

party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

The Petitioners filed a timely post-hearing brief; however, counsel to the Commissioner of Labor (Commissioner) sent a letter to the Board, copied to the Petitioners' attorney, dated the last business day before the Commissioner's brief was due but received after, requesting a 30 day adjournment in order to "issue [] Amended Orders to Comply and make arguments thereon." The Petitioners objected to this request, and by letter dated December 7, 2009, the Board denied the Commissioner's request for an extension of time to file a brief and advising that because the record was closed, it was not possible to present additional evidence. The Petitioners' attorney advised the Board by letter dated December 16, 2009 that the Commissioner nonetheless issued Amended Orders to Comply in this matter on December 11, 2009.

The Order to Comply with Article 19 (Wage Order) and the Order to Comply under Article 19 (Penalty Order) under review were issued by the Respondent Commissioner on November 6, 2008 against Petitioners Samuel Parada, Sr. and Superior Car Wash & Accessories, Inc. T/A Samuel's Car Wash. The Wage Order directs compliance with Article 19 and payment to the Commissioner for wages due and owing to 14 named claimants in the amount of \$71,150.39 for the time period from February 26, 2002 through March 10, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of \$7,516.60, and assesses a civil penalty in the amount of \$71,150.00, for a total amount due of \$149,816.98. The Penalty Order finds the Petitioners violated Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records, and directs payment of a civil penalty in the amount of \$5,000.00.

SUMMARY OF EVIDENCE

Superior Car Wash & Accessories, Inc. is a car wash located in Brooklyn, New York that trades as Samuel's Car Wash. Petitioner Samuel Parada, Sr. owns Samuel's Car Wash along with Lucy Parada, his wife, and Samuel Parada, Jr., his son. Samuel's Car Wash provides car washing services and oil changes.

Samuel Parada, Jr. testified that he is the manager of Samuel's Car Wash. His duties include preparing the payroll and ensuring that the facility is stocked with the necessary chemicals and oil. He further testified that his mother, Lucy Parada, "does the bills" and that his father, Samuel Parada, Sr. is not involved in the business.

Parada, Jr. currently maintains employee time and payroll records in a system called Acroprint. During the time period covered by the Orders, Parada, Jr. used punch cards to track employee hours worked, and transferred the information from the punch cards to an Excel spreadsheet. Parada, Jr. testified that he threw out the punch cards once he transferred the information on them to the spreadsheet. No punch cards were produced to the Department of Labor (DOL).

When asked about the time records for the period from January 7 to January 13, 2008 that Parada, Jr. had produced to DOL and moved into evidence, he did not remember which hourly wage rate his employees were paid, testifying that it was "\$7.15 or 6 and change." He conceded that the records entered into evidence do not show the employees' pay rates. Parada, Jr. explained that the pay rate used was the "going rate at the time" multiplied by the hours worked. He further testified that pay day is every Monday, the employees are paid in cash, and overtime is paid. Parada, Jr. also testified that he does the payroll by "see[ing] the hours, do[ing] the math, [and] pay[ing] the workers." Parada, Jr. stated that he makes no deductions from this calculation. He testified that he did not know whether Samuel's Car Wash gave its employees W-2 tax forms.

Raoul Mejia testified that he has worked at Samuel's Car Wash since 2002. When he first started he was paid \$5.25 an hour, and worked on average 50 hours per week from 2002 to 2008. When the weather is bad, the car wash closes and the car wash workers are sent home, but the oil technicians stay and work. Mejia testified that he does not recall the exact hours that he worked during any specific week nor the amount of wages he was paid. Mejia testified that prior to DOL's investigation he punched in on a time clock each day that he worked. He was paid in cash from 2002 to 2008 and never received a wage statement during that time period.

He currently works Monday to Saturday and is paid \$7.25 an hour. He receives a one hour lunch break each day. Mejia testified that if he works more than 40 hours, he is paid overtime. Mejia further testified that Samuel's Car Wash has given him a W-2 form.

