STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
WINSTON CASTILLO AND E-Z PARKING LOT CORP. (T/A E-Z PARKING & AUTO SALES),	:	
Petitioners,	:	DOCKET NO. PR 15-097
To Review Under Section 101 of the Labor Law: An Order to Comply With Article 6 the Labor Law, an Order to Comply With Article 19 of the Labor Law, and an Order Under Article 19 of the Labor Law, all dated February 2, 2015,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

The Law Office of Leo Yakubov, Esq. (Leo Yakubov of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Fredy H. Kaplan of counsel), for respondent.

WITNESSES

Winston Castillo, Juan Oviedo, Labor Standards Investigator Milton Vera, and Senior Labor Standards Investigator Favio Escudero, for petitioners.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on April 6, 2015, and seeks review of three orders issued by respondent Commissioner of Labor on February 2, 2015 against petitioners Winston Castillo and E-Z Parking Lot Corp. (T/A E-Z Parking & Auto Sales). Respondent moved on May 4, 2015 to dismiss the petition and subsequently withdrew her motion and filed an answer on November 19, 2015.

Upon notice to the parties a hearing was held in this matter on May 3, 2016, in New York, New York, before Devin A. Rice, Counsel to the Board, and the designated Hearing Officer in this proceeding, and on August 10, 2016, before Vilda V. Mayuga, Chairperson of the

Board. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and make statements relevant to the issues.

The order to comply with Article 19 of the Labor Law (minimum wage order) under review directs compliance with Article 19 and payment to respondent for unpaid minimum wages due and owing to claimant Juan Oviedo in the amount of $31,694.38 for the time period from September 5, 2009 to October 28, 2011, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $1,359.14, liquidated damages in the amount of $7,991.10, and assesses a civil penalty in the amount of $31,964.38, for a total amount due of $73,279.00.

The order to comply with Article 6 of the Labor Law (unpaid wages order) under review directs compliance with Article 6 and payment to respondent for unpaid wages due and owing to claimant Juan Oviedo in the amount of $350.00 for the time period from September 5, 2009 to October 28, 2011, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $181.96, liquidated damages in the amount of $87.50, and assesses a civil penalty in the amount of $350.00, for a total amount due of $969.46.

The order under Article 19 of the Labor Law (penalty order) assesses a $1,000.00 civil penalty against petitioners for violating Labor Law § 661 and 12 NYCRR § 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from on or about September 5, 2009 through October 28, 2011, and a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages from on or about September 5, 2009 through October 28, 2011, for a total due of $1,500.00.

The petition alleges in relevant part that the orders are invalid or unreasonable because petitioners did not employ Juan Oviedo or any other individuals during the relevant time period, the interest and liquidated damages imposed by the orders are unreasonable and unduly burdensome, the civil penalties are unwarranted, and petitioners operate a family business, have no employees, conduct business in good faith, and have never committed a Labor Law violation or failed to keep accurate records. For the reasons set forth below, we affirm the minimum wage and unpaid wages orders, except that the civil penalties are revoked, and we revoke the penalty order.

SUMMARY OF EVIDENCE

Claims and DOL's investigation

On October 31, 2011, Juan A. Oviedo filed a claim with the New York State Department of Labor (DOL) for unpaid minimum wages/overtime and for one week of unpaid wages. Labor Standards Investigator Milton Vera took Oviedo's claim by asking him the questions listed on the claim forms and recording his answers. The claim for unpaid minimum wages/overtime alleges that Oviedo worked from August 31, 2009 to October 27, 2011 as a parking attendant at E-Z Parking & Auto Sales in Bronx, New York, and that he worked 69 hours a week (Sunday to Friday from 7:00 a.m. to 7:00 p.m. with a 30 minute break each day) for a salary of $350.00. The claim for unpaid wages alleges he was not paid for 68 hours of work at E-Z Parking & Auto

Sales the week ending October 28, 2011. The claims allege Winston Castillo was the responsible person at the firm, the person who hired Oviedo, and the person who managed him. The claims further allege Oviedo stopped working at E-Z Parking & Auto Sales because he received a threatening phone call.

