In the Matter of the Petition of:	:	
SHAMEEM AHMEND CHOWDHURY (T/A NEW MILLENIUM),	:	
Petitioner	:	DOCKET NO. PR 08-141
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 19 of the Labor Law, dated July 18, 2008,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Shameem A. Chowdhury, *pro se*.

Maria L. Colavito, Counsel, New York State Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WITNESSES

Shameem A. Chowdhury for Petitioner; Mohammed Sozon and Pamela Friedman, Supervisor Labor Standards Investigator, for Respondent.

WHEREAS:

A Petition for review in the above-named case was received by the Industrial Board of Appeals (Board) on September 11, 2008. Petitioner Shameem A. Chowdhury (Petitioner) seeks to vacate two Orders to Comply with Article 19 of the Labor Law that the Respondent Commissioner of Labor (Commissioner) issued against Petitioner on July 18, 2008.

The first Order (Wage Order) directs Petitioner to pay to the Commissioner unpaid wages owed employee Mohammed M. Sozon (Claimant) in the amount of $20,606.25, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of $15,319.76, and a civil penalty in the amount of $20,606.00, for a total amount due of

$56,532.01. The second Order (Penalty Order) directs Petitioner to pay to the Commissioner a civil penalty for failure to keep and/or furnish true and accurate payroll records for Claimant in the amount of $750.00.

The Petition alleges that the Wage Order was invalid or unreasonable because Claimant: (i) worked for Petitioner as an "independent contractor" and "was not an employee" during the period of the claim; and (ii) worked a total of "about 60 to 80 hours" and was paid for all work performed.

The Commissioner filed an Answer to the Petition and a motion pursuant to Board Rule § 65.13 (a) to strike certain allegations of the Petition as "irrelevant, unnecessary and/or frivolous". By decision dated December 8, 2008, the Board dismissed paragraph 6 of the Petition on the grounds that it did not state a basis for relief and directed the Commissioner to file an Amended Answer to the remaining allegations of the Petition. The Commissioner thereafter filed an Amended Answer denying the material allegations of the Petition, and interposing as affirmative defenses that that the Petition fails to establish Claimant was an independent contractor and that the Commissioner's calculation of wages is in all respects valid and reasonable.

Upon notice to the parties, a hearing was held on July 21, 2009 before J. Christopher Meagher, Esq., Member of the Board and the Board's designated hearing officer in this case.

Each party was afforded full opportunity at the hearing and by post hearing briefs to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues. The Commissioner submitted a post hearing brief and Petitioner did not. A Bengali translator provided by the Board was available at the hearing to translate the proceedings for the benefit of the Claimant.

SUMMARY OF EVIDENCE

Petitioner is the owner of a building located at 1168 Fulton Street, Brooklyn, New York (the Building) and operates a restaurant called "Hallal Restaurant" on the Building's first floor. Petitioner lived on the second floor of the Building during the period of the wage claim.

The Wage Claim(s)

On February 22, 2005, Claimant filed claims against Petitioner with the Department of Labor (DOL) for unpaid wages, including overtime wages, accrued during the period May 13, 2002 to November 26, 2003. The claim forms stated that Claimant had been hired by Petitioner on May 13, 2002 at the rate of $12.50 per hour to perform demolition and renovation in the Building and that his last day worked was November 26, 2003.

The claim forms listed "New Millenium" as the corporate or trade name of the employer and that Petitioner was the responsible person of the firm who was the "landlord of building & owner of [the] restaurant."

Claimant's wage claim listed ten weeks unpaid wages accrued for the weeks ending May 17, May 24, May 31, June 7, June 28 and July 26, 2002, and January 3, February 7, March 14, and April 4, 2003. The wage claim stated that Claimant worked a total of 72 hours each week at the rate of $12.50 per hour, that he was paid $270 each week, and that he was owed a total amount due of $6,300 for 720 hours of work. Claimant's overtime claim stated that he had worked six days per week from 9:00 AM to 9:00 PM, with 30 minutes for meals.

