STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: CARMEN MANCHENO AND VINCENT MANCHENO AND MAGIC SETTING, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law and an Order to under Articles 6 and 19 of the Labor Law, both dated October 30, 2008, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 08-184 RESOLUTION OF DECISION

APPEARANCES

Edmundo R. Garcia, CPA, for Petitioners.

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

WITNESSES

Nancy Gao, Labor Standards Investigator; Cloty Ortiz, Senior Labor Standards Investigator; Marlon Marin, and Vincent Mancheno, for Petitioners.

Nancy Gao, Labor Standards Investigator, for Respondent.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on December 27, 2008 and an Amended Petition was filed on April 10, 2009. An answer was filed on May 19, 2009. Upon notice to the parties, a hearing was held on February 25, 2010 and continued on April 10, 2010 in New York City before Anne P. Stevason, Esq., Chairperson of the Board and the designated Hearing Officer in this proceeding. Each 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 Commissioner of Labor (Commissioner) issued the Orders under review against Petitioners Carmen Mancheno and Vincent Mancheno and Magic Setting Inc. (together, Petitioners) on October 28, 2008. The Order to Comply with Labor Law article 19 (Wage Order) directs payment to the Commissioner for wages due and owing to six named employees in the total amount of $39,106.58, with interest continuing thereon at the rate of 16% calculated to the date of the Wage Order, in the amount of $25,317.43, and assesses a civil penalty in the amount of $29,330.00, for a total amount due of $93,754.01.

The Order under Labor Law articles 6 and 19 (Penalty Order) assesses a civil penalty against the Petitioners in the total amount of $8,000. Count 1 of the Penalty Order assesses a penalty of $4,000, finding that Petitioners violated 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 periods November 8 through November 13, 2004; November 15 through November 19, 2004; November 22 through November 26, 2004; and November 29 through December 3, 2004. Count 2 of the Penalty Order assesses a penalty of $4,000, finding that Petitioners violated Labor Law § 661 and 12 NYCRR 142-2.7 by failing to furnish each employee with a complete wage statement with every payment of wages for the same periods noted in Count 1.

The Petition and Amended Petition allege that the Orders are invalid and unreasonable in finding six individuals to be employees. Petitioners assert that the six are independent contractors and not employees. At hearing Petitioners also alleged that the Wage Order is unreasonable because the amount of the wages found due is based on an incorrect finding as to the number of hours that employees worked.

I. SUMMARY OF EVIDENCE

Petitioner Vincent Mancheno opened Magic Setting, a diamond setting business, in 1997. Before that, Mancheno worked as a diamond setter. According to him, the custom in the industry is for diamond setters to be paid by piece rate and to work for many companies at the same time. Mancheno testified that setters are independent contractors who can decide their own hours and work when they want. Petitioner also had polishers working for him who polished the jewelry after the diamonds were set. Petitioner treated the polishers as employees. The Wage and Penalty Orders were issued on behalf of Petitioners' diamond setters.

Petitioners gave diamond setters loose diamonds and jewelry settings, such as rings, necklaces and bracelets, in which to set the diamonds. Setters worked on the business premises, but were also allowed to take the diamonds and jewelry home to complete their work. The deadline to complete each piece of jewelry was usually the day after the Petitioners assigned the work to the setter. If a setter damaged or lost a diamond, he/she would have to buy another diamond to replace it.

Marlon Marin (Marin) worked exclusively for Petitioner from 1999 to 2004 and never owned or operated his own business. He learned how to set diamonds while working

for Petitioners. When Petitioners hired Marin, they unilaterally determined his compensation, which was the same as all other setters who were all paid at the same piece rate. Petitioners also unilaterally determined when to increase the piece rate paid to setters and what that rate would be. Petitioners paid the setters on a weekly basis and required that each setter submit an invoice with specified information detailing the work that had been completed within the prior week in order to receive compensation. Petitioners checked the quality of the setters' work and returned work to them when repair was required. Petitioners did not require that Marin have his own insurance; provided the diamond setters with a 1099 tax form every year; and did not keep records of their time worked. Marin did purchase his own tools for work that he did at home, but did not have his own customers and did not have a relationship with Petitioners' customers, that is, the parties who contracted with Petitioners to have the diamonds set and the finished pieces polished and returned.

