STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
PERRY R. STUART AND LONG ISLAND LIMOUSINE SERVICE CORP.,	:	
Petitioners,	:	DOCKET NO. PR 14-301
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6, and an Order Under Article 19 of the Labor Law, all dated September 23, 2014,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Perry Stuart, petitioner pro se, and for Long Island Limousine Service Corp.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Petitioner Perry Stuart and Victor Perez, for petitioners.

Claimant Salvatore Iglio and Senior Labor Standards Investigator Jeremy Kuttruff, for respondent.

WHEREAS:

On November 24, 2014, petitioners Perry R. Stuart and Long Island Limousine Service Corp. filed a petition with the Industrial Board of Appeals (Board) seeking review of three orders issued by respondent Commissioner of Labor (Commissioner or DOL) on September 23, 2014. The Commissioner answered on March 5, 2015.

Upon notice to the parties, a hearing was held on June 26, 2015 in Hicksville, New York before Vilda Vera Mayuga, Chairperson of the Board and designated hearing officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order to comply with Article 6 of the Labor Law (wage order) directs payment of wages due and owing to claimant Salvatore Iglio in the amount of $200.00 for the period from June 14, 2013 to July 15, 2013, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $40.85; 25% liquidated damages in the amount of $50.00; and a 100% civil penalty in the amount of $200.00. The total amount due is $490.85.

The second order to comply with Article 6 of the Labor Law (supplemental wage order) directs payment of unpaid benefits or wage supplements due and owing to claimant in the amount of $600.00 for the period from June 14, 2013 to July 15, 2013, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $18.41; 25% liquidated damages in the amount of $150.00; and a 100% civil penalty in the amount of $600.00. The total amount due is $1,368.41.

The order under Article 19 of the Labor Law (penalty order) assesses a civil penalty in the amount of $500.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 for failure to keep and / or furnish true and accurate payroll records for each employee for the period from on or about June 14, 2013 through July 15, 2013.

The petition contends that the Commissioner's orders are unreasonable because (1) claimant did not work on the day for which he seeks wages and therefore no wages are due; (2) Long Island Limousine Service Corp.'s (company) benefits policy does not provide for paid holidays for mechanics and therefore no supplemental wage payment is due; and (3) in the absence of any liability under the Labor Law, the assessed civil penalties, interest, and liquidated damages are invalid.

SUMMARY OF EVIDENCE

Testimony of Petitioner Perry Stuart

Perry Stuart testified that he is the owner of Long Island Limousine Service Corp. Stuart interviewed and hired claimant Salvatore Iglio for a mechanic position as an hourly employee in June 2012. At the interview, Stuart discussed with claimant the possibility of becoming a salaried employee, but claimant was not inclined to accept the salary, instead preferring to be paid hourly. Stuart indicated that Victor Perez is the mechanics' supervisor and was responsible for any issues relating to the mechanics' daily work. During the course of claimant's employment with petitioners, claimant never spoke with Stuart about pay for days that he did not work.

Stuart testified that he provided DOL with a time card for the week ending June 16, 2013 that shows the time, date, and claimant's name, as written by one of the company's bookkeepers, who is responsible for keeping the timecards. Stuart wrote "didn't work" on Iglio's timecard because he had not worked that day or any days in June 2013. Stuart also provided DOL with a payroll card which includes claimant's name and his wage rate, weekly earnings, gross and net salary, social security number, and address. Stuart testified that employees were paid on Fridays, so if an employee worked on June 14th, which was a Friday, he would be paid for that day the following Friday.

At hearing, Stuart presented a written benefits policy that in relevant part, reads: "[N]o drivers or mechanics are entitled to holiday pay, sick pay, personal days or vacations without the prior written approval of management." During the claim period, Stuart provided paid holidays off to salaried employees only. As claimant was not salaried, Stuart testified he was not entitled to pay for any day not worked. Stuart did not provide each employee with a copy of the employee benefits policy, but testified that the policy is posted "at various places throughout our business." Stuart added that he shared the policy with DOL investigator Jeremy Kuttruff who wrote Stuart that the policy was not clear enough for DOL to consider it.

