

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

ANTHONY BOVE AND ABOVE CONSTRUCTION
CORP.,

Petitioners,

DOCKET NO. PR 09-165

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 6, An Order to
Comply with Article 19, and an Order Under Article
19 of the Labor Law, all dated June 19, 2009,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Steven Landy & Associates, PLLC (Steven Landy of counsel), for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor, (Laraissa C. Bates of
counsel), for respondent.

WITNESSES

Anthony Bove, for petitioners.

Cordie McCann, Labor Standards Investigator; Vincent R. Hammond, Senior Labor
Standards Investigator; and Wilfredo Obregon, for respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial
Board of Appeals (Board) on July 2, 2009. An answer was filed on August 13, 2009. An
amended petition was filed on August 17, 2009 which was answered by respondent on
August 24, 2009. Upon notice to the parties, a hearing was held on January 11, 2011 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 closing briefs.

The Commissioner of Labor (Commissioner, DOL [Department of Labor], or respondent) issued three orders against petitioners Anthony Bove and Above Construction Corp. (together petitioner) on June 19, 2009. An Order to Comply with Article 6 (Wage Order) directs payment to the Commissioner for wages due and owing to claimant Wilfredo Obregon (claimant) in the amount of \$6,260.10 with interest continuing thereon at the rate of 16% calculated to the date of the Wage Order, in the amount of \$894.59, and assesses a civil penalty in the amount of \$6,260.10, for a total amount due on the Wage Order of \$13,414.79.

An Order to Comply with Article 19 (Minimum Wage Order) directs payment to the Commissioner for overtime wages due and owing to claimant in the amount of \$3,863.65 with interest continuing thereon at the rate of 16% calculated to the date of the Minimum Wage Order, in the amount of \$552.13, and assesses a civil penalty in the amount of \$3,863.65, for a total amount due on the Minimum Wage Order of \$8,279.43.

The Order under Article 19 of the Labor Law (Penalty Order) assesses a civil penalty against the Petitioner in the amount of \$2,500: \$1000 for failing to provide requested payroll records for the period of February 4, 2008 through July 28, 2008; \$1000 for failing to provide each employee with a wage statement with every payment of wages during the same time period; and \$500 for failing to allow employees at least 24 consecutive hours of rest in any calendar week, also during the same time period.

The main allegation of the petition is that petitioner never employed claimant. At hearing the petitioner also raised the issue that the investigation was conducted at the wrong address and therefore, petitioner was not given proper notice and an opportunity to respond. Respondent objected to the filing of an amended petition at that late hour since the petition had already been amended once, the Board had set a deadline for further amendments and the petitioner had been given a copy of the DOL file and all necessary information months before. Respondent requested that the Board deem the allegation concerning the lack of notice to be waived. After hearing, petitioner filed its Second Amended Petition which included this new allegation.

SUMMARY OF EVIDENCE

Petitioner Anthony Bove incorporated Above Construction Company in December 2005 and provided 48-24 Beach 48th Street, Brooklyn, New York as the address of the corporation. The company acted as a general contractor. Its Home Improvement License, as well as its state and federal tax filings were filed using the address of 48-24 Beach 48th Street. Bove testified at hearing that he never used any other business address and never leased space anywhere else for his business. His bank records indicated the Beach 48th Street address.

Bove also testified that he had never met claimant Wilfredo Obregon and never employed him. While Bove filed quarterly payroll tax statements as well as distributed W-2 forms, he never had any record of Obregon.

Bove stated that he never received a request to provide payroll records from DOL, and no employees worked over 40 hours per week. However, petitioner did not maintain time records for 2008, but employees signed in on a daily sheet. Although Bove recognized a business card listing Anthony Bove as president of Above and indicating its address at 1491 Schenectady Avenue, Bove denied that it was his business card. There is no sign nor anything at the door of 1491 Schenectady Avenue to indicate that Above Construction does business there.

Wilfredo Obregon filed two claims against Above Construction Company with DOL in August 2008. The claim forms indicate that Francisco Bove is the owner of the company and hired and supervised Obregon and that Anthony Bove is the president. The claims are for overtime for the entire period of his employment: February 4, 2008 to July 28, 2008; and for unpaid wages from June 16, 2008 to July 28, 2008. Obregon testified at the hearing and identified Anthony Bove as the president of Above Construction Co., for which he worked installing sheetrock, painting and framing. Francisco is Anthony's father and claimant was directed by both individuals on what to do and where to report in the morning. He worked 7 days per week, Monday through Saturday from 7:00 a.m. to 7:00 p.m. and on Sunday from 8:00 a.m. to 5:00 p.m. While working for Above Construction Co., Obregon performed work at 1491 Schenectady Avenue, Beach 48th Street which was the Boves' home, and two other construction sites, one of which was in New Jersey. Anthony and/or Francisco would transport Obregon to the workplace each morning. When he worked in New Jersey he would be picked up at 7:00 a.m. by the Lincoln Tunnel and transported 2 hours to the worksite in New Jersey by Anthony and/or Francisco Bove. Obregon also produced a business card naming Anthony Bove as president of Above Construction and providing 1491 Schenectady Avenue as the address with his claim. He found the card when he was cleaning off a table, per instructions, at 1491 Schenectady Avenue.