Marin was not paid for vacations, which he took only during the slow season and with Petitioners' approval. The slow season was from January through June, except for Valentine's Day and Mother's Day. During the slow season Marin usually worked 40 hours a week or less. During the busy season of July through December, Marin worked everyday, Monday through Sunday. His usual work hours Mondays through Thursdays were 9:30 a.m. to 4:30 p.m. at Petitioners' premises and afterwards from 8:00 p.m. to 11:00 p.m., at home. On Fridays, Marin worked from 9:30 a.m. to 4:00 p.m. On Saturdays and Sundays, he worked from 11:00 a.m. to 5:00 p.m. and then 8:00 p.m. to 11:00 p.m. With an hour deducted for daily meal breaks, Marin worked 57.5 hours per week during the busy season.

On December 1, 2004, Marin filed a claim for $819 against Petitioners with the Department of Labor (DOL). Petitioners had deducted this amount from Marin's pay, alleging that he had lost diamonds; however, Marin asserted that the diamonds were lost at Magic Setting's premises. On his claim form, Marin set out the hours that he worked during the busy season.

On January 21, 2005, Labor Standards Investigators Nancy Gao (Gao) and Cloty Ortiz (Ortiz) conducted an inspection at Petitioners' place of business. Gao interviewed Carmen and Vicente Mancheno, and Ortiz interviewed employees. Although the Investigators observed eight workers, only six time cards were punched. At the end of the inspection, the Investigators gave Petitioners a Notice of Revisit for the purpose of reviewing time and payroll records. Following the inspection, Petitioners' then accountant appeared at DOL offices with the some of the diamond setters' invoices that were submitted to Petitioners for payment and also provided DOL with statements that the setters were independent contractors. These were the sole records produced by Petitioners. The invoices did not indicate hours worked, rate of pay, gross wages, deductions, etc.

Petitioners produced Marin's invoices which indicated how much he was paid each week. During his testimony, Marin estimated that he made approximately $13.00 per hour. DOL determined that Marin and the other setters were owed overtime wages because Petitioners did not pay them any premium wages for the time that they worked over 40 hours in a week. Gao testified how DOL calculated the overtime due. Each setter's weekly pay was divided by 57.5 hours to determine his regular hourly rate of pay. The number of

hours over 40 that a setter worked in a week was then multiplied by .5 the regular hourly rate of pay to determine what the setter was owed for overtime that he worked. If there was no invoice available for any particular week, DOL used the estimated average of $13.00 per hour as the rate of pay. DOL found that overtime was due to six setters, including Marin. DOL's calculations were based on the weekly hours that Marin stated that he worked. DOL gave no consideration to either the time it might take to set each piece assigned to each setter or to whether the amount of work that Petitioners assigned to setters was subject to seasonal fluctuations.

Investigator Ortiz testified that she recommended the 75% civil penalty that the Wage Order assesses after considering the prior history, good faith and size of Petitioners. In particular Inspector Ortiz determined that Petitioners were not cooperative in the investigation, and did not have or provide the required records.

II. STANDARD OF REVIEW

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in [the petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103).

Pursuant to the Board Rules of Procedure and Practice (Rules) 65.30 (12 NYCRR 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Orders are not valid or reasonable.

III. FINDINGS AND CONCLUSIONS OF LAW

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

A. <u>The diamond setters were Petitioners' employees.</u>

Under Article 19 of the Labor Law, "employee" is defined as "any individual employed or permitted to work by an employer in an occupation" with certain exception not relevant here. (Labor Law § 651[5]). "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 protected by the Labor Law's wage standards or an independent contractor without such protections, "[t]he 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 F.2d 1054, 1059 [2d Cir 1988]). The factors considered in determining whether, as a matter of "economic reality," an employment relationship exists 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).