Mejia testified that Parada, Jr. told him to testify and that prior to the hearing Parada, Jr. went over the past two months time records with him, but not records from 2002 to 2008.

Melvin Martinez has worked for Samuel's Car Wash as an oil technician since the beginning of 2007. He currently works Monday, Tuesday, Wednesday, Friday and Saturday from 7:00 a.m. to 8:00 p.m. and is paid \$7.25 an hour plus overtime. He is paid in cash. Martinez further testified that he used to work half days seven days per week, but does not remember the hours he worked during specific weeks. Martinez also testified that he is sent home early when there is bad weather or business is slow, but he does not remember any specific days that the car wash closed.

Martinez testified that Parada Jr. told him one month before the hearing date that he would testify, but he did not go over any records with him. Mejia told him he had to testify at the hearing. Samuel's Car Wash will pay Martinez for the time he spends at the hearing.

Guillermo Perez testified that as of the date of the hearing, he had worked for Samuel's Car Wash as a car dryer for three years. He works six days per week from 7:00 a.m. to 8:00 p.m. for \$7.25 an hour. Three years ago, he worked seven days a week and changed to half days at some point. Perez testified that he cannot remember the number of hours he worked on specific days. He testified both that he is always paid overtime and that he is not always paid overtime.

Perez testified that in 2007 he was given pay stubs that indicated his hours and pay rate, and that he is given a list of his hours worked. Mejia told him three weeks prior to the

hearing that he would testify. Mejia drove him to the hearing. Parada, Jr. was not in the same car.

Miguel Martinez started working at Samuel's Car Wash on May 11, 2007. He is paid \$7.25 an hour and has always been paid \$7.25 an hour. He works Monday, Tuesday, Thursday, Friday, Saturday and Sunday from 7:00 a.m. to 7:00 p.m. cleaning and drying cars. He worked half days six days per week prior to the DOL investigation.

Martinez testified that he does not work if it is raining or snowing and that if business is slow he can go home early, but did not recall any specific days that he did not work because of bad weather or that he was allowed to leave early. Martinez further testified that the car wash closes on New Year's Day, Thanksgiving, Christmas Eve, and Christmas, and that it closes early the day before Thanksgiving.

Franklin Norberto Bautista Acosta testified that he had been a car washer for Samuel's Car Wash for three years prior to the hearing, and that for the past six months he has worked Monday, Tuesday, Thursday, Friday, Saturday and Sunday from 7:00 a.m. to 8:00 p.m. He used to work half days and his day off was Tuesday. Acosta further testified that he does not work when the weather is bad, and leaves early when work is slow.

Acosta testified that he receives pay stubs from Samuel's Car Wash in the name "Franklin Acosta" but that he told the DOL investigators when they interviewed him that his name is "Franklin Bautista."

Edgar Ixcaquic has worked for Samuel's Car Wash as a car washer and dryer since the beginning of 2005. He currently works Monday to Saturday from 7:00 a.m. to 8:00 p.m. and is paid \$7.25 an hour. Ixcaquic testified that there is no work when the weather is bad and that he sometimes goes home early. He further testified that when he started working at the car wash, he worked 8 or 9 hours per day, but he does not remember the number of hours he worked in any specific week. Ixcaquic stated that he is always paid overtime.

Labor Standards Investigator (LSI) Enrique Anico-Taveras testified that as part of a DOL targeted investigative sweep of car washes, he visited Samuel's Car Wash on March 2, 2008 along with several other DOL investigators. LSI Anico-Taveras spoke to six employees, but only two of them consented to be interviewed. The other employees refused to be interviewed stating that "I cannot be interviewed because I fear losing my job."

LSI Anico-Taveras testified that he asked the employees he was able to interview for information such as:

"first name, last name, date of birth, for how long they've worked with the employer, the day that they started with the employer, the day they started their employment, how much do they make per hour, if they make overtime, if they are paid overtime, if they pay in cash, what day do they get paid, et cetera, et cetera . . . and those kinds of questions helps us to get information to make a clear determination if the employer is in compliance with the law."

