STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: PIOTR GOLABEK and AMICA CORP., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the New York State Labor Law and an Order Under Article 19 of the New York State Labor Law, both dated May 13, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-127 RESOLUTION OF DECISION

APPEARANCES

Santo J. Bonanno, Esq., for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin A. Shaw, Esq., of counsel) for respondent.

WITNESSES

Piotr Golabek and Stanley Muzyk, for petitioners; Elizabeth Ares, Senior Labor Standards Investigator, for respondent.

WHEREAS:

On June 3, 2009, Piotr Golabek and Amica Corp. (Petitioners) filed a Petition for review with the New York State Industrial Board of Appeals (Board), pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure And Practice (Board Rules) (12 NYCRR Part 66) seeking review of two Orders to Comply that the Commissioner of Labor (Commissioner, Respondent, or DOL) issued against them on May 13, 2009. The first Order under Article 19 (Wage Order) finds that Petitioners failed to pay wages to twelve

employees: Zenon Maciorowski, Slawomir Mioduszewski, Stanley Muzyk, Ryszard Pac, (first name unknown) Prznova, Maciej Silwinski, Kazimierz Stachyra, Giemiek Sudol, Arthur Treczynski, Cezoy Trowinski, John Wiszowety and Tomasz Zareba, for the period October 15, 2007 through September 13, 2008, and demands payment of $54,830.00 in minimum wage underpayments; interest at the rate of 16%, calculated through the date of the Wage Order in the amount of $5,956.13, and a 100% civil penalty of $54,830.00 for a total amount due as of the Order's date, of $115,616.13. The second Order under Article 19 (Penalty Order) finds that the Petitioners failed to keep and/or furnish true and accurate payroll records for each employee for the period from on or about October 15, 2007 through September 13, 2008 in violation of Article 19, and demands payment of $500.00.

The *pro se* Petition alleges that except for two individual subcontractors, Tomasz Zareba and Artur Treczynski, the workers named in the Wage Order were not Petitioners' employees. It also alleges that "[A]ll of the employees are paid exactly as stated in the employment agreement" and that "[s]ince we do not belong to a Union nor are we obligated to pay a prevailing wage we should not be responsible for underpayment of wages as stated by the notice received." An answer was filed by the Respondent on July 15, 2009.

Upon notice to the parties, a hearing was held on January 4, 2011 in White Plains, NewYork, before Jean Grumet, Esq., Member 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 make closing arguments. After the conclusion of the hearing, the Petitioners filed a post hearing brief on February 11, 2011. The Commissioner filed her post hearing brief on March 9, 2011, and the Petitioner filed a reply on March 31, 2011.

I. SUMMARY OF EVIDENCE

Testimony of Piotr Golabek

Piotr Golabek is president of Amica, a masonry contractor, which has a warehouse and office in Newburgh, New York, and formerly had an office at Golabek's home, in Elmwood Park, New Jersey, which Golabek has not lived in since May or June 2008, but continues to own. Golabek's New Jersey home phone number remains a working number, but he no longer uses it. He continues to use a New Jersey cell phone number, which he has had since 2002.

In 2007, Amica, through Golabek, contracted with Kirchoff Construction (Kirchoff), a general contractor with which it had worked in the past, to perform masonry work at a construction project for Marist College in Poughkeepsie, New York. The work included installation of cinder blocks to form structural walls, grouting the blocks with cement or concrete, and exterior brick work. Golabek testified he had the Kirchoff contract in his office, but did not bring it to the hearing.

Amica subcontracted with Zenon Maciorowski, a subcontractor with whom it had worked in the past, to perform block and brick installation. According to Golabek, there was a written subcontract with Maciorowski (which he also did not bring to the hearing),

stating that Amica would pay Maciorowski $4.25 per block or $1.00 per brick installed. Although the subcontract also stated a price for bricks, Maciorowski only installed blocks under the subcontract. Amica, for its part, grouted the blocks with cement and did exterior brick work. Besides the Amica subcontract, Maciorowski contracted directly with Kirchoff to do brick work on the last building at the end of the Marist College project.

Golabek testified that Petitioners paid Maciorowski a total of $488,250.00 for installing 119,000 blocks, as recorded in six invoices from Maciorowski to Amica with dates between November 30, 2007 and April 1, 2008.[1] Maciorowski, not Petitioners, employed and paid most workers on the Marist College job, and Golabek did not know how these workers were paid. During the job, some of Maciorowski's employees lived, along with Golabek and Amica supervisor Andrzek Koziel, in a house in Poughkeepsie rented by Amica, whose cost Petitioners and Maciorowski split.

Amica also rented a trailer to store tools, and provided "the bigger major tools," with Maciorowski responsible for providing "the hand tools." Petitioners introduced in evidence an August 8, 2007 Certificate of Insurance, effective through May 16, 2008 for liability insurance and through July 14, 2008 for workers' compensation insurance, listing Amica as the Certificate Holder and Maciorowski as the Insured. Golabek testified that Maciorowski handed him this Certificate after Golabek asked Maciorowski to provide insurance, and that it was Maciorowski's responsibility to pay for the insurance.