Testimony of Mohammed Sozon

Claimant testified that he had known Petitioner for about fifteen years, as Claimant and Petitioner had a similar friend in the community. The friend was a business partner of Petitioner's in another building and solicited Claimant to "work for" Petitioner at the Building at 1168 Fulton Street. Claimant testified that Petitioner hired him at the rate of $12.50 per hour to do construction work on one of the vacant floors in the Building. He thereafter performed construction assignments at Petitioner's direction from May, 2002 to November, 2003 on the third floor and stairs and in the first floor restaurant and basement of the Building. When Claimant was hired he did not have his own contracting business, letterhead, business cards, an official d/b/a from the State of New York, or insurance. Claimant did not sign a contract with Petitioner for the work to be performed.

Claimant testified that his work on the third floor included demolition, partitioning and framing walls, sheet rocking and painting, replacing the bathroom floor and tiles, and installing new doors. After Claimant finished on the third floor, Petitioner assigned him to do sheet rocking and framing in the first floor restaurant and basement and to replace broken tiles on the stairs. When materials were necessary for the work, Petitioner would bring Claimant to the supply store in Petitioner's van, buy the materials, and the two would return to the Building together so Claimant could do the work assigned. Claimant said he brought his own tools but also used tools provided by Petitioner. Claimant testified that he worked at other painting and construction jobs during the claim period and that Petitioner called and hired him when Claimant did not have other work. Claimant said he worked for Petitioner a total of "like 90 days" and that Petitioner paid him "roughly I think $6,000".

Claimant testified that Petitioner showed him the construction work to be done, directed his schedule, and supervised his work. Since Petitioner operated a restaurant in the Building and lived on the second floor, Petitioner "all the time ... c[a]me up and down and ... checked whatever I did." Claimant testified that Petitioner told him to report to work between 9:00 AM and 10:00 AM, to "work late" to finish assignments, and to work until "how long [he could] work" on the third floor because it was vacant. Petitioner also employed a manager, N. I., who worked as a cook in Petitioner's restaurant. N.I. sometimes paid Claimant on Petitioner's behalf, told Claimant to work on assignments in the restaurant, and supervised Claimant's work in the Building when Petitioner went on vacation.

Claimant was shown his written claim forms filed with DOL and testified that they are true and accurate to the best of his recollection and that the information on the second page of the forms accurately reflects the hours he worked and wages he was paid. Claimant testified that Petitioner paid him in cash, did not provide him a wage statement or receipt, and did not pay him on a regular basis. When Claimant asked Petitioner to be paid his money, Petitioner would delay and pay Claimant less than what he was owed. Claimant testified that he tried to mediate the matter through friends and a mutual mosque, but was unsuccessful, and it was only after his attempt to resolve the wage dispute within his community that he sought DOL's assistance.

Testimony of Pamela Friedman

Supervisor Labor Standards Investigator Pamela Friedman (Friedman) testified concerning DOL's investigation of the claim.

The investigative file revealed that a DOL investigator visited Petitioner's premises and spoke with Petitioner concerning the claim in May, 2005. Petitioner told the investigator that he did not recall hiring Claimant at any time and that Claimant was not an employee. DOL thereafter requested additional information from Claimant to validate his claim and Claimant submitted affidavits from three other individuals stating that they had witnessed Claimant performing work in Petitioner's Building.

By letter dated August 22, 2005, DOL informed Petitioner that Claimant had submitted multiple witness statements validating the work he performed for Petitioner. In order to resolve the matter, DOL requested that Petitioner submit "all necessary payroll records for the period from 5/13/2002 to 11/26/2003" and that the records should reflect "daily and weekly hours worked, gross wages paid, net wages paid and statutory deductions as well as detailed job descriptions."

By letter dated August 30, 2005, Petitioner responded and requested a District meeting to discuss DOL's investigation. Petitioner asserted that Claimant was a "contractor" who did home improvement; that Claimant "never worked for me as an employee"; and that Claimant worked in his building on a job "for an amount of $5,400 ... including material and labour." Petitioner also stated that Claimant worked at a "few small job[s] including labour and materials."