Three DOL "Car Wash Employee Interview sheets" from March 2, 2008 are in evidence. The first is for Antonio Blanca and states that the employee had worked for Samuel's Car Wash for four months prior to the interview, earns \$4.50 an hour, and works 10 ½ hours per day, seven days a week. The second interview sheet is for an employee whose name is illegible but appears to be Clemente Perez Hernandez, who stated that he works 7 1/2 hours per day, five days per week and is paid \$7.50 an hour. There is no starting date of employment listed for this employee. The third interview form is for Tony Jackson, who stated that as of the date he was interviewed, he had worked for Samuel's Car Wash for one year. Jackson's interview sheet appears to indicate that he works Monday through Wednesday from 8:00 a.m. to 4:00 p.m., with a half-hour lunch break each day, at a pay rate of \$9.00 an hour. Tony Jackson stated that he does not work overtime.

LSI Anico-Taveras testified that on his March 2, 2008 visit to Samuel's Car Wash, nobody showed him any records. LSI Anico-Taveras returned to Samuel's Car Wash on April 18, 2008 and spoke to Samuel Parada Sr., Lucy Parada, and Samuel Parada, Jr. Samuel Parada Sr. represented himself as the owner and president of the company, and Samuel Parada, Jr. represented himself as the general manager. LSI Anico-Taveras was given payroll records at that time, but no time cards were provided. LSI Anico-Taveras testified that when he asked for the time cards, "they indicated to me that they don't have the necessity of keeping their records because their employees are paid in cash."

LSI Anico-Taveras testified that because the employer did not have any reliable payroll records, he computed the wages due and owing based on an average weekly underpayment that was derived from the information that was available to DOL from the employee interview sheets. The underpayments were computed for a six year time period from the date of the Order because employers are required to maintain payroll records for six years. LSI Anico-Taveras further testified that he determined each employee was owed wages for the entire six year time period, even though some of the employees who provided statements specifically stated that they had worked at Samuel's Car Wash for less than six years.

Senior Labor Standards Investigator (SLSI) Vincent Hammond testified that he supervised the investigation of Samuel's Car Wash and was present at the on-site visits. SLSI Hammond testified that he recommended imposing a 100% civil penalty against the Petitioners because the payroll records were inadequate and because the employer was estimated to be a large employer.

SLSI Hammond testified that DOL investigators visited the car wash on three occasions, and observed six to eight employees working at the site each time.

SLSI Hammond further testified that he did not believe that the employees who testified at hearing worked at the car wash for six years, but did believe that they worked there for a particular amount of time. He stated that "the employees were not forthcoming as to their exact start dates, and the employer did not show us payroll records to show us the start date."

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rules 65.39 (12 NYCRR 65.39).

The Petitioners have the burden to show that the Orders are invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30).

The Commissioner issued the Orders under review following an investigative sweep of car washes that found violations of the Minimum Wage Act, Article 19 of the Labor Law. These violations were determined by the Commissioner based on interviews with three employees, and a review of payroll records produced by the Petitioners for the time period from March 4, 2002 through April 6, 2008, but without the supporting punch cards.

Article 19 requires every employer to pay each of its covered employees the minimum wage in effect at the time payment is due (*see* Labor Law § 652). The applicable minimum wage in effect in New York during the time period covered by the Wage Order was \$5.15 an hour from February 26, 2002 through December 31, 2004; \$6.00 an hour from January 1, 2005 through December 31, 2005; \$6.75 an hour from January 1, 2006 through December 31, 2006; and \$7.15 an hour from January 1, 2007 to March 10, 2008, the last date covered by the Wage Order (12 NYCRR 142-2.1). In addition, an employer must pay every non-residential covered employee overtime at a wage rate of 1 1/2 times the employee's regular rate of pay for all hour worked in excess of 40 in a given work week (12 NYCRR 142-2.2). When an employee is paid on a basis other than an hourly rate, "the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total earnings" (12 NYCRR 142-2.16).