The only people on the Marist College job site who worked for Petitioners rather than for Maciorowski, according to Golabek, were "my job supervisor," Andy Koziel, Giemiek Sudol, Arthur Treczynski, Tomasz Zareba, and Miroslaw Zakrzewski. Koziel, Amica's job supervisor, "led" the Zenon Maciorowski company but was not at Marist College full-time. Petitioners kept no record of Koziel's on-site hours. Sudol, who was hired by Golabek, worked for Petitioners for one week. Treczynski and Zareba worked for Golabek as part-time laborers on the concrete pump, and were paid "[s]ometimes on the books, sometimes . . . from Zenon." Treczynski and Zareba worked both at Marist College and elsewhere; Golabek did not remember where else they worked. At some point, Treczynski was also Golabek's subcontractor, but Golabek was not sure whether that was during the relevant period.[2] Zakrzewski worked for Golabek as a helper and drove a van to deliver materials to the work site.

Golabek submitted a list, prepared by Petitioners' accountant, of Petitioners' employees and what they were paid during the period October 1, 2007 through October 1, 2008. Koziel and Zakrzewski appear on this list, but the names of the twelve workers whose pay is at issue in the Wage Order do not. The same is true of Amica's federal tax returns for

[1] The six invoices add up to $505,750, corresponding to $4.25 per block for 119,000 blocks. Golabek testified that as reflected in a March 20, 2008 invoice from Amica to Maciorowski, he deducted $17,500.00 from Maciorowski's bill, reflecting charge-backs by Kirchoff to Amica for damaged materials and equipment and extra Kirchoff supervision, and Maciorowski's half share in the cost of renting a Poughkeepsie house. Petitioners did not furnish copies of cancelled checks to verify these transactions.

[2] According to the DOL's Employee Jobsite Interview Sheets, Sudol told the DOL that he started to work two weeks before the November 2, 2007 interviews, and Zareba told the DOL that he had worked for Amica "a couple of times, a few months ago" and at other sites including Sleepy Hollow, starting in May 2006. Treczynski spoke little English and gave the DOL little information.

the last quarter of 2007 and the first two quarters of 2008 submitted by Petitioners: they report wages for Koziel and Zakrzewski, but not for the twelve workers from the Wage Order.

Testimony of Stanley Muzyk

Stanley Muzyk, one of the workers named in the Wage Order, was called as Petitioners' witness.[3] Muzyk testified that he was a mason on the Marist College job in 2007-2008, putting up blocks for Zenon Maciorowski, who paid him by check. Besides Maciorowski, Muzyk was supervised by Andrzek Koziel, who checked if the work was done correctly. Muzyk did not recall Sudol's or Treczynski's names, and testified that Zareba did grouting but did not work very often. Muzyk was aware that Golabek was the president of Amica in 2007-2008, and stated that he knew this because "You just know who the boss is.... And I often saw him there.... And when I was working for Zenon, everybody knew. They said he is the boss." Muzyk also testified that he told a DOL investigator that his boss was Maciorowski because Maciorowski gave him his paychecks, and that he understood Golabek to be the boss "because we were working in the capacity of subcontractors" for Golabek.

Testimony of Elizabeth Ares

On November 2, 2007, DOL Senior Labor Standards Investigator Elizabeth Ares accompanied about a dozen other DOL staff, including four less senior labor standards investigators, to a "misclassified worker investigation" at the Marist College construction site. The investigators tried to interview every worker, most of whom were masonry-related workers. The investigators filled out a printed questionnaire, which asked workers to name their employer and included such questions as by whom they were paid, hired, and supervised. Workers were additionally asked their names, addresses, phone numbers, trades, start and stop dates, daily and weekly schedules, pay rates, whether they punched in and out on a time clock, and other information.

The primary language of the masonry workers was Polish, which Ares does not speak. Some of the workers spoke limited English; most, according to Ares, understood the questions being asked. They knew what time they started work and, according to Ares, could confidently state their rates of pay. At times, investigators used their fingers to confirm that numbers were being accurately conveyed. If investigators really felt that a worker didn't understand questions, they made a notation on the form to indicate this. Tomasz Zareba (interviewed by another investigator, Connie Higgins, with Ares "standing at her side") spoke excellent English and translated for Ryszard Pac and Giemiek Sudol.

Ares testified concerning "Employee Jobsite Interview Sheets" which indicate that of the twelve workers who were interviewed by the DOL:

- Nine (Maciorowski, Mioduszewski, Pac, Prznova, Stachyra, Sudol, Treczynski, Trowinski and Zareba) gave the name of the

[3] Muzyk testified through a Polish interpreter. At the end of the hearing, Petitioners re-called Muzyk for brief rebuttal testimony without an interpreter.

Company as Amica,[4] two (Sliwinski and Wiszowety) gave it as "Zenon Maciorowski," and one (Muzyk) gave it as "Gener."

- Seven (Maciorowski, Mioduszewski, Pac, Prznova, Sudol, Wiszowety and Zareba) reported being supervised, hired and/or paid by Golabek or Koziel or both, and three (Muzyk, Stachyra and Trowinski) reported being supervised, hired and/or paid by Maciorowski. Two (Sliwinski and Treczynski) were unable to answer.