By letter dated October 10, 2005, DOL issued Petitioner a notice recapitulating the claim and informing Petitioner that it had computed a total underpayment of $20,606.25. The letter requested that Petitioner remit payment of the unpaid wages by October 25, 2007 and advised that failure to respond could result in issuance of an Order to Comply, including assessment of interest and penalties. The letter enclosed a "Recapitulation Sheet" listing the amount of wages due and the period covered by the underpayment. The Recapitulation was not limited to the ten specific weeks listed in Claimant's claim forms, however, but calculated the underpayment based on each consecutive work week from May 13, 2002 to November 26, 2003.

On April 01, 2008, Claimant submitted written answers to a series of questions DOL posed concerning Claimant's work. Claimant stated that he had set days and hours of work and informed the employer if he was late, absent, or wished to take time off. Claimant stated that he worked at the employer's premises, was supervised by a manager, and that the employer provided tools and materials. Finally, Claimant stated that he did not have his own business or bill for his services and did not have workers compensation or unemployment insurance.

By letter dated April 4, 2008, DOL issued Petitioner notice to attend a compliance conference on May 6, 2008 where the claim might be resolved. The notice further advised Petitioner to bring all payroll records for the Claimant for the period May 13, 2002 to November 26, 2003. Petitioner did not appear at the conference.

Friedman testified that as a supervisor investigator with DOL she had reviewed the file for purposes of the hearing. Based on her review, Friedman stated that Petitioner did not submit any documentation during the course of DOL's investigation upon which it could be determined that Claimant was an independent contractor or an alternate calculation could be made of the hours worked, wages paid, or wages owed. The Claimant had provided DOL with information concerning the details of his work which precluded the possibility that he was an independent contractor. Accordingly, DOL's wage calculations were based solely on the information provided by Claimant's claim forms.

Friedman also testified that the Labor Law allowed the Commissioner to assess a civil penalty as high as 200 % for willful failure to pay wages. However, since Petitioner was somewhat responsive to the investigation but failed to appear at a District Conference scheduled at his request, a civil penalty of 100 % was imposed.

Based on DOL's investigation, the Commissioner issued the Orders under review on July 18, 2008.

Testimony of Shameem A. Chowdhury

Petitioner testified that he hired Claimant in 2003 to remodel a bathroom in the Building. Petitioner said he heard of Claimant's construction work from others in the community and hired him as an "independent contractor", not as an employee.

Petitioner testified that he did not obtain quotes from other contractors or ask to see Claimant's d/b/a/ certificate, contracting license, or proof of insurance when he hired Claimant for the work to be performed. Petitioner explained that he was not experienced in the construction industry and did not know what to ask. Petitioner testified that he and Claimant had a verbal contract for the work to be done, which included cost of materials in the contract price. Petitioner did not submit an independent contractor agreement between the parties.

Petitioner testified that Claimant worked a total of "about 60 hours" remodeling the bathroom and replacing broken tiles on the stairs. Claimant's work in the bathroom included

removing the floor, applying new tiles to the walls, and fitting a new door. Petitioner said he was unhappy with Claimant's work in the bathroom and that Claimant never completed the job.

Petitioner testified that he explained "what needed to be done" to Claimant but that Claimant selected, purchased, and brought all the materials necessary for his construction work, including picking out the tiles for the bathroom. Petitioner said he did not make any choices about the color or kind of products used in Claimant's work and did not give the Claimant any guidelines on how much to spend.

Petitioner testified that he paid the Claimant in cash, and had records of the payments, but did not keep a record of the hours that Claimant worked. He did not produce records of these payments to DOL during its investigation or at the hearing. Petitioner asserted that he paid Claimant in full and that Claimant returned six months later demanding to be paid an additional $500 for his work. Petitioner said he refused the demand because Claimant left the job incomplete and that he believed Claimant's complaint to DOL was in retaliation for his refusal to pay the additional $500.