Article 19 additionally requires employers to maintain payroll records and to keep those records available for inspection by the Commissioner at any reasonable time (Labor Law § 661). DOL regulations at 12 NYCRR 142-2.6 provide that weekly payroll records must be maintained and preserved for six years and shall show, *inter alia*, the name and address; social security number; wage rate; number of hours worked daily and weekly; amount of gross wages; deductions from gross wages; allowances if any claimed as part of minimum wages; and net wages paid for each employee.

It is undisputed that the payroll records maintained by the Petitioners are not sufficient. The records produced do not show each employee's wage rate, although the days and hours worked and "total pay" are included. Parada, Jr. admitted that he could not recall which hourly rates he used during specific time periods and further admitted that there is no way to determine the hourly rates without "doing the math."

We have reviewed the records, and determined that the records are not credible. For example, the records show that during the payroll period ending January 13, 2008, Santiago Felipe worked 38 hours and is listed under "regular hours" as earning \$271.70 which in fact is the then in effect minimum wage of \$7.15 an hour multiplied by 38 hours. However, Felipe is also listed under "total pay" for that week as receiving \$275.00. No explanation is provided as to why an employee who supposedly earned minimum wage was actually paid more than he earned which gives the payroll records the appearance of having been

manufactured after DOL's investigation to show that minimum wage was paid. In the same pay period, Soto Angel is listed as having worked 60 hours. Therefore, we would expect that his "total pay" would have been \$500.50 which is 40 hours x \$7.15 an hour or \$286 plus overtime at a rate of \$10.725 for an additional \$214.50. However, Angel's "total" pay is inexplicably \$505.00.

It is also incredible that these records show the employees working the exact same hours every day in contrast to the Petitioners' current records that show employees working different hours each day. Additionally, the Petitioners provided no time cards to support the records they produced, and asserted that they had thrown the time cards away. We give no credit to what appear to us as manufactured payroll records and sustain the Penalty Order. We would be remiss not to note that manufacturing payroll records for submission to a state agency to be used in an administrative investigation or proceeding may be a criminal offense (*see e.g.* Penal Law §§ 175.10, 175.30).

In the absence of adequate payroll records, the Commissioner determined the amount of underpayments by deriving an average or mean underpayment of \$5,082.17 for each of 14 named employees from February 26, 2002 to March 10, 2008, including the six employee witnesses who testified in this proceeding and the three employees whom DOL investigators interviewed. We have repeatedly held that where an employer fails to maintain required records, DOL may use the best available evidence to calculate back wages due to the employer's employees, which in this case was the estimate made by DOL (*see e.g. Matter of Abdul Wahid et al.*, PR 08-005 [November 17, 2009]; *Matter of Ricardo J. Ahrens*, PR 07-062 [August 27, 2009]; *Matter of 238 Food Corp.*, PR 05-068 [April 25, 2008]; *see also* Labor Law § 196-a). The Petitioners had the burden to prove that the Commissioner's method of assessing the Petitioners' liability in this case was invalid or unreasonable.

Six employees testified on behalf of the Petitioners. Raoul Mejia testified that he worked an average of 50 hours per week from 2002 to 2008, and that in 2002 he was paid \$5.25 an hour. He conceded that he could not recall the precise number of hours he worked or the wages he was paid in any specific week. The balance of Mejia's testimony concerned whether he was paid overtime, the hours he worked, and his pay rate at the time of the hearing, and not for the time period covered by the Wage Order. We find that Raoul Mejia worked 50 hours per week at \$5.25 an hour for the entire time period covered by the Wage Order. Accordingly, he is owed \$20.75 per week for the time period from February 26, 2002 to December 31, 2004; \$67.50 per week for the time period from January 1 2005 to December 31, 2005; \$108.75 per week for the time period from January 1, 2006 to December 31, 2006; and \$130.75 per week for the time period from January 1, 2007 to March 10, 2008.