Testimony of Victor Perez

Victor Perez testified that he has worked for the company for 13 years and continues to work there as a supervisor overseeing the everyday work of the shop and mechanics. In this capacity, he is familiar with claimant who worked at the company "on and off" until he eventually "disappeared." Perez recalled that claimant did not report to work during the week ending June 16, 2013. Claimant never addressed to Perez any wages due to him and Perez does not handle questions of employee benefits; these are the responsibility of petitioner Stuart.

The company tracks employees' time on the job using a time-card system. The time clock is located in the company's office. All the time cards are lined up with each person's name on a card. Each day, a mechanic is responsible for punching-in and punching-out upon arriving at and leaving work, respectively. Perez noted: "if [a mechanic] doesn't punch-in with the time card, he's not there, he has to be punched-in." The company's bookkeeper is responsible for labeling and setting out time cards each Monday and collecting them at the end of the week. Perez identified the time card petitioner introduced into evidence as the standard time card used by the company's mechanics.

Perez acknowledged the company's employee benefits policy for mechanics and noted that it is posted by the time clock, the garage, the "parts room," and "a couple of other places." Perez first saw the policy approximately five or six years ago.

Testimony of Claimant Salvatore Iglio

Salvatore Iglio testified that he first met Stuart in June 2012 during his interview to become a mechanic at the company. Iglio's starting pay was $25.00 per hour with a potential to become salaried at a later date. Iglio never became a salaried employee. He explained that he "never had a problem with [being paid hourly]," because "whatever I worked I got paid for." Accordingly, he used a time clock to punch-in and out of work. Iglio had never seen the timecard in evidence dated June 16, 2013 but acknowledged that it was the type of timecard he had used while employed by petitioners. While looking at the timecard provided by petitioners, Iglio could not identify which day of the week should have indicated that he worked. He kept independent records in a note pad he kept with him to ensure he was paid properly but did not offer these notes during hearing. Perez supervised Iglio in his day-to-day work.

Iglio filed an October 13, 2013 claim for unpaid wages for one day of work on June 14, 2013, which was the only day in June 2013 that he worked for petitioners. Iglio could not recall how his employment with petitioners ended or why he checked that he was discharged on both his unpaid and supplemental wage claim forms, but testified that he stopped working for

petitioners due to tendonitis in his elbow, which prevented him from being able to perform his duties. Iglio testified that after a conversation with Perez, Iglio worked one eight-hour shift, for which he filled out a time card and was never paid. Iglio's wage claim form shows his last day at the company was June 14, 2013. It also shows he is owed for wages from the payroll week ending on June 22, 2013, which he testified is the date the check should have been issued.

Iglio testified that he filed a supplemental wage claim form seeking payment for three holidays: Thanksgiving and Christmas 2012 and New Year 2013.[1]

Testimony of Senior Labor Standards Investigator Jeremy Kuttruff

Jeremy Kuttruff testified that he investigated Iglio's claims against petitioners, although he never spoke to claimant and respondent's records do not reflect that anyone from DOL reached out at any point during the investigation. He explained that one claim was for unpaid wages for June 14, 2013, and one claim was for holiday pay for wages due for Thanksgiving and Christmas 2012 and New Year 2013.

In investigating the claim for unpaid wages, Kuttruff testified that he was unable to accept Stuart's statement and records reflecting the claimant did not work on June 14, 2013, because petitioners did not provide "conclusive evidence" that included daily and weekly hours worked by Iglio during the claim period. Kutturff did not explain what "conclusive evidence" petitioners would have had to produce in addition to the time card showing Iglio did not work on June 14, 2013.