- Eight (Mioduszewski, Pac, Sliwinski, Stachyra, Sudol, Treczynski, Trowinski and Wiszowety) were recorded either as "Polish speaking," or as not understanding at least one question.

- Four (Maciorowski, Mioduszewski, Prznova and Sliwinski) stated that they worked only 40 hours per week. Three (Stachyra, Treczynski and Trowinski) did not give a clear answer on this issue. Stachyra listed his hours as "45 – not yet," added that he had "never worked more than 40 yet," yet also stated that his daily hours for a five-day week were 7:30 to 4:30, which implies a 42 ½-hour work week if there was a ½ - hour lunch break.[5] Treczynski did not say anything concerning hours; his sheet states "Polish speaking does not speak or read English could not understand." Trowinski stated his weekly hours as "40(+)."

- Two (Muzyk and Wiszowety) stated that they had worked more than 40 hours per week and been paid an overtime premium, and a third (Sudol) that he had worked more than 40 hours but "doesn't know yet" whether he would receive a premium, since he had not yet been paid. Two (Pac and Zareba) stated that they had worked more than 40 hours (7 a.m. to, respectively, 5:30 p.m. or "4:30-5:30," five days a week) but had not received a premium, only straight time. Muzyk stated his weekly hours as "40-50," that his daily hours were 7 to 3:30 with a ½-hour lunch, that he had a six-day work week with Sunday off, and that he received time and a half for hours over 40. Wiszowety stated his daily hours for a five-day week as 7:30 to 3:30 or 4:30, that he worked "up to 7 hrs" on weekends "if rain during week," and that he received time and a half for overtime – "sometimes 45 hr."

- In response to the question "Do you punch or sign in & out?," Maciorowski responded: "no – everyone same." Two other workers (Sliwinski and Stachyra) also answered "no," while

[4] Mioduszewski also stated that his "start date" was "3 mos Amica/ 2-3 weeks here."

[5] The DOL assumed that all workers had a ½-hour daily lunch break, based on statements from a few of the workers during their interviews.

seven (Mioduszweski, Pac, Prznova, Sudol, Trowinski, Wiszowety and Zareba) answered "yes," in several cases, also specifying that they wrote hours down on a time sheet.

- Six workers (Maciorowski, Miodusewski, Muzyk, Prznova, Sliwinski and Trowinski stated that they received a wage statement (stub) with their pay. Two (Pac and Zareba) stated that they did not.

While labor standards investigators interviewed workers at the site, other DOL staff went to the contractor trailers and filled out forms and asked questions. In addition to the Employee Jobsite Interview Sheets, an Employer Jobsite Interview Sheet was completed by a representative of the DOL's Unemployment Insurance Tax Services division, based on an interview with Koziel, Amica's project manager. According to the sheet, Koziel stated that twelve employees were currently on the job, that they were paid by check with taxes withheld and stubs provided, that the nature of Amica's business was "subcontractor – concrete & masonry," and that Amica's sole subcontractor was "Zenon Maciorowski, mason."

Ares' review of the case left her "uncertain regarding some aspects," and she tried to contact Petitioners to find out exactly how many hours employees worked, their rates, and the project's start and finish dates; and to obtain relevant records. The DOL's contact log, introduced in evidence by Ares, states that the case was assigned to her on September 25, 2008. On September 25 and 26, 2008, she left phone messages, which were not returned, on Golabek's New Jersey home phone number. On September 29 and November 3, 2008, she wrote to him, at each of the two addresses for Amica (one in Newburgh, New York, the other in Elmwood Park, New Jersey) which she obtained from the New York State Department of State's website. Her letter stated that she had been unable to reach Golabek at either his home or his cell number, and that she was seeking information and payroll records. The letters were not returned to the DOL, nor did Petitioners respond.

On January 28, 2009, Ares called Marist College and was referred to Kirchoff, the general contractor. Kirchoff representatives told Ares that Amica worked at Marist College from October 2007 through mid-September 2008, and that Kirchoff also contracted directly with Maciorowski for masonry work beginning in June 2008. Based on the interviews conducted earlier, Ares then determined that there had been underpayment of masonry workers on the Marist College project, whose amount she proceeded to estimate. Ares observed that the "interviews as a whole, even with the certain discrepancies from interview to interview, showed that masons were there basically full-time Monday through Friday," and that the three interviews given or translated by Zareba (his, Pac's, and Sudol's) implied up to a 50-hour work week.[6] Based on Maciorowski's "saying everyone works the same hours," Ares assumed that this 50-hour week applied to all twelve workers, even while acknowledging "that the standard hours of Monday through Friday, ten hours a day, don't

[6] Pac stated that he worked 7:00 am to 5:30 pm, and Sudol and Zareba that they worked 7 am to 4:30-5:30 pm. Ares explained: "if we went from seven to 5:30 and figured half an hour for lunch, that's ten hours a day, giving the employees the benefit of – or recognizing the possibility that they may well have worked to 5:30 on a regular basis, that comes out to ten hours a day, figuring five days a week, that's where I came up with the 50 hours per week."

exactly reflect all of the information as exactly provided... by each individual employee."[7] She also assumed that no worker was paid an overtime premium, and that all but one of the workers worked at Marist College for 48 weeks, "the time frame that I had obtained in my research as to how long Amica or the masons were working on-site. Other than for Zenon Maciorowski, whom I had found went onto Kirchoff's payroll I had been told mid-June, so I figured June 14, so I used only 35 weeks for him."