Melvin Martinez testified that he started working at Samuel's Car Wash at the beginning of 2007 and used to work half days, seven days a week. He provided no testimony concerning the actual number or hours he worked per week during the relevant time period or the wages he was paid. The Petitioners, therefore, failed to meet their burden to show that the Commissioner's determination of hours worked by Martinez and the wages owed to him was unreasonable. The Petitioners did, however, prove that Melvin Martinez did not work for the Petitioners from February 26, 2002 to December 31, 2006. Therefore, we find that Melvin Martinez worked from January 2, 2007 to March 10, 2008, for the

average number of hours per week determined by the Commissioner and is owed the average underpayment set forth in the Wage Order for that time period.

Guillermo Perez testified that he started working at Samuel's Car Wash three years prior to the hearing. At first he worked seven days per week which was reduced to half days at some point. Perez conceded that he could not recall the specific hours he worked on any particular day. Perez further testified concerning his then current hours and wages, but such testimony is not relevant to the time period covered by the Wage Order. The Petitioners did not produce sufficient testimony regarding Perez's hours of work and wages paid during the time period covered by the Wage Order to establish that the calculations made by the Commissioner are unreasonable, but did prove that Perez was not employed by Samuel's Car Wash from February 26, 2002 to September 29, 2006. Accordingly, we find that Guillermo Perez worked from September 30, 2006 to March 10, 2008 for the average number of hours per week determined by the Commissioner and is owed the average underpayment set forth in the Wage Order for that time period.

Miguel Martinez testified that he started working at Samuel's Car Wash on May 11, 2007. Martinez did not provide any specific testimony concerning the hours he worked or wages he was paid during the time period covered by the Wage Order. Therefore, the Petitioners failed to prove that the Commissioner's determination as to the hours worked and wages owed to Martinez was unreasonable. The Petitioners did, however, prove that Martinez did not work at Samuel's Car Wash from February 26, 2002 to May 10, 2007. We find, therefore, that Miguel Martinez worked from May 11, 2007 to March 10, 2008 for the average number of hours per week determined by the Commissioner and is owed the average underpayment set forth in the Wage Order for the time period that he worked.

Franklin Norberto Bautista Acosta testified that he started working at Samuel's Car Wash three years prior to the hearing. Acosta testified that he worked six days a week but failed to give specific testimony regarding the number of hours he worked per day or the wages he was paid during the time period covered by the Wage Order. Accordingly, the Petitioners failed to prove that the Commissioner's determination as to the hours worked and wages owed to Acosta was unreasonable. The Petitioners did, however, prove that Martinez did not work at Samuel's Car Wash from February 26, 2002 to September 29, 2006. Therefore, we find that Acosta worked from September 30, 2006 to March 10, 2008 for the average number of hours per week determined by the Commissioner and is owed the average underpayment set forth in the Wage Order for the time period that he worked.

Edgar Ixcaquic testified that he started working at Samuel's Car Wash at the beginning of 2005. Ixcaquic testified that when he started, he worked 8 to 9 hours per day, and that he has always been paid overtime. Ixcaquic also testified that he could not remember the hours he worked during specific weeks. Ixcaquic did not testify concerning the wages he was paid or his hourly wage rate. We do not believe that Ixcaquic was paid overtime because there is no credible evidence that any other employee was paid overtime, and because Ixcaquic did not provide specific enough testimony regarding his wage rates for us to determine whether he was in fact paid overtime. We find, therefore, that Ixcaquic worked 9 hours per day for the average number of days per week determined by the Commissioner at the average wage rate determined by the Commissioner for the time period from January 2, 2005 to March 10, 2008

In addition to the six employees who testified, three other employees gave statements to DOL. Antonio Blanca told DOL he had worked for Samuel's Car Wash for four months prior to the interview, earned \$4.50 an hour, and worked 10 ½ hours per day, seven days a week. Clemente Perez Hernandez informed DOL that he worked 7 ½ hours per day, six days per week and was paid \$7.50 an hour. Hernandez did not provide DOL with the date he started working for the Petitioners. Tony Jackson told DOL that he had worked for Samuel's Car Wash for one year as of the date of the interview, that he worked Monday through Wednesday from 8:00 a.m. to 4:00 p.m., with a half-hour lunch break each day, at a pay rate of \$9.00 an hour, and that he did not work overtime.