Vera testified that he personally met with Oviedo at DOL's offices in New York, New York, to take his claim, that he asked him the questions on the claim forms, wrote the answers down on the forms, explained the process, and submitted the claims to his supervisor for approval, who at the time was John Hopkins, and then to Albany to be processed. Vera further testified that he gave Oviedo a copy of the claim forms, but that he did not review Oviedo's answers with him, because "[i]t's not typical to review it . . . if he [has] a question, he will ask [it]." Vera recalled that Oviedo said he quit because he received threats, and that he did not receive his last week's wages because he refused to sign a letter from the employer stating that he had quit his job. Vera did not ask Oviedo who threatened him and Oviedo never said that the threats were made by Winston Castillo or anyone else from E-Z Parking.

Senior Labor Standards Investigator Favio Escudero testified that during the time period relevant to this matter he was a Labor Standards Investigator or "field investigator." He recalled that he received the E-Z Parking file "at the moment we had to calculate for underpayments" and explained that in calculating the wages owed to Oviedo he "used the intake form, the information [from] the claim form, the wages paid and hours worked and that's how we got the payments, due to a lack of records." Escudero assessed the liquidated damages as 25 %, which he testified was "just a standard across the board 25 percent we assess with all underpayments." He also testified that although he did not assess the civil penalties, the 100 % civil penalty assessed in this case was also "standard" and according to "procedure." The penalties for the non-wage violations can range from $0.00 to $1,000.00, and, according to Escudero, "In most cases we give a thousand dollars per violation. That's how we do it."

Escudero testified that correspondence requesting documents and notifying petitioners of Oviedo's claim was mailed to 72 Concourse Village West, Bronx, New York. None of the correspondence sent to that address was returned by the post office as undeliverable. Escudero also testified that Castillo requested a compliance conference. DOL's contact log shows a compliance conference was scheduled and Castillo failed to appear due to child care issues. A "conference summary record" indicates the conference was held without Castillo, that Oviedo was present and "reiterated" his claim, and that the hearing officer recommended the case be referred to an order to comply with the imposition of maximum interest and penalties.

Testimony of Juan Oviedo

Claimant Juan Oviedo testified that he was hired by petitioner Winston Castillo on August 31, 2009, to work as a parking attendant at E-Z Parking Lot Corporation. Oviedo met Castillo for the first time at the parking lot when he was looking for work. Castillo hired Oviedo as an overnight parking attendant to park cars and clean the parking lot and office, because, according to Oviedo, there had been a young guy working there who had recently quit. Oviedo testified that he worked 7:00 p.m. to 7:00 a.m. and Castillo paid him $350.00 a week in cash every Saturday. Castillo never gave Oviedo a receipt or wage stub with his wages or any other papers. Oviedo testified that he did not have a driver license at the time, and did not tell Castillo

nor did Castillo ask. Castillo personally trained Oviedo during the first week and then he started to work on his own the following week.

Oviedo testified that two attendants – Payo and Miguel --worked during the day, explaining that "I would relieve Payo and Miguel at 7 at night and the next day in the morning Payo would relieve me." Oviedo's duties included parking the vehicles and closing the gate at 10:00 p.m. After 10:00 p.m. Oviedo had to open the gate for customers by pressing a button located in the office. When customers parked, Oviedo handed them a ticket, which they placed on their wind shield. The other half was kept in the office. Oviedo also received car keys from customers, which were kept on a board in the office.

Oviedo testified that petitioners had both daily and monthly customers. Oviedo explained that when customers parked their cars, they left their keys with him and he put the keys on a board in the office in case he needed to move the car. Oviedo once scratched a car when he was parking it and Castillo made an agreement with the vehicle's owner to pay $250.00 for the damage caused by Oviedo. Castillo deducted $25.00 each week from Oviedo's wages to recover the amount he had paid to the customer for the damage caused by Oviedo.