Petitioner submitted two affidavits in support of his testimony, one from a current employee and a second from a former employee during the claim period. The affidavits both stated that Claimant was an "independent contractor"; that Claimant worked a total of 30 days on the job; and that the dispute between the parties was over whether Petitioner had made a final payment to the Claimant of $500. Neither of these individuals testified at the hearing.

In rebuttal to the Commissioner's witnesses, Petitioner pointed to DOL's recapitulation of wages owed the Claimant and argued that it would have been illogical for him to have employed Claimant on an open ended basis for the continuous year and a half period listed in the recapitulation. Petitioner also testified that he was not in the United States for the period of August, 2002 to September, 2002, as listed in the recapitulation. Petitioner submitted portions of his passport to support his testimony, highlighting the visa stamps of entry.

GOVERNING LAW

A. Standard of Review and Burden of Proof

The Labor Law provides that "any person...may petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter" (Labor Law § 101 [1]). It also provides that an order of the Commissioner "shall be presumed valid" (*Id.* § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an Order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is a petitioner's burden at

hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Rules § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; *Angelo v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]).

It is therefore Petitioner's burden to prove by a preponderance of evidence the allegations in its Petition that the Orders are invalid or unreasonable because Claimant was an independent contractor and did not work the hours claimed.

B. Definition of "Employee" Under Article 6 of the Labor Law

Under Article 6 of the Labor Law, "employer" is defined as "any person, corporation, or association employing any individual in any occupation, trade, business or service" (Labor Law § 190[3]). "Employed" is defined as "permitted or suffered to work" (Labor Law § 2[7]). The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 U.S.C. § 203[g]). Because the statutory language is identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoumana v Gristede's Operating Corp.*, 225 F Supp2d 184, 189 [SDNY 2003]).

In determining whether an individual is an employee covered by the Labor Law, or an independent contractor without wage and hour protections, "the ultimate concern is whether, as a matter of economic reality the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v Superior Care Inc.*, 840 F2d 1054, 1059 [2nd Cir 1988]). The factors to be considered in assessing such economic reality include: (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship, and; (5) the extent to which the work is an integral part of the employer's business (*Id.* at 1058-1059). No one factor is dispositive (*Id.* at 1059).

C. Recordkeeping Requirements

Article 19 of the Labor Law, known as the "Minimum Wage Act," defines "[e]mployee," with certain exceptions not relevant to this appeal, as including "any individual employed or permitted to work in any occupation (Labor Law § 651 [5])." Labor Law § 661 requires employers to maintain payroll records for employees covered by the Act and to make such records available to the Commissioner:

> "Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement

> of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time . . . ."

The Commissioner's regulations at 12 NYCRR § 142-2.6 also provide in relevant part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:
> (1) name and address;
> (2) social security number;
> (3) wage rate;
> (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
> (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
> (6) the amount of gross wages;
> (7) deductions from gross wages;
> (8) allowances, if any, claimed as part of the minimum wage."

D. DOL's Calculation of Wages in the Absence of Adequate Employer Records

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid (Labor Law § 196-a.; *Angello v Natl. Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]). 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 calculations to the employer."

In *Anderson v Mt. Clements Pottery Co.*, 328 US 680, 687-688 [1949], superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate....[t]he solution...is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his

> statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Citing to *Anderson v Mt. Clemens,* the Appellate Division in *Mid-Hudson Pam Corp., supra,* agreed:

> "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee.... Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

FINDINGS

Petitioner Failed to Prove Claimant Was an "Independent Contractor

It was Petitioner's burden to establish that "as a matter of economic reality" Claimant was in business for himself and not dependent on Petitioner to render the renovation and construction work he performed for Petitioner (*Brock v Superior Care Inc.,* at 1059). Such "economic reality" is determined by a balancing of factors, with no one factor dispositive, including the control exercised by Petitioner over the Claimant's work; the Claimant's opportunity for profit or loss from his work beyond his own labor; Claimant's skill and independent initiative in performing the work; the duration of the work Claimant was hired to perform, and; whether the work Claimant rendered was integral to Petitioner's business (*Id.* at 1058-59).