Labor Standards Investigator (LSI) Cordie McCann testified that she was assigned to investigate claimant Wilfredo Obregon's claim. In October 2008 LSI McCann made her first visit to 1491 Schenectady Avenue, the address listed for the employer on the claim form and the address indicated on the business card attached to the claim form. Once there, McCann observed two men working with wood in a workshop/warehouse located at that address. She first interviewed Alfredo Guerrero, who spoke English. Guerrero told McCann that his employer was Above Construction and that he was hired, supervised and paid by Anthony Bove. McCann then interviewed Edgar Guzman through Guerrero since Guzman did not speak English, and he also indicated that he worked for Above Construction and that he was hired, supervised and paid by Anthony Bove. Both workers stated that they were paid weekly but were not given any wage statement. Guzman was paid in cash and Guerrero was paid by check.

McCann stated that there was no sign on the door or above the door at 1491 Schenectady Avenue. When she inspected the premises she saw mail addressed to Anthony Bove and Above Construction at 1491 Schenectady Avenue. One such item of mail was what appeared to be a bank statement. Guzman and Guerrero indicated that the employer

operated out of two locations: the 1491 location and another location in downtown Brooklyn. Guerrero is named on the quarterly tax documents produced by petitioner as an employee of Above Construction in 2008 and petitioner also produced a W-2 form for Guerrero for 2008 indicating that he was employed by Above Construction.

Prior to leaving the premises, McCann left a Notice of Revisit with Guerrero with instructions to give the notice to his employer. The notice indicated that McCann would return on November 13, 2008 to review payroll records for the period of January 2006 to "present." Prior to her return visit on November 13, McCann telephoned Anthony Bove and left a message reminding him of her visit. McCann could not remember and had no note of the telephone number that she called.

McCann made her scheduled second visit to 1491 Schenectady Avenue on November 13. The door was closed, the gate was down and no one was there. McCann spoke with a neighbor who said that the employer and approximately 6 to 7 of his employees were working at that location the day before.

McCann did not receive any payroll records from petitioner. She calculated the amount of wages owed: overtime wages under the minimum wage order and regular wages under Article 6 of the Labor Law, based on information in Obregon's claim. All communication that McCann had with petitioners was addressed to the 1491 Schenectady Avenue address. No mail was ever returned to DOL from this address.

Senior LSI Vincent Hammond testified that he supervised McCann's investigation and that on June 4, 2008, Hammond sent a letter to petitioners at 1491 Schenectady Avenue with a copy to Beach 48th Street concerning the DOL investigation and Obregon's claim. In response, Hammond received a telephone call from a woman who claimed to do payroll for petitioner stating that the employer does not know Obregon and also does not have an address at 1491 Schenectady Avenue. The next day Hammond received another call from Steve Meleska who also claimed to do payroll for Above Construction. Since no payment or payroll documents were received from petitioner, Hammond referred the matter to an Order to comply and recommended a penalty of 100% based on the employer's lack of cooperation and document production.

The penalty order was imposed due to the fact that the employer failed to maintain payroll records, failed to provide wage statements and failed to provide its employees with a day of rest. The orders were sent to 1491 Schenectady Avenue, as well as the Beach 48th Street address which Hammond believed was Bove's home address.

Hammond testified that there were two wage orders because one order was based on the failure to pay claimant the overtime wages that were due him, under the minimum wage provisions. The second order was based on the fact that claimant was paid no wages at all for the period of June 16, 2008 to July 28, 2008. The figures were based on a pay rate of \$120 per day. There is no overlap of wages due under the orders.

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” (Labor Law §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 (Board’s Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 [“The burden of proof of every allegation in a proceeding shall be upon the person asserting it”]; *Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

It is therefore petitioners’ burden to prove the allegations in the petition by a preponderance of evidence.

B. 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 implementing Article 19 provide at 12 NYCRR § 142-2.6:

- “(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.”

C. 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 provides that employers who keep inadequate records “shall bear the burden of proving that the complaining employee was paid wages, benefits, and wage supplements” (*see 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 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 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.”

FINDINGS

Petitioners employed the claimant.