Ares took individual workers' pay rates from their interviews: "For example, Zenon's interview, he said he got $20 an hour.... Someone said they got $13 an hour. Someone said they got $22 an hour. I used those rates."[8] Using these assumptions – an across-the-board 50-hour work week, across-the-board failure to pay overtime premiums, 48 weeks of work for everyone but Maciorowski, and individual hourly rates based on worker interviews – Ares calculated underpayment estimates for each Individual Worker, totaling, for the twelve of them, $54,830.00.[9]

Ares explained that in making her calculation she assumed that all twelve employees, including those who had told her they did not work more than 40 hours, actually worked a 50-hour week because "other interviews, particularly the translated ones, showed more hours." She "gave the employer four opportunities to provide accurate records" to "document or evidence that 5:30 was not the correct or not the average finish time," but Petitioners provided no records. On cross-examination by Petitioners' counsel, Ares added that while she did not believe that workers who denied working overtime had been lying,

> "they may have misunderstood.... Because I didn't have a translator of any kind for those four. Because common sense, which is not necessarily evidence, would tell me that probably all the workers are working the same hours. Mr. Zenon told us that everyone is working the same hours.... I was hoping that I would receive records from Amica that would clarify a lot of things, and I would have been happy to adjust or modify my findings."

On February 13, 2009 Ares again wrote to Golabek at both his Newburgh, New York and his Elmwood Park, New Jersey addresses, notifying Petitioners of the wage audit and

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[7] Ares noted that actual hours worked also "could be more than 50 hours a week. There is somebody in there who said he worked Saturday.... [T]hey were mostly from New Jersey area and living locally, there's a presumption, which I did not build into the hours, but there's also a presumption that the employer may have told them, you know, be at this location at this date so that I can transport you... which could open the door for additional hours that should be on the clock."

[8] The Employee Jobsite Interview Sheets show that Sudol stated that he did not know his rate – "has not received pay yet. Er did not tell him rate of pay" – and that Treczynski, who "could not understand" most questions in his interview, also did not state a rate. Ares' Computation Sheets for Sudol and Treczynski show that she assumed they were paid $20 per hour, the rate stated by six other Individual Workers, including Tomasz Zareba. Her Computation Sheet for Sudol states: "Use $20 same as TZ."

[9] The individual amounts, stated in the Wage Order, were: Maciorowski - $3,500; Mioduszewski, Muzyk, Pac, Sudol, Treczynski, Trowinski and Zareba - $4,800 each; Prznova - $5,280; Silwinski - $6,000; Stachyra - $3,250; Wiszowety - $3,200. In the case of Wiszowety, Ares' calculation was evidently mistaken. Using her assumptions, his weekly underpayment would have been $80, not the $64 shown in her Computation Sheet, and his 48-week total would have been $3,840, rather than $3,200.

finding Petitioners in violation of Labor Law § 661 and 12 N.Y.C.R.R. § 142-2.7 for failure to maintain payroll records, and attaching a Recapitulation Sheet showing $54,830.00 in wages due for overtime work for twelve employees. The letter requested payment or credible evidence that these wages were not due within 20 days.

No response was received from the employer. On May 13, 2009 the DOL issued the two Orders to Comply challenged in the Petition, addressing them to "Piotr Golabek and Amica Corp., Marist College, 3399 North Rd, Poughkeepsie, NY 12602."

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). If the Board finds that the "order, or any part thereof, is invalid or unreasonable it shall revoke, amend or modify the same" (Labor Law § 101(3)).

Pursuant to Rule 65.30 of the Board's Rules of Procedure and Practice (Rules) (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 Petitioners 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 Board Rule 65.39 (12 NYCRR § 65.39).

The two main issues in this case are: (1) whether the twelve workers named in the Wage Order were employed by Petitioners, and (2) whether the calculation of amounts due individual workers in the Wage Order was valid and reasonable. For the reasons stated below, the Board finds that the workers were employed by Petitioners, but that while it was valid and reasonable to conclude, in the absence of employer records, that there was underpayment, most of the underpayment amount stated in the Wage Order was not validly and reasonably estimated based on the best evidence available. We affirm the Penalty Order in its entirety and affirm the Wage Order only as modified below.

At the outset, we note the Commissioner's position that the sole issue in this case is whether the Claimants were employed by the Petitioners, and that Labor Law § 101(2) bars Petitioners from raising the correctness of the Commissioner's underpayment calculation because the issue was not raised in the Petition. The *pro se* Petition states that "employees were paid exactly as stated in the employment agreement" and that "Petitioners should not be responsible for the underpayment of wages as stated in the notice received." We find that a challenge to the DOL's calculations in the Wage Order is implicit in the Petition's denial of responsibility "for the underpayment of wages as stated by the notice received" and

statement that employees were paid exactly as stated in their employment agreement. *See Matter of Borough Park Food Mart, LLC*, PR 08-022 [September 24, 2008]. We also note that the Commissioner was not prejudiced or unfairly surprised by consideration of this issue, nor did she request an adjournment when the issue was raised at the hearing. The calculations were performed by the Labor Standards Investigator, who was called as the Commissioner's witness.