Oviedo testified that he recalled two times that the gate to the parking lot was broken and he had to sit outside. He called Castillo when the gate was broken and Castillo came to fix it. Oviedo denied that he was only hired by Castillo to work at the parking lot on those occasions when the gate was broken.

Oviedo took a vacation from June 17 to 23, 2011, at the suggestion of Castillo, who promised to pay him $350.00 vacation pay. Oviedo testified that Castillo only paid him $150.00 for the week off and when he complained about it, Castillo paid him an additional $50.00 the following week. Oviedo does not know who worked the night shift at the parking lot the week he was off.

Oviedo testified that he quit working for petitioners because Castillo was not paying him minimum wage. Oviedo denied that he ever received any threats over the phone from Castillo or anyone else from E-Z Parking, or that he had complained to DOL that he had been threatened. Oviedo further testified that Castillo told him to sign a letter in order to receive his last week's wages. Oviedo refused to sign the letter because it was written in English and he could not understand it.

Testimony of Winston Castillo

Petitioner Winston Castillo testified that he has worked continuously as a school bus driver since 2001, and owned and operated E-Z Parking Lot Corp. from 2009 to 2015, because he wanted to "tr[y] to be in business." Castillo rented the parking lot directly from the landlord in May, June, or July 2009, and did not have any employees when he started the business. Although Castillo had no employees, he testified that he did not run the business himself, his family and friends, including an individual named Percio, known as Payo, "helped" him, but also testified that he "was working there [himself] practically." Castillo did not pay his family and friends for the help they gave him at the lot, which included moving, washing, and selling cars, but he also testified he paid a $100.00 commission to anybody who sold a car for him.

Castillo testified that the parking lot was open 24 hours a day, 7 days a week. Daily customers could arrive any time from 7:00 a.m. to 4:00 or 5:00 p.m., and they had to leave by 7:00 p.m. Monthly customers, who had paid for the whole month, had 24 hour access to the parking lot, had a key to access the facility at night, and had an assigned parking space.

Castillo denied that he employed Oviedo, who he knew as "Mateo," between August 31, 2009 and October 27, 2011, and explained that he did not even know his real name until a week before the hearing. According to Castillo, Oviedo "always came asking for work. I told him, no. One day I said I am going to need you to stay because the gate was broken." Castillo wanted somebody to stay when the gate was broken, because "I didn't feel comfortable leaving the gate open and staying overnight." Castillo described Oviedo's duty as "to sit there and guard the place. Make sure that people would not come in and vandalize it. He was not responsible for any duty as a parking attendant." Castillo further explained that he hired Oviedo ten days "tops" to work during four occasions when the gate was broken, and paid him for the time he worked. Castillo paid Oviedo $350.00 for each time he guarded the lot when the gate was broken, even though the number of days may have differed. Castillo believed this was "a fair amount because he is risking staying over there and with the gate open and $350 for that, two or three days there, helping me that nobody vandalizes the car[s]. If I don't put him there and someone come and vandalize the car[s], it would cost me double that."

Castillo did not need Oviedo when the gate was working, but he did "hang out" at the parking lot, meaning that "people come and say, 'hi,' and I have a lot of people come and stay there with us. Hang out mean that we stay there and I got friends and they come and help and I have a few people they come and help." Castillo did not pay Oviedo or any other people who came to the parking lot to "hang out."

Castillo testified that:

> "I never had a working relationship with [Oviedo]. I told him to come and guard the place. It was at night and I was not there in the night. I treated him fairly with respect and I took the guy – the guy used to come try to help and clean and park cars and stuff, try to help. I never hire[d] him on a continuous basis. He never worked for me like he said months or whatever period of time, he is making that up."

