NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order issued Petitioners on January 28, 2009 is vacated ; and

2. The Petition for review be and the same hereby is, granted.

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 Albany, New York, on
December 15, 2010.

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
LIZA J. GATTEGNO and PRINCESS JESSIE ROSE INC. and JESSIEROSE INC. (T/A JESSIE ROSE BOUTIQUE),	:	
Petitioners,	:	DOCKET NO. PR 09-032
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, dated January 28, 2009,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Liza J. Gattegno, *pro se*, for Petitioners.

Maria L. Colavito, Counsel, New York State Department of Labor, Larissa C. Wasyl of counsel, for Respondent.

WITNESSES

Liza J. Gattegno for Petitioners; Giovanna Geraldo, Senior Labor Standards Investigator, and Julie Mondragon, Labor Standards Investigator, for Respondent.

WHEREAS:

A Petition for review in the above-named case was received by the Industrial Board of Appeals (Board) on March 20, 2009. Petitioners Liza J. Gattegno, Princess JessieRose Inc., and JessieRose Inc. (together, Petitioners) seek to vacate an Order to Comply with Article 6 of the Labor Law that the Respondent Commissioner of Labor (Commissioner) issued against Petitioners on January 28, 2009.

The Order directs Petitioners to pay to the Commissioner wages found owed to employee Yvonne A. Bailey (Claimant) in the amount of $230.00, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of $101.83, and a civil penalty in the amount of $173.00, for a total amount due of $504.83.

The Petition alleges that the wages, interest, and penalty were improperly assessed because Petitioners fully paid the Claimant all her wages for the period of the claim. Petitioners assert that an "Hours Book" signed by the Claimant and a final paycheck issued to her for $315 on April 13, 2006 establish that Petitioners "do not owe [Claimant] for any additional hours" of work and that she was fully paid.

The Commissioner filed an Answer, denying the Petition's material allegations, and interposing as an affirmative defense that the calculation of wages, interest, and penalties in the Order are in all respects valid and reasonable.

Upon notice to the parties, a hearing was held on January 26, 2010 before J. Christopher Meagher, Esq., Member of the Board and the Board's designated hearing officer in this case. Each party was afforded full opportunity at the hearing to present evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

SUMMARY OF EVIDENCE

Petitioner Liza J. Gattegno is the owner of Princess JessieRose Inc. and JessieRose Inc. (T/A JessieRose Boutique) (together, the Boutique), a clothing store that sold fashions designed by Gattegno which operated at 220 East 60th Street, New York, New York until Spring, 2006.

The Wage Claim

On June 3, 2006, Claimant filed a claim against Petitioners with the Department of Labor (DOL) for $230.00 in unpaid wages for the period April 1, 2006 to April 24, 2006. The claim listed the employer's business address as 220 East 60th Street, New York, New York 10022.

Claimant's written claim form stated that she had been employed by Petitioners as a sales associate at the rate of "$10 p/h (no taxes deducted)." She estimated her date of hire as November 12, 2005, and stated that her last day of work was April 24, 2006. Claimant stated that she left her employment because of unreasonable working conditions and had made several demands of Gattegno in May, 2006 for payment of her wages for the period April 1 to April 24, 2006, a period Claimant stated was an "estimated guess."

By letter dated June 11, 2006, Claimant advised DOL that after filing her claim she had learned the Boutique had closed and was no longer in operation.

Claimant did not testify at the hearing.

Testimony of Petitioner Liza Gattegno

Gattegno testified that she is a fashion designer and was the owner and operator of the Boutique. She hired the Claimant to work as a "salesgirl" at the Boutique at the rate of $10 per hour, plus supplemental payments for "small projects" that Claimant would take home and sew for extra money.

Gattegno submitted copies of records maintained by the Boutique and asserted they establish Claimant's last day of employment was April 8, 2006 and that Claimant was paid for all her hours worked. The records were admitted into evidence by stipulation.

Gattegno submitted a copy of a check issued to the Claimant on April 13, 2006 in the amount of $315.00 and testified that it was Claimant's "last paycheck", representing payment for "21 and a half hours at $10 an hour" and an additional $100 for small "sewing projects". In the Memo section of the check Gattegno wrote "$100 – sewing $215 hrs (sic)". In addition, Gattegno testified from copies of handwritten entries that Claimant entered in an "Hours Book." According to Gattegno, the "Hours Book" was a record where the employees "... would come in, sign the date, the time that they arrived, the time that they left and they would total the hours per day."

In evidence are copies of three pages of entries for the Claimant from a spiral notebook.[1] The pages show various dates during the period "11/19" (year omitted) to "4/8/06." Claimant's name is written at the top of each page, with dates, arrival and leaving times, and total hours per day listed underneath. There are also references reflecting check payments for the total hours listed, including payment for work performed on garments and accessories. Regarding the time frame of the claim, one page lists arrival times, leaving times, and 21.5 total hours worked by the Claimant on "3/23/06," "3/30/06," "4/1/06," and "4/8/06." The document lists a check payment of $315 made to Claimant on 4/13/06 for the period "3/23/06 – 4/8/06", including $100 for work performed on "Jean Skirts" and "Jeans." There are no time entries for Claimant during the claim period other than those listed above and no pages or entries for Claimant after April 8, 2006.

On cross examination, Gattegno acknowledged that her records did not specifically list the Claimant's wage rate, social security number, gross wages, deductions, or net wages. Gattegno also said she did not have a computer timekeeping system but argued that the check, which was cashed by the Claimant on April 20, 2006, together with the entries in the "Hours Book" demonstrate that Claimant's time records