While we find that Petitioners could challenge the correctness of the Commissioner's calculations, we agree with the Commissioner that an additional issue which Petitioners sought to raise in their post-hearing brief, a claim that Golabek was not individually liable as an employer, was not encompassed by the Petition and that Labor Law § 101(2) forecloses Petitioners from belatedly raising this issue. We note that while Petitioners filed the Petition *pro se*, they were represented by counsel at the hearing, yet the issue of Golabek's individual liability was not raised during the hearing, nor did Petitioners request leave prior to the conclusion of the hearing to amend the Petition to include the allegation that Golabek was not individually liable. The Board denies Petitioners' post-hearing attempt to raise the issue after submission of evidence is completed, which would be prejudicial to Respondent. *Matter of NYC Dep't of Transportation (5 Dubois Avenue, Staten Island, NY)*, PES 06-004 [December 17, 2008]. Furthermore, as discussed below, even had the issue been properly raised, we would still have found that Petitioners did not meet their burden of proof to show that Golabek was not individually liable.

A. Petitioners employed the twelve individual workers.

Under Article 6 of the New York 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 USC § 203[g]). The "'test for determining whether an entity or person is an employer' is the same under New York State and federal law" (*Matter of Ovadia v Industrial Bd. of Appeals*, 81 AD3d 457 [1st Dept. 2011], *app. pending, [quoting Chu Chung v New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 318 n6 (SDNY 2003)]). The Supreme Court has observed that "[a] broader or more comprehensive coverage of employees" than that provided by the FLSA "would be difficult to frame" (*United States v Rosenwasser*, 323 US 360, 362 [1945]. In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir. 1999]), the Second Circuit Court of Appeals enunciated this test for determining employer status:

> "the overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the "economic reality" presented by the facts of each case.... Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control "do[ ] not diminish the significance of its existence."

(*Id* [citations omitted]; *See also Brock v Superior Care, Inc.*, 840 F 2d 1054, 1058-1061 [2d Cir. 1988]).

We find, as discussed below, that Petitioners did not prove that the Order finding them to be the individual workers' employers was unreasonable or invalid under this statutory standard. Petitioners claimed that except for Sudol, a short-term worker whom Golabek acknowledged he personally hired, the 12 individual workers were all either subcontractors themselves or employed by subcontractor Zenon Maciorowski rather than by Petitioners. To support this claim, Petitioners introduced evidence, principally Golabek's own testimony, that Petitioners paid Maciorowski a per-block price for installing blocks and Maciorowski directly paid most employees. While such evidence could be relevant to whether Maciorowski was also an employer, it is insufficient to establish that it was unreasonable or invalid to regard Petitioners, who controlled the work and for whom the work was done, as having employed the individual workers.

Under the expansive definition of "employ" used in the New York Labor Law as well as the federal FLSA, a "worker may be employed by more than one individual or entity at the same time (*See Ovadia*, 81 AD 3d at 458; *Rutherford Food Corp. v McComb*, 331 US 722 [1947]; *Zheng v Liberty Apparel Co.*, 355 F3d 61, 67-76 [2d Cir. 2003]). Factors considered in assessing whether a business is an employer of its subcontractor's employees, "based on 'the circumstances of the whole activity, viewed in light of economic reality'" (*Ovadia*, 81 AD3d at 458., quoting *Zheng*, 355 F3d at 71), have included: (1) whether the business's premises and equipment were used by the employees; (2) whether the subcontractor's employees could or did shift as a unit from one business to another; (3) the extent to which the employees performed a discrete line-job integral to the process of production; (4) whether responsibility to perform that job for the business could or did pass from one subcontractor to another; (5) the degree to which the business or its agents supervised the employees' work; and (6) whether the employees worked exclusively or predominantly for the business whose employer status is in question. Such factors can indicate that a business has functional control over subcontractors' employees even in the absence of formal control (*Zheng*, 355 F3d at 72).

In the present case, it was reasonable and valid to regard Petitioners as the twelve individual workers' employers; there is no need to consider whether evidence might also have supported finding Maciorowski as a joint employer of some of the twelve. It is undisputed that Petitioners contracted with the general contractor Kirchoff to perform the masonry work at the Marist College project. Both block installation and grouting were integral to the work which Petitioners contracted to perform. Of the twelve individual workers interviewed by the DOL and named in the Wage Order, nine named Amica as the company they worked for, and seven specifically reported being supervised, hired and/or paid by Golabek or Koziel or both. Golabek testified that Koziel, undisputedly an Amica supervisor, led the workers. Muzyk, called as a witness by Petitioners, testified that even though he worked for Maciorowski, he and "everybody" else knew Golabek was "the boss." Muzyk testified that Koziel supervised his work. It is undisputed that Petitioners funded the workers' wages, even if, as Golabek testified, they did so by paying Maciorowski on a per-block basis and Maciorowski then paid wages directly. This indicates that the individual workers were ultimately dependent on Petitioners, who governed their employment and its terms and conditions.