Petitioner submitted statements from a current and former employee stating that Claimant worked for Petitioner as an independent contractor. We give these statements no weight as they do not cite any direct evidence of Claimant's work and neither employee was available at the hearing to be examined by the Commissioner.

Petitioner's conclusory testimony that he hired Claimant as an independent contractor, and not as an employee, is also unavailing. Petitioner did not produce an independent contractor agreement and admitted that he did not obtain quotes from other contractors or ask to see Claimant's d/b/a/ certificate, contracting license, or proof of insurance when he hired Claimant for the work to be performed. The bald assertion that an individual is an independent contractor, without more, is not proof of such status (*Real v. Driscoll Strawberry Associates, Inc.* 603 F2d 748, 755 [9th Cir 1979] ["an employer's self-serving label of workers as independent contractors is not controlling"]).

We find the record evidence amply demonstrates that Claimant was an employee of Petitioner as a "matter of economic reality" under the applicable five part balancing test.

First, Petitioner exercised control over the terms, manner, means, and performance of Claimant's construction work in the Building.

We credit Claimant's testimony that Petitioner hired him at the rate of $12.50 per hour and paid him in cash to perform construction assignments in the Building. While Petitioner testified that he had a verbal construction contract with Claimant for the work, and in a letter to DOL asserted that it was for a set amount, Petitioner submitted no evidence of the agreement or the payments he made to the Claimant. Claimant's testimony was specific and credible and demonstrates Petitioner's control over the rate and method of payment for the work to be performed. Petitioner's hiring of Claimant at an hourly wage is compelling evidence that Claimant was hired for the work itself, as an employee, and not the end product of the work, as an independent contractor.

We credit Claimant's testimony that Petitioner directed his work schedule, specifically telling Claimant to report at 9:00 or 10:00 AM, to work late, and to work until however long he could to finish the construction work assigned. Petitioner offered no testimony concerning Claimant's scheduled hours. Claimant also submitted a statement to DOL during its investigation that Claimant was required to inform Petitioner if he would be absent, late, or wished to take time off.

Petitioner acknowledged that he "explain[ed] what needs to be done" to the Claimant but testified that Claimant selected, purchased, and brought all the materials necessary for his construction work, including picking out the tiles for the bathroom. Petitioner claimed that he did not make any choices about the color or kind of products used in Claimant's work and did not give the Claimant any guidelines on how much to spend. We do not find it credible that Petitioner would abstain in the decision making process regarding the type of materials to be used in his building or give Claimant carte blanche over the budgeting for such materials. In contrast, Claimant was credible and specific regarding how materials such as framing material, sheetrock, doors, and tiles were acquired for the construction work to be done. We credit Claimant's testimony that Petitioner would accompany him to purchase materials in Petitioner's van, buy the materials, and the two would return to the Building together so Claimant could do the work assigned.

We credit Claimant's testimony that Petitioner supervised and monitored his construction work "all the time", as Petitioner operated a restaurant and lived in the Building. Claimant testified that he performed various construction assignments at Petitioner's direction on the third floor and in the first floor restaurant and basement of the Building. Claimant's testimony concerning the scope and supervision of his work was specific and credible. We credit it over Petitioner's testimony that Claimant's work was limited to the bathroom and stairs. Claimant also testified, without rebuttal, that Petitioner employed a manager, N. I., who worked as a cook in Petitioner's restaurant. N.I. sometimes paid Claimant on Petitioner's behalf, told Claimant to work on assignments in the restaurant, and supervised Claimant's work in the Building when Petitioner went on vacation.

We find that Petitioner's supervision over the terms, manner, means, and performance of the construction work performed by Claimant is consistent with Claimant's

status as an employee *(Brock v Superior Care, Inc.,* at 1060 [employer setting of wages and hours and review of work performance are indicia of supervision and control consistent with employment]; *Bynog v Cipriani Group,* 1 NY2d 193,198 [2003] [critical inquiry in determining employment relationship is degree of control by employer over results produced or the means used to produce the results]).