Based on these interview sheets, which were not contradicted by the Petitioners, we find that Antonio Blanca worked 73 1/2 hours per week for \$4.50 an hour from November 10, 2007 to March 10, 2008 and is owed \$314.54 per week for that time period; and Clemente Perez Hernandez worked 45 hours per week at \$7.50 an hour from February 26, 2002 through March 10, 2008, and is owed \$18.75 per week for that time period. Tony Jackson is not owed wages since he did not work in excess of 40 hours a week and was paid more than the applicable minimum hourly wage rate for the duration of his employment.

The Petitioners produced no evidence concerning the five named employees covered by the Wage Order who did not testify or provide statements to DOL. Accordingly, the Commissioner's calculations with respect to those named employees are upheld.

Finally, there was credible testimony that Samuel's Car Wash is closed on New Year's Day, Thanksgiving Day, Christmas Eve, Christmas Day, and a half-day on the Wednesday before Thanksgiving.

Civil Penalty

The Wage Order assesses a 100% civil penalty. The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of a 100% civil penalty were 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 section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

THE AMENDED WAGE ORDER ISSUED DECEMBER 11, 2009 IS REVOKED

After the record was closed in this matter and the time for briefing had run, the Commissioner issued an Amended Wage Order against the same Petitioners over the Petitioners objections and without the Board's consent. The Amended Wage Order, although for the same amount of underpayments and penalties, appears to attempt to correct mistakes made by DOL concerning the time periods worked by several of the employees.

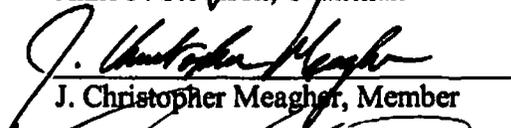
Allowing the Commissioner to issue an Amended Wage Order after the conclusion of the hearing to correct errors in the original Wage Order that came to light at hearing and that are detrimental to the Commissioner is unfair to the Petitioners who had no notice of the Amended Order at the time of the hearing and would need to start the appeal process over. Additionally, we do not believe that the Commissioner has any more right to issue Amended Orders after the conclusion of the hearing, than the Petitioners do to add a claim to their appeal that was not raised prior to closing the record. Indeed, “[c]onsiderations of judicial economy as well as fairness to the parties mandate, at some point, an end to litigation. Afterthoughts or after discoveries, however understandable and morally forgivable are generally not enough to create a right to litigate anew” (*Matter of Reilly v Reid*, 45 NY2d 24, 28 [1978]). The litigation here ended when the hearing was concluded, and we find that issuance of the Amended Wage Order was invalid.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

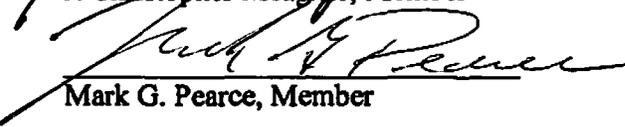
1. The Amended Wage Order issued on December 11, 2009 is revoked; and
2. The Commissioner is instructed to recalculate the wages due and owing based on the findings of the Board, and to issue an Amended Wage Order consistent with this decision; and
3. The Penalty Order is affirmed; and
4. The Petition for Review be, and the same hereby is, denied.



Anne P. Stevason, Chairman



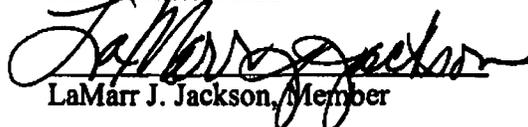
J. Christopher Meagher, Member



Mark G. Pearce, Member



Jean Garnet, Member



LaMarr J. Jackson, Member

Dated and signed in the Office of
the Industrial Board of Appeals,
at New York, New York, on
January 27, 2010.