Petitioners provided housing in Poughkeepsie, where Golabek, Koziel, and many of the individual workers (all of whom lived nearly two hours away in New Jersey) lived while

working at the Marist work site. The major tools used by all of the masonry workers belonged to Petitioners and were stored in Amica's locked trailer at the Marist work site. Muzyk testified that he got the tools from the trailer each morning and put them back in the shed when he was finished working in the evening. In his interview with the DOL, Koziel stated that the twelve employees "currently on the job" were covered by a workers' compensation policy, for which Golabek testified he was the Certificate Holder. Based on the evidence, it was valid and reasonable for the DOL to conclude that Petitioners employed the twelve workers within the meaning of the Labor Law.

Although Golabek testified Amica had a written subcontract with Maciorowski, he did not bring the contract to the hearing. Even assuming that Amica paid Maciorowski $488,250.00 for installing blocks based on a per-block price, and left it to Maciorowski to make direct wage payments to the workers, such an arrangement is no different than the relationship in *Zheng*. Such a relationship is not a legal basis to escape employer status under the Labor Law; otherwise, employers could easily be absolved of their legal responsibility, leaving the employer with the benefit of employees' labor while freeing it of that labor's cost, and making workers' rights effectively unenforceable.

The Petition alleged that except for "two individual subcontractors Tomasz Zareba and Artur Treczynski," the workers named in the Order "have nothing to do with Amica" and were not its employees. No record evidence was presented by Petitioners to demonstrate that Zareba and Treczynski were subcontractors as opposed to employees. Golabek testified that Zareba and Treczynski were laborers who "work[ed] part-time for me," and were paid "[s]ometimes on the books, sometimes . . . from Zenon." Golabek also acknowledged that "I hired" Giemiek Sudol. Nor did the Petition claim that the individual workers were employed by Maciorowski, an allegation that was raised for the first time at the hearing. As stated in *Brock v Superior Care*, 840 F.2d at 1059-1061, "an employer's self-serving label of workers as independent contractors is not controlling."

While Petitioners emphasized that none of the workers appears in a list of employees prepared by Petitioners' accountant or in Amica's quarterly tax returns, employee status is not negated by leaving workers off their tax returns or an employee list. On the contrary, if employees are misclassified as independent contractors, legal ramifications result. In the present case, the incompleteness of the list is unmistakable since even Sudol, whom Golabek acknowledged "I hired," and Treczynski and Zareba, who "work[ed] part-time for me," were omitted. In any event, the question is not whether Amica was obligated to file tax returns including the workers. The question is whether Petitioners employed them within the meaning of the Labor Law, and the DOL's finding that Petitioners were employers is supported by the record.

Petitioners' Post-Hearing Briefs argue, for the first time, that even if Amica was an employer, "Piotr Golabek is not responsible, personally, for the actions or inactions of Amica." As previously stated, this issue was not timely raised. The evidence presented at the hearing, in any event, supports the DOL's finding that Golabek, as well as Amica, was the employer of the individual workers. Labor Law § 190(3) defines "employer" to include "any person, corporation, limited liability company or association, employing any individual in any occupation, industry, trade, business or service." The employer status and responsibility of an individual, personally, are evaluated under the same statutory definition

and standards that have already been discussed (*See, eg., Herman v. RSR Sec. Servs.*, 172 F.3d at 140 [upholding finding that 50% owner of company, who had authority to hire and did hire managers, occasionally supervised employment conditions, and "controlled the company financially," was an employer under the FLSA's "economic reality" test]). The Board has found individuals to be employers if they possess the requisite authority over employees (*See, e.g., Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 [Jan. 27, 2010]).

In the present case, Golabek was Amica's president, the company formerly operated out of his house, and he presented no evidence that it had any other owner or officer. Muzyk, called as a witness by Petitioners, testified that Golabek was often at the work site and everybody knew him as "the boss." By his own admission, Golabek employed "my supervisor, Andy Koziel." He also acknowledged hiring Sudol, Treczynski and Zareba; Pac's Employee Jobsite Interview Sheet states that he, too, was hired by Golabek; and the interview sheets of three other workers (Maciorowski, Mioduszewski and Prznova) identified Golabek as their supervisor. Golabek did not deny that he personally controlled Amica, both financially and in every other way, and he regularly referred in testimony to "my supervisor, Andy Koziel," "[m]y masonry trailer," "my subcontractor," "my warehouse address," and "my payroll." The evidence supports the finding that Golabek, in his individual capacity, possessed the requisite authority over the individual workers to be found individually liable as an employer under the Labor Law.

B. The Wage Order's underpayment estimates were not valid and reasonable.

Article 19 of the Labor Law requires employers to maintain payroll records, to keep those records available for inspection by the Commissioner at any reasonable time, and to furnish them to the Commissioner on demand (Labor Law § 661). The Commissioner's regulations implementing Article 19, at 12 NYCRR § 142-2.6, provide that weekly payroll records must be maintained and preserved for six years and shall show, *inter alia,* the name and address; social security number; wage rate; number of hours worked daily and weekly; amount of gross wages; deductions from gross wages; and net wages paid for each employee. Petitioners provided no payroll records either to the DOL during the investigation or at the hearing, and we therefore affirm the Penalty Order.

