given the fact, according to Complainant, Petitioner owed Complainant over \$10,000 at that time. In addition, Complainant’s demeanor while testifying, in looking down and not making eye contact, along with his testimony that he did receive one blank check which someone else cashed for him, did not lend credence to this statement. Therefore, we credit \$1,300 to Petitioner.

We also find that Petitioner failed to meet its burden of proving that Complainant stopped working at the end of February rather than March 23, 2006. Choi’s testimony in this regard was not definitive and in fact, he testified that the business did not close until June 2006.

Therefore, we modify the Order demanding payment of \$14,400.00 in wages and reduce that amount to *reflect* payment of \$3,000 for the checks negotiated by Albuquerque, \$1,300 for the deposit into Complainant's account in March 2006 and \$300 in cash which Complainant initially admitted to being paid. Accordingly, the unpaid wages due to Complainant equal \$9,800.00.

CIVIL PENALTIES FOR FAILURE TO PAY WAGES

The Order assesses civil penalties in the amount of 50% 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

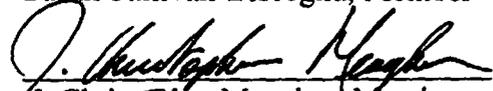
Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date 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."

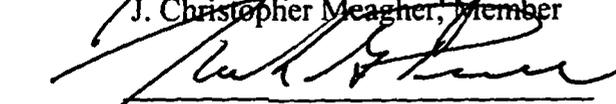
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 6, dated November 23, 2007 is modified to reflect a reduction to \$9,800 in wages due, with the amount of interest and penalties due modified to reflect that figure; and
2. The Order to Comply under Article 19, dated November 23, 2007 is affirmed; and
3. The Petition for review is hereby denied.


Anne P. Stevason, Chairman

Absent
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
January 28, 2009.