Second, we credit Claimant's testimony that he was not in business for himself when Petitioner hired him to perform construction work in the Building. Petitioner admitted that he had not seen a d/b/a/ certificate, contracting license, or proof of insurance regarding the Claimant when he hired him for the work to be performed. Claimant's only investment was his own time and service and he was economically dependent on the agreement with Petitioner, with no opportunity for profit or loss beyond his own labor. Such return is properly classified as wages from employment and not profit or loss from work as an independent contractor (*Brock v Mr. W. Fireworks, Inc.,* 814 F2d 1042, 1051 [5th Cir 1987] [where employee's sole opportunity for return is from his own labor, he cannot be said to have opportunity for profit or loss that exists for an independent contractor]).

Third, while Claimant is no doubt experienced in construction, Petitioner determined what work was to be performed and what Claimant would be paid for that work. Petitioner or his agent then assigned Claimant the work and Claimant did it. Such dependence on an employer to provide the opportunities for work does not reflect the skill and independent initiative of an independent contractor *(Brock v Superior Care Inc.,* at 1060 [where skilled nurses did not use technical skills in any independent way to obtain work opportunities, but instead depended on employer for job assignments for which the employer controlled the terms and conditions, economic reality reflects employment]).

Last, the duration of Claimant's work in Petitioner's Building is also consistent with his status as an employee. Claimant was hired by Petitioner in May, 2002 to perform various construction assignments in the Building. Petitioner did not submit any evidence of an agreement between the parties as to how long the construction work would last or a cap on the number of hours that Claimant could work. Based on Claimant's credited testimony, we find that Petitioner asked Claimant to work between the hours of 9 a.m. or 10 a.m. until "how [ever] long [he could] work." Claimant also testified that he worked at other construction jobs outside of his employment with Petitioner and that Petitioner called and hired him when he didn't have other work. Petitioner's hiring of Claimant on an open-ended basis to perform multiple construction assignments at the rate of $12.50 per hour is evidence that Claimant was an employee, not an independent contractor.

By virtue of the multiple factors described above, we find that as a matter of "economic reality" Claimant was "employed" by Petitioner during the period of the wage claim. We find Petitioner's proof insufficient to establish that Claimant was an "independent contractor".

Petitioner Violated Article 6 of the Labor Law by Failing to Pay Claimant Wages Due

We modify the Wage Order to reduce the amount of unpaid wages due and owing to Claimant to $7,737.50, reduce the interest and civil penalty on such amount proportionally, and affirm the Wage Order in all other respects.

Having failed to produce time and payroll records required by Labor Law § 661 and 12 NYCRR § 142-2.6, DOL's calculation of wages must be credited unless Petitioner met its burden to negate the reasonableness of the Commissioner's determination (*Angelo v Natl. Fin. Corp., supra.*). We reject the assertion in the Petition that the Wage Order is in error because the Claimant worked for Petitioner a total of "about 60 to 80 hours". Aside from his general testimony, Petitioner did not submit payroll records or other probative evidence to substantiate the number of hours that Claimant worked. Petitioner submitted no specific evidence of what he paid the Claimant for his work.

In the absence of employer records, DOL may make reasonable inferences and "is permitted to calculate back wages due to employees by using the best available evidence" (*Matter of Mid - Hudson Pam Corp. v Hartnett,* at 821). In this case, Claimant's wage claim listed ten weeks unpaid wages accrued for the weeks ending May 17, May 24, May 31, June 7, June 28 and July 26, 2002, and January 3, February 7, March 14, and April 4, 2003. The wage claim stated that Claimant worked a total of 72 hours each week at the rate of $12.50 per hour, that he was paid $270 each week, and that he was owed a total amount due of $6,300 for 720 hours of work. Claimant's overtime claim stated that he had worked six days per week from 9:00 AM to 9:00 PM, with 30 minutes for meals. Claimant was shown his written claim forms filed with DOL and testified that they are true and accurate to the best of his recollection and that the information on the second page of the forms accurately reflects the hours he worked and wages he was paid. Claimant's statements were the best available evidence of his hours worked and wages paid and thereby created a reasonable inference as to the amount of back wages due him. The evidence was never rebutted by Petitioner at hearing.