Where the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties...shall not operate as a bar tofiling of a complaint by an employee. In such a case, the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits, and wage supplements."

In cases such as the present one, where employer records have not been maintained, it is proper for the DOL to credit employee statements and calculate wages due based on information provided (*See* Labor Law § 196-a; *Matter of Angello v National Finance Corp.*,

1 AD3d 850, 853-854 [3d Dept 2003]; *Matter of Mohammed Aldeen,* PR 07-093 [May 20, 2009] *affd sub nom, Matter of Aldeen v Industrial Appeals Bd.*, 82 AD3d 1220, 1221 [2d Dept. 2011]). *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 A.D.2d 818, 820-821 [3d Dept. 1989], upheld the Commissioner's determination of wages due some 43 employees from a variety of evidence including complaints from two employees, lists of employees, and interviews of others.

In *Anderson v Mt. Clemens Pottery Co.*, 328 U.S. 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's records are inaccurate or inadequate," stating that the 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." The Court held that 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 under the Fair Labor Standards Act."

The Appellate Division adopted *Mt. Clemens*' reasoning in *Mid-Hudson Pam Corp.*, explaining that to hold otherwise "would in effect award Petitioners a premium for their failure to keep proper records and comply with the statute," and holding in light of the remedial nature of the prevailing wage statute and "its public purpose of protecting workmen," that

> "[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."

(156 AD2d at 821). The Board follows the precedent set in *Mid-Hudson Pam Corp.* that where required employer records are unavailable, DOL may use "the best available evidence" to estimate back wages due and "shift the burden of negating the reasonableness of the Commissioner's calculations to the employer," with "the amount and extent of underpayment... a matter of just and reasonable inference" (*Mid-Hudson Pam Corp.*, 156 AD2d at 821; *Matter of Abdul Wahid*, PR 08-005 [Nov. 17, 2009]; *Matter of Dueck Sun Kim Youn*, PR 08-172 [Mar. 24, 2010]).

In the present case, Ares acknowledged that her assumption that all twelve workers worked Monday to Friday, ten hours a day, did not "exactly reflect all of the information as exactly provided... by each individual employee," but noted that Petitioners ignored four requests to provide records, and stated: "All I had to work with was interviews.... I was hoping that I would receive records from Amica that would clarify a lot of things, and I would have been happy to adjust or modify my findings." While frustration at Petitioners' non-response to repeated requests for records was understandable,[10] in the circumstances

[10] The evidence shows that Ares left messages for Golabeck on September 25 and 26, 2008; wrote to him on September 29 and November 3, 2008; and again wrote to him on February 13, 2009 enclosing her preliminary findings and again requesting a response. She directed requests to both addresses given in Amica's filing with

here, the Board finds that there was no valid or reasonable basis for the DOL's finding that the workers were entitled to ten hours' weekly overtime. Ares' assumptions that the employees, as a group, worked a 50-hour week without any overtime premium is not supported by the interview sheets. Of the twelve workers interviewed, four stated that they worked only 40 hours per week; three gave an ambiguous or no answer; two stated that when they worked more than 40 hours per week they were paid an overtime premium; one stated that he had worked more than 40 hours but "doesn't know yet" whether he would receive an overtime premium; and only two, Pac and Zareba, stated that they had worked more than 40 hours but were not paid a premium, although their interview sheets are not reliable enough to draw the conclusion that they worked 50 hours every week of the claim period, particularly with respect to Pac, who apparently does not understand English.

The jobsite interview sheet completed for Pac indicates that his pay-rate was $20.00 an hour, and that his "scheduled hours" were 7:00 a.m. to 5:30 p.m. with a lunch break of an unspecified duration at 1:00 p.m. The sheet also indicates that when asked whether he is paid time and a half when he works more than 40 hours, he answered "No. Straight time." However, the sheet also indicates that when asked what his last amount paid was, he answered "$800.00." The sheet also indicates that he was paid in cash and that the "cash portion" of his wages is "$800.00." Based on such limited information acquired during a brief interview under fraught conditions with respect to the ability of worker and DOL to communicate with each other, we do not find that it was reasonable to impute nearly two years of overtime liability on such scant evidence. Indeed, the interview sheet on its face indicates both that the worker worked overtime and that he did not as evidenced by the fact that he could not have worked overtime during the last pay period before the interview was conducted since he was paid $800.00 which at $20.00 an hour, indicates that he was paid "straight time" for 40 hours of work.

We find the interview sheet for Zareba, however, does support an overtime violation. His interview sheet indicates that his "scheduled hours" were from 7:00 a.m. to 4:30 or 5:30 p.m., with a thirty minute lunch break, that his pay rate was $20.00 an hour, that he did not receive time and a half for hours worked over 40, and that the "last amount paid" was $1,000.00. Based on this information, it is reasonable to conclude, based on the interview sheet, which in the absence of employer records, is the best available evidence, that Zareba worked 50 hours the last pay period before he was interviewed by DOL ($1,000.00 ÷ $20 an hour = 50 hours worked), and may have worked 50 hours each week at the site since he indicated that he worked from 7:00 a.m. to 4:30 or 5:30 p.m.