In applying these factors, we must be mindful that "the remedial nature of the statute . . . warrants an expansive interpretation of its provisions so that they will have the widest possible impact in the national economy" (*Herman v RSR Sec. Servs., Ltd.*, 172 F3d 132, 139 [2d Cir 1999]). Indeed, the U.S. Supreme Court in discussing the definition of "employ" in the federal Fair Labor Standards Act has observed that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame" (*United States v Rosenwasser*, 323 U.S. 360, 362 [1945]).

Petitioners exercised great control over the diamond setters' work and compensation.

Although the setters could perform work at home when they did not complete their work on Petitioners' premises, the majority of work was done at Petitioners' place of business and determined by Petitioners' demand. Marin was trained at diamond setting while he worked at the Petitioners and therefore, instructed by Petitioners on how to perform his job. Petitioners determined which setter would get what item of jewelry to be set, determined the price per piece for each setter, required that the work assigned be completed the day following the assignment, and had final approval of the quality of the setters' work. Thus, Petitioners exercised great control over the setters' work.

The diamond setters' had no real opportunity for profit or loss.

The setters' sole investment in working for Petitioners was time. Moreover, Marin testified that he was not operating his own business, had never set diamonds before he worked for Petitioners, had not worked for any other business during the five years that he worked for Petitioners, and had never again set diamonds after he worked for Petitioners. Mancheno testified that the other setters named on the audit worked for him and he was unaware of whether they worked for other jewelers or were in their own business. Although the setters were responsible for lost or damaged diamonds and were required to replace them, so there was a potential for loss, the Petitioners set the pay rate and it was the same for all setters. Furthermore, the record does not show that the diamond setters had a relationship with Petitioners' customers or dealt with them directly.

The degree of skill and independent initiative that diamond setters were required to perform setting does not support a conclusion that they independent contractors.

The ability to set diamonds in jewelry is a skill which Marin acquired while he was working for Petitioners which was the only time that he worked as a setter. The work was determined by the type of setting received and the number of diamonds, which in turn was determined by Petitioners.

The permanence or duration of the diamond setters' working relationship with Petitioners does not support a conclusion that they were independent contractors.

Marin began working for Petitioner in 1999 and worked for no one else for over five years during which he set diamonds in numerous pieces of jewelry. Mancheno presented no evidence as to the length of employment of the other setters.

The extent to which the setters' work is an integral part of Petitioners' business supports an employment relationship.

Petitioners are in the business of setting diamonds into jewelry, polishing the jewelry and returning the finished pieces to their customers. The stone setters were therefore an integral part of the Petitioners' business. Further, Marin and the other setters were dependent on the Petitioners' business for the opportunity to render services (*see Superior Care*, 840 F.2d at 1059).

Accordingly, based on the totality of circumstances, Petitioners failed to meet their burden to prove that the setters were independent contractors. An employment relationship existed between the Petitioners and the stone setters, and the Petitioners are liable for unpaid overtime wages pursuant to Labor Law article 19.

B. Petitioners failed to keep records that Labor Law § 661 requires employers to maintain.

Record Keeping Requirements

Labor Law § 661 states in relevant part:

> "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 Minimum Wage Order for Miscellaneous Industries at 12 NYCRR 142-2.6 specifies the information required to be maintained:

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

The regulations at 12 NYCRR 142-2.7 further provide:

> "Every employer . . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid, and to provide its employees with a wage statement every time an employees is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

The Commissioner Is Required to Base Wage Calculations on Employees' Assertions in the Absence of Adequate Employer Records.

The law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rates, and gross and net wages paid (12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or her designated representative (Labor Law § 661; 12 NYCRR 142-2.6).