While supervisor investigator Friedman testified that the wage calculations in this case were based solely on the information provided by the Claimant's claim forms, the file reveals that DOL's Recapitulation was not limited to the 10 specific weeks cited in Claimant's forms, but was calculated based on each consecutive work week from May 13, 2002 until November 26, 2003. We therefore modify the wages owed to $7,737.50 and calculate the wages owed consistent with the Claimant's written claims and testimony. The calculation is as follows:

5/18/2002	11.5	6	69	$12.50	$18.75	$1,043.75	$270	$773.75
5/25/2002	11.5	6	69	$12.50	$18.75	$1,043.75	$270	$773.75
6/1/2002	11.5	6	69	$12.50	$18.75	$1,043.75	$270	$773.75
6/8/2002	11.5	6	69	$12.50	$18.75	$1,043.75	$270	$773.75
6/29/2002	11.5	6	69	$12.50	$18.75	$1,043.75	$270	$773.75
7/27/2002	11.5	6	69	$12.50	$18.75	$1,043.75	$270	$773.75
1/4/2003	11.5	6	69	$12.50	$18.75	$1,043.75	$270	$773.75
2/8/2003	11.5	6	69	$12.50	$18.75	$1,043.75	$270	$773.75
3/15/2003	11.5	6	69	$12.50	$18.75	$1,043.75	$270	$773.75
4/5/2003	11.5	6	69	$12.50	$18.75	$1,043.75	$270	$773.75
							TOTAL Gross Underpayment:	**$7,737.50**
							Wages owed to Claimant	**$7,737.50**

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."

Petitioner did not challenge the assessment of interest made by the Wage Order. The Board finds that the considerations required to be made by the Commissioner in connection with the interest set forth in the Wage Order are valid and reasonable. However, we modify the Order to reduce the interest proportionally on the amount of $7,737.50 wages owed.

Imposition of Civil Penalties

If the Commissioner determines that an employer has violated Article 19 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing (Labor Law § 218 [1]).

Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty based on the amount owing. Labor Law § 218 [1] provides:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of these provisions, rules, or regulations, or to an employer whose violation has been found to be willful or egregious, shall direct payment to the Commissioner of an

> additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages ... found by the Commissioner to be due, plus the appropriate civil penalty ... In assessing the amount of the penalty, the Commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages ... the failure to comply with recordkeeping or other non-wage requirements."

Petitioner did not challenge the Commissioner's assessment of a civil penalty made in the Wage Order beyond his assertion that Claimant was an independent contractor and not an employee. The Board finds that the determination made by the Commissioner in assessing Petitioner a 100% civil penalty in the Order is therefore valid and reasonable. However, we modify the Order to reduce the civil penalty proportionally on the amount of $7,737.50 back wages owed.

Penalty Order

Petitioner did not submit evidence challenging the Commissioner's assessment of a $750 penalty in the Penalty Order for failure to maintain payroll records. We therefore affirm the Penalty Order as valid and reasonable in all respects.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Wage Order is modified to reduce the amount of wages due and owing to $7,737.50, and to reduce the interest and civil penalty on such amount proportionally, and in all other respects is affirmed;

2. The Penalty Order is affirmed; and

3. The Petition for review be, and the same hereby is, denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 22, 2010

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Wage Order is modified to reduce the amount of wages due and owing to $7,737.50, and to reduce the interest and civil penalty on such amount proportionally, and in all other respects is affirmed;

2. The Penalty Order is affirmed; and

3. The Petition for review be, and the same hereby is, denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 22, 2010