Petitioner had the burden to prove that neither he nor his company employed the claimant. In support, petitioner submitted tax records, W-2s and testified that he did not do business at 1491 Schenectady and never employed Obregon. In response, Obregon testified that he was employed by Anthony Bove and Above Construction Co., was told that Above Construction Co. was his employer, and that he was supervised by Anthony and Francisco Bove. In corroboration, LSI McCann testified that she interviewed two employees whom

she observed working at 1491 Schenectady and was told by both that they were employed by Above Construction Co. and were hired, paid and supervised by Anthony Bove. She also stated that she observed mail addressed to Anthony Bove with the address of 1491 Schenectady at that location. One of the employees at 1491 Schenectady appears on petitioner's quarterly payroll tax report for 2008 and was given a W-2 and therefore, was an employee of petitioner according to petitioner's own records.

The Board finds that a preponderance of the credible evidence supports a finding that Obregon was employed by Anthony Bove and Above Construction Co.

Wages owed to claimant.

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements (*Matter of Mid-Hudson Pam Corp. v Hartnett*, *supra* at 821). In a proceeding challenging such determination, the employer must then "come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence" (*Anderson v Mt. Clemens Pottery*, *supra* at 688; *Matter of Mid-Hudson Pam Corp. v Hartnett*, *supra* at 821 [employer burden to negate reasonableness of Commissioner's determination]). *Anderson* further opined that the 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" (*Id.* at 688-89).

The only records provided by petitioner were tax and corporate records. There were no time records and petitioner failed to present its employees with wage statements when they were paid. We find petitioner's testimony that no one ever worked over 40 hours per week was insufficient to carry its burden.

Obregon's claim provided a schedule of hours worked which DOL used to estimate the amount of wages due. Petitioner argues that this is not an accurate audit since, for example, when the work was in New Jersey, claimant testified that he would be picked up by petitioners at 7:00 a.m. (the time indicated on the claim form) but would not start the actual construction work until 9:00 a.m. However, there was no evidence of how many times this happened, whether petitioner required claimant to be waiting at 7:00 a.m., in which case the time might be compensable, and therefore, petitioner cannot complain about the inexactness of the audit where it has failed in its legal obligation to keep time records (*see e.g. Anderson, supra*).

We affirm the wage orders.

The Board will not consider petitioner's second amended petition.

Under the circumstances of this case, the Board is using its discretion to deny petitioner's motion to amend the petition. Petitioner was represented by counsel, participated in a prehearing conference at which time the issues of the case were discussed,

received a copy of DOL's investigative file months before the hearing, and, was granted leave and a deadline to file an amended petition after the prehearing conference. The Board finds that under these circumstances, petitioner was provided with sufficient notice and opportunity to raise the issue of whether DOL's investigation was sufficient given that it was conducted at 1491 Schenectady Avenue and not the official address of the corporation.

In any event, the preponderance of the evidence indicates that 1491 Schenectady was a site where petitioner did business and received mail. In addition, prior to the issuance of the orders to comply, DOL wrote a letter to petitioner and sent a copy to Beach 48th Street and DOL was called by two representatives of the company.

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." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum from the date of the underpayment to the date of the payment."

Imposition of Civil Penalties in the Wage Orders

If the Commissioner determines that an employer has violated Articles 6 or 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 and a civil penalty based on the amount owing (Labor Law § 218 [1]). In this case, DOL imposed a 100% penalty based on petitioner's failure to provide records and lack of cooperation. The Board finds that this penalty is reasonable.

The Penalty Order

An order was also issued against petitioner for failure to maintain or furnish payroll records, failure to issue wage statements and failure to provide one day's rest in seven. We find that this order is reasonable and valid and supported by a preponderance of the evidence.

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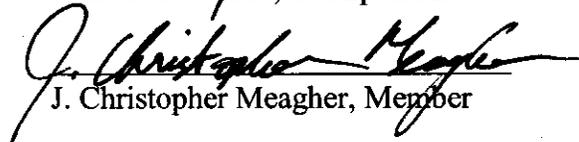
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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Orders of the Commissioner are hereby affirmed; and
2. The Petition for review be, and the same hereby is, otherwise denied.



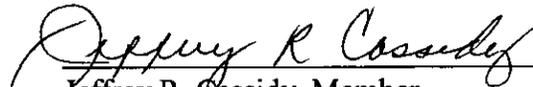
Anne P. Stevason, Chairperson



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 New York, New York, on
January 30, 2012.

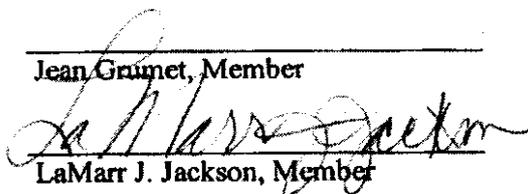
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Orders of the Commissioner are hereby affirmed; and
2. The Petition for review be, and the same hereby is, otherwise denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grunet, Member



LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
January 30, 2012.