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, the Commissioner 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). As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3rd Dept 1989), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer."

In *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-88 (1949), *superseded on other grounds by statute*, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate . . . [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

The *Anderson* Court further opined that a court may award damages to an employee, "even though the result be only approximate. . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . .the Act" (328 US at 688-89).

The Legislature expressly stated its intent in enacting the Unpaid Wage Prohibition Act, which includes Labor Law § 196-a: "The legislature finds . . . that too often the working people of our state do not receive the full wages they have earned, and that some workers are never paid at all for their labor. . . [W]e must ensure that working people are paid what they earn" (L 1997, ch. 605).

The remedial purpose of the Unpaid Wage Prohibition Act mirrors that of the prevailing wage statute and federal law. We therefore follow the precedent set in *Mid-Hudson Pam Corp.* that where an employer fails to keep records, the Commissioner may use the best available evidence to calculate back wages due and "to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer. . . In such a situation the amount and extent of underpayment is a matter of just and reasonable inference . . . ." *Mid-Hudson Pam Corp.*, 156 AD2d at 821.

When combined with the burden of proof that the employer normally bears in a petition before the Board to show that an order of the Commissioner is invalid or unreasonable, the burden of disproving the wage amounts that the Commissioner finds due, whether based on employee claims or not, and using the best available evidence, rests with the employer. To hold otherwise would reward the employer's disregard of its statutory obligation to maintain employee records.

C. Wages are due under the Minimum Wage Act.

The Minimum Wage Order for Miscellaneous Industries requires an employer to pay a non-residential employee minimum wage and overtime at a wage rate of 1 ½ times the employee's "regular rate" for hours worked over 40 in a work week, subject to any applicable exemptions (12 NYCRR 142-2.2).

The "regular rate" is defined at 12 NYCRR 142-2.16 as:

> "the amount that the employee is regularly paid for each hour of work. When an employee is paid on a **piece work** basis, salary, or any other basis other than hourly rate, the regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee's total earnings." [Emphasis added.}

See Matter of Cayuga Lumber, PR 05-099 (Decision on Reconsideration, September 26, 2007) (the regular rate of pay, which is the basis for determining the premium pay that must be paid for overtime hours worked, is calculated by dividing the employee's weekly pay by the regular number of hours worked per week.)

Both Mancheno and Marin testified that the jewelry business had a slow season and a busy season. The slow season was approximately from January through June and the busy season from July through December. During the slow season, Marin and the other setters rarely, if ever, worked for more than 40 hours per week. Therefore, based on the testimony at hearing, the Commissioner's findings of wages owed to each setter, as indicated in the schedule attached to the Wage Order, are revised to reflect overtime owed during only the busy season. Based on finding that overtime wages are only due for the months of July through December, the following wages are due:

1. Marlon Marin	$10,302.41
2. Jorge Bravo	$ 1,766.83
3. Jorge Hernandez	$ 2,183.89
4. Alejandro Gordillo	$ 343.91
5. Roberto	$ 2,573.32
6. Santos Perez	$ 1,873.77
TOTAL	**$19,044.13**

D. Civil Penalties for failure to pay wages are affirmed.

The Wage Order additionally assessed a civil penalty in the amount of 75% of the wages due. The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amount set forth in the Order is proper and reasonable in all respects.

F. The Civil Penalties for failure to have records and issue pay statements are upheld.

Petitioner alleges that the records and wage statements were not required due to the fact that the setters were independent contractors and not employees. However, as the Board finds that the setters were Petitioners' employees and that Petitioners failed to keep the required records or issue pay statements, the civil penalties are upheld.

G. Interest is due.

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 19 (Wage Order) is modified by reducing the amount of wages due to $19,044.13 and by reducing the interest and penalty due proportionately; and

2. The Order under Labor Law articles 6 and 19 (Penalty Order) is affirmed; and

3. The Petition is otherwise 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
October 20, 2010.

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