While the DOL is permitted to assume, in cases such as the present one in which an employer fails to respond to repeated requests for information, that information it receives from workers or other sources is accurate and to use the best evidence available to estimate underpayment, other employees' statements concerning only their own hours are not the best evidence as to the hours of other employees who themselves have given statements concerning their hours and have specifically stated that they did not work overtime.

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the New York State Department of State as well as by Amica supervisor Koziel in his November 2, 2007 interview, and to the two telephone numbers given by Koziel. Golabeck did not deny that the addresses and numbers were correct, or that the numbers remain in service; the Petition itself lists as Amica's address the Newburgh address to which Ares repeatedly wrote.

Ares based her assumption that *all* employees worked a 50-hour week while being denied any premium chiefly on Pac and Zareba's statements – which were not about the workers as a group – and on Maciorowski's having answered the question "Do you punch or sign in & out?" by saying "no – everyone same." Yet the worker interviews, as Ares acknowledged, reflect a variety of hours, not "everyone same." And, seven workers, including Pac, Sudol and Zareba, on whose interviews Ares relied for the 50-hour-per-week figure, answered "yes" to the question "Do you punch or sign in & out?," contradicting Maciorowski. Ares testified that she gave weight to the hours stated by Pac, Sudol and Zareba because Zareba, who translated for the other two, spoke excellent English. Yet Maciorowski and Prznova, whose interview sheets give no indication of any language difficulty, were among workers who stated that they worked only 40 hours. And Ares herself testified that even the workers with "limited English... know seven o'clock versus eight o'clock," and for that very reason, expressed confidence in her use in calculating underpayment of the hourly rates provided by all the workers, including those whose English may have been limited and for whom Zareba did not translate.

Many of the workers provided the DOL with both an address and phone number and there was no indication that they were reluctant to talk with the DOL. If, as Ares testified, she was concerned that workers "may have misunderstood," she should have contacted them instead with the help of a certified Polish interpreter or Polish speaking DOL employee, instead of assuming that all employees worked the hours stated by only three of them, even though the DOL's interviews taken as a whole do not show this.

We find that it was valid and reasonable to conclude, in the absence of required employer records only that Zareba, who so stated in his interview, worked up to ten hours per week of overtime without being paid an overtime premium. The "best evidence available" did not support the finding that the workers as a group worked a 50 hour week without receiving any overtime premium, and we find that it was not valid and reasonable to conclude that other employees, who did not so state and who in many cases specifically denied working overtime, also worked ten hours per week of overtime without being paid a premium.[11]

Additionally, it was unreasonable for DOL to assume that the employees worked any days after November 2, 2007, the date of the sweep, since DOL did not speak to them after that date to determine whether they were still working at the site. The wage order finds the Petitioners liable for wage underpayments through September 13, 2008, which is apparently based on information received by DOL from Marist College that Amica and/or Maciorowski continued to perform masonry work at the site until September 13, 2008. However, the fact that the Petitioners and/or Maciorowski continued to work at the site after the date of the DOL sweep, is not evidence that the one worker, Zareba, who we found worked overtime, continued to work on the project or, indeed, worked overtime on any date after November 2.

The Wage Order is modified to reduce the wages due and owing to Przynova, Pac.

[11] Sudol, while also stating that he worked up to ten hours per week of overtime, stated that he did not yet know whether he would be paid a premium, or, indeed, what his hourly pay rate was. While it was valid and reasonable to accept Sudol's statement that he worked overtime, we do not find it valid simply to assume that he was not paid a premium, given that some workers stated they were paid premiums when they worked overtime.

Sliwinski, Stachyra, Sudol, Treczynski, Trowinski, Wiszowety, Maciovowski, Mioduszewski, and Muzyk to $0.00; and the reduce the wages due and owing to Zareba to $300.00 ($100.00 a week for three weeks).

C. The Imposition of Interest is Affirmed

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." We therefore affirm the rate of interest imposed but find that the amount of interest assessed must be modified based on the reduction in the amount of wages found due.

D. The Imposition of Civil Penalties in the Wage and Penalty Orders is Affirmed

Labor Law § 218 provides that in assessing the amount of a penalty, the commissioner "shall give due consideration" to the following factors: (1) the size of the employer's business; (2) the good faith of the employer; (3) the gravity of the violation; (4) the history of previous violations; and (5) in the case of violations involving wages, benefits or supplements, the failure to comply with recordkeeping or other non-wage requirements. The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amounts are reasonable in all respects. We therefore affirm the imposition of a 100% penalty in the Wage Order but find that the amount of the penalty must be recalculated based on the $300.00 found due and owing. We affirm the $500.00 Penalty Order for failure to keep and/or furnish true and accurate payroll records.

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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 from $54,830.00 to $300.00, and the interest and civil penalty due are to be recalculated based on that amount;

2. The Penalty Order is affirmed; and

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

Anne P. Stevason, Chairperson

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 Albany, New York, on
December 14, 2011.