In investigating the claim for supplemental wages, Kuttruff confirmed that he had sent a letter to petitioners stating that he could not accept petitioners' benefits policy because it had to be signed and dated by Iglio acknowledging its receipt. Kuttruff further testified that the supplemental wage order is for the period of June 14, 2013 to July 15, 2013, even though the order does not include these dates. When questioned about this discrepancy, Kuttruff explained that although benefits do not become due until 30 days have passed, "I certainly think that the period of this claim should include the dates of the specific holidays that the claimant stated that he's owed for."

SCOPE OF REVIEW AND BURDEN OF PROOF

An aggrieved party may petition the Board to review the validity and reasonableness of an order issued by the Commissioner (Labor Law § 101 [1]). A petition must state in what respects the orders on review are claimed to be invalid or unreasonable and any objections not raised in the petition shall be deemed waived (*id.* § 101 [2]).

The Labor Law provides that an order of the Commissioner is presumed valid (*id.* § 103 [1]). Should the Board find the order or any part thereof invalid or unreasonable, the Board shall revoke, amend, or modify the order (*id.* § 101 [3]).

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[1] We note that while claimant wrote Thanksgiving, Christmas, and New Year on his claim form for the period involved, he wrote "12/5/12" "12/25/12" and "1/1/13" under "date payments due and payable."

Petitioners bear the burden of proving every allegation in a proceeding (State Administrative Procedure Act § 306 [1]; 12 NYCRR 65.30; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]), and must prove that the challenged order is invalid or unreasonable by a preponderance of evidence (Labor Law § 101 [1]; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 11, 2011]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

We Revoke the Wage Order

The wage order finds petitioners owe claimant $200.00 in unpaid wages. Article 6 of the Labor Law requires that an employer pay wages to its employees (Labor Law § 191). Labor Law § 190 (1) defines "wages" as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." Article 6 also requires employers to maintain for six years certain records of the hours their employees worked and the wages they paid them (Labor Law § 195 [4]). The records must show for each employee, among other things, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, allowances claimed, if any, and money paid in cash (*id.*).

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820–21 [3d Dept 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2010]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employee's evidence (*Anderson v Mt. Clemens Pottery*, 328 US 680, 687–88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's credible evidence (*Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 20, 2014]).

Petitioners presented two pieces of documentary evidence to support their position that claimant did not work on the day for which he seeks wages: (1) claimant's time-card for the payroll week ending June 16, 2013; and (2) claimant's payroll card for the 2013 calendar year. With respect to the former, Stuart and Perez testified that the company's bookkeeper was responsible for producing and maintaining the company's time cards, a role in which neither witness participates. Stuart acknowledged that he wrote that claimant "[d]idn't work," on the time card, but this does little to establish the reliability of the underlying document. With respect

the latter, Stuart similarly failed to produce a witness to substantiate the record. Even if petitioners established a foundation for the payroll card, it does not contain the weekly hours worked, which Stuart acknowledged, nor does it contain the overtime pay rate or the number of overtime hours worked, if any, which are required by Labor Law § 196 (4). We find that petitioners have failed to produce payroll records required by the Labor Law.

Having failed to produce legally sufficient payroll records as required by Labor Law § 195 (4), DOL's calculation of wages must be credited unless petitioners meet their burden to negate the reasonableness of the Commissioner's inferences drawn from claimant's evidence (*see Anderson v. Mt. Clements Pottery Co.*, 328 US 680, 687 [1949]). In this case, petitioners met their burden.

Through testimonial evidence, petitioners contend that claimant did not report to work on July 14, 2013. Perez, who was the supervisor for the mechanics, worked directly with claimant and credibly testified that claimant worked for the company "on and off," eventually "disappeared," and did not report to work on the day claimed. Stuart credibly testified that petitioners used a time clock and required mechanics to clock-in and clock-out each day, and mechanics are paid according to whether they have done so, which is consistent with claimant's testimony in this respect. Stuart credibly testified that claimant did not clock-in or out for the day in question, which is supported by him writing that claimant "[d]idn't work" on claimant's timecard for the day in question. Perez also credibly testified that petitioners use a time clock, stating: "if [a mechanic] doesn't punch-in with the time card, he's not there." Perez further testified that claimant never spoke to him about wages owed to claimant.