Castillo further testified that he did not need an employee at night because the customers who parked at night had a key for the gate, "they open the gate. They park their car, close the gate and leave." Castillo denied that there was a button located in the office to open and close the gate. The button was not installed until August or September 2011. Castillo never gave Oviedo a key to the gate, but there was a key in the office. Castillo explained that during the night shift, "we do not put tickets in the people's car. We already know the car and we have the key." Tickets were only given to the daily parkers, because "We don't know them . . . . that's how we identify the car." When Oviedo worked guarding the gate, he was only allowed to accept monthly parkers into the lot so had no need to give tickets to customers. Castillo explained that he told Oviedo to "sit there, don't let people come and vandalize and the monthlies would come, you know who they are, they will come they will park, and they will go." However, Castillo later testified that Oviedo "couldn't know who the monthlies were."

Castillo testified that he did not know whether Oviedo had a driver license until after "he had that accident." Castillo told Oviedo not to touch any cars after that. Castillo recalled that a police report had been made.

Castillo denied that he ever presented Oviedo with a document to sign. Castillo testified he kept no records concerning the hours worked or money paid to the individuals, including Oviedo, who helped him at the parking lot. He also testified that he did not provide DOL with any information during their investigation of Oviedo's claim. However, Castillo did request a compliance conference but was unable to attend because his daughter was ill. When he attempted to reschedule the conference, DOL refused. During the investigation, when asked about Oviedo, Castillo was not able to provide any information, because he did not know Oviedo was the same individual as Mateo. Castillo also explained that he may not have received correspondence from DOL because when he leased the parking lot, he used a mailing address for the business that he later learned was incorrect, but never filed a correction or change of address with the Secretary of State.

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

Burden of Proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30). Petitioners failed to meet their burden of proof that the minimum wage and unpaid wages orders are unreasonable or invalid, except with respect to the civil penalties, and met their burden to show the penalty order is unreasonable.

Petitioners employed the claimant

"Employer" as used in Articles 6 and 19 of the Labor Law means in relevant part "any individual or corporation acting as an employer" (Labor Law § 651 [6]; *see also* Labor Law § 190 [3]) and "employee" means "any individual employed or permitted to work by an employer in any occupation" (Labor Law § 651 [5]; *see also* Labor Law § 190 [2]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]). Castillo's testimony that claimant frequently came to the parking lot looking for work or went there to hang out, that he only hired him on a few occasions of short duration to watch the parking lot at night when the gate was broken, and no attendant was necessary unless the gate was broken, is not credible. We find the credible evidence supports respondent's finding that petitioners employed the claimant in that they suffered or permitted him to work as an overnight parking attendant. Claimant credibly testified that he met Castillo when he went to the parking lot looking for work, Castillo hired him as a night time parking attendant because the person who previously held the position had left, set his wage rate, and paid him on Saturday, which was the regular pay day. Claimant also testified in great detail about his job duties, including that he was required to use a button to open a gate when customers arrived. This shows sufficient control over the claimant to support a

finding that the individual and corporate petitioners are employers under Articles 6 and 19 of the Labor Law (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]; *Matter of Yick Wing Chan et al.*, Docket No. PR 08-174 [October 17, 2012]). We do not credit Castillo's inconsistent and contradictory testimony that claimant was merely a temporary and occasional employee. It does not follow that Castillo paid the exact same salary to claimant each time the gate was broken no matter how many days he worked until the gate was repaired. Likewise, Castillo originally testified that claimant knew who the monthly parkers were, which he could only know if he worked at the lot on a regular basis, but on cross-examination testified claimant could not know the monthly parkers because he only worked a total of ten days maximum for petitioners. Castillo's testimony alone was insufficient to meet petitioners' burden to show they were not claimant's employer where claimant gave credible, consistent, and detailed testimony of his work for petitioners and the duration and terms and conditions of his employment.