The burden going forward thereby shifted to the Commissioner to submit sufficient evidence establishing that claimant worked the hours for which he seeks payment. Respondent's evidence consisted of the claimant's and investigator's testimony only. Investigator Kuttruff's testimony was limited to describing the investigative file that includes correspondence between petitioners and respondent in which petitioner Stuart states what he testified at hearing -- that claimant did not work on the date claimed. Claimant's testimony is limited to confirming what he wrote on the claim form, which is that he worked on June 14. Claimant also testified that he kept an independent record of when he worked but respondent failed to produce the notebook into evidence at hearing, which is the best available evidence of the hours he worked. In the absence of the best available evidence, respondent failed to rebut petitioners' credible evidence.

We revoke the wage order in its entirety.

We Revoke the Supplemental Wage Order

The supplemental wage order finds that petitioners owe claimant $600.00 in unpaid benefits or supplemental wages for holiday pay. New York does not require employers to provide holiday pay to employees. However, when an employer does have a paid leave policy, Article 6 of the Labor Law requires the employer to pay such agreed-upon "benefits or wage supplements" as part of wages (Labor Law §§ 190 [1], 198-c [2]) in accordance with the established terms of an agreement (Labor Law § 198-c; *Matter of Mills*, PR 14-104 at 11 [July 22, 2015]). Labor Law § 195 (5) further requires an employer to "notify his employees in writing or by publicly posting the employer's policy on . . . holidays." The Labor Law does not require that such policy be signed and dated by the employees. As with respect to other forms of wages, an employer's

failure to keep required records entitles the DOL to make just and reasonable inferences and use other evidence to establish an employee's entitlement (*see, e.g.*, *Matter of Marchionda v IBA*, 119 AD3d 1342, 1343 [4th Dept 2014]).

Petitioners contend that claimant was not entitled to unpaid benefits, including paid holidays. Petitioners' employee benefits policy states "no drivers or mechanics are entitled to holiday pay, . . . without the prior written approval of management." It is uncontested that claimant was hired as and worked as a mechanic. While petitioner Stuart admitted that he did not provide a written copy of the policy to employees, Perez testified that the policy was in force during the claim period and was posted in at least three locations throughout the company, including at the time clock where hourly employees punched in and out on a daily basis, which is supported by Stuart's testimony in this regard. Furthermore, Stuart testified that petitioners offered paid holidays only to salaried employees. Consistent with claimant's testimony, Stuart testified that claimant was an hourly employee who declined Stuart's suggestion that claimant could become salaried after he had worked at the company for a certain length of time. Accordingly, as an hourly employee, claimant would not be entitled to benefits under the terms of petitioners' benefits policy.

The burden having shifted, investigator Kuttruff testified that the claim period—June 14, 2013 to July 15, 2013—does not include Thanksgiving and Christmas 2012 and New Year 2013, the holidays for which claimant seeks compensation. We find the supplemental wage order to be invalid on its face.

We revoke the supplemental wage order in its entirety.

Penalty Order

The penalty order assesses a $500.00 civil penalty for violating Labor Law § 661 and 12 NYRCC 142-2.6 by failing to keep and / or furnish true and accurate payroll records for each employee from June 14, 2013 through July 15, 2013. Article 19 requires employers to maintain for six years certain records of the hours their employees worked and the wages they paid them (Labor Law § 661 and 12 NYCRR 142-2.6). The payroll requirements under Article 19 include those required under Article 6 (*comp.* Labor Law § 661, *and* 12 NYCRR 142-2.6, *with* Labor Law § 195 [4]). As discussed above, we find petitioners failed to maintain records required under Article 6, and therefore find that petitioners failed to maintain payroll records required under Article 19.

We affirm the penalty order.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage and supplemental wage orders are revoked in their entirety; and

2. The penalty order is affirmed; and

3. The petition for review is granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
October 26, 2016.