The minimum and unpaid wage orders are affirmed

Article 19 of the Labor Law, entitled the "Minimum Wage Act," sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]), and its implementing regulations require payment of time and one-half a non-residential employee's regular hourly rate for each hour worked over 40 in a week (12 NYCRR 142-2.2). Article 6 of the Labor Law, entitled "payment of wages," requires employers to pay manual workers, such as claimant, wages weekly and no later than seven days after the last day of the week in which the wages were earned (Labor Law § 191 [1]). Based on claimant's claim that petitioners failed to pay him minimum wages and also withheld his last week's wages when he quit working for them, respondent determined petitioners violated Articles 6 and 19 of the Labor Law and issued the orders on review (*see* Labor Law § 196-a [where an employee files complaint and the employer does not keep required payroll records, the employer has the burden to prove the wages were paid]).

It is undisputed that petitioners, who took the position they never employed claimant, failed to maintain any records of time worked and wages paid to him. In the absence of required records, petitioners had the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett,* 156 AD2d 818, 821 [3d 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 calculation to the employer."

Therefore, petitioners had the burden of showing that the Commissioner's orders are invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimant worked and that he was paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011]). Where no records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378 [1st Dept 1996], *citing Mid-Hudson Pam Corp.*). In this case, respondent used the best available evidence, which was the information provided by claimant in his claim, which was fully corroborated at hearing by his credible testimony.

Therefore, we find respondent's determination that petitioners owe $31,694.38 in unpaid minimum wages and $350.00 in unpaid wages to claimant is reasonable.

Liquidated Damages

Respondent included liquidated damages of 25 % of the wages found due in the minimum wage and unpaid wages orders. Labor Law § 218 (1) requires respondent to include liquidated damages of 100 % of the wages found due with the order. Liquidated damages must be paid by the employer unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law."[1] The assessment of liquidated damages is upheld, because petitioners failed to prove a good faith basis to believe the underpayments were in compliance with the law

Civil penalty

The minimum wage and unpaid wages orders both assess a 100 % civil penalty. The Commissioner must impose an "appropriate civil penalty" where she determines that a violation is not willful or egregious and there is no history of prior wage and hour violations (Labor Law § 218 [1]). The Commissioner in assessing the civil penalty applicable in this case was required to "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 . . . the failure to comply with recordkeeping or other non-wage requirements" (*id.*). The civil penalties are revoked. Senior Labor Standards Investigator Escudero, called as a witness by petitioners, was unable to explain how the statutory factors were considered when assessing a 100 % civil penalty in this matter, explaining that the penalty was "standard." Respondent, who called no witnesses, did not present any testimony showing the considerations made by DOL in this case to determine that a 100 % civil penalty was appropriate.

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 financial services 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 per centum per annum." Petitioners failed to submit evidence challenging the interest assessed in the orders, and the issue is thereby waived pursuant to Labor Law § 101 (2).

Penalty order

The penalty order assesses a $1,000.00 civil penalty against petitioners for violating Labor Law § 661 and 12 NYCRR § 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from on or about September 5, 2009 through October 28, 2011, and a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of

[1] While Labor Law § 218 requires the Commissioner to include 100 % liquidated damages in her orders to comply, Labor Law §§ 198 and 663 provide that liquidated damages shall be calculated by the Commissioner as "no more than" 100 % of the underpayments found due.

wages from on or about September 5, 2009 through October 28, 2011, for a total due of $1,500.00.

Labor Law § 218 (1) provides that where a violation is for a reason other than an employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed $1,000.00 for a first violation, $2,000.00 for a second violation, or $3,000.00 for a third or subsequent violation. In assessing this penalty respondent is required to "give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, and the history of previous violations." (*id.*). Although there can be no dispute that petitioners failed to keep required records and give wage statements with each payment of wages, Senior Labor Standards Investigator Escudero's testimony that a $1,000.00 civil penalty is assessed in most cases for non-wage violations is insufficient to show that respondent gave due consideration to the statutory factors. The penalty order is, therefore, revoked.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The civil penalty assessed by the minimum wage order is revoked, and the order is otherwise affirmed; and

2. The civil penalty assessed by the unpaid wages order is revoked, and the order is otherwise affirmed; and

3. The penalty order is revoked; and

4. The petition for review be, and the same hereby is, granted in part and denied in part consistent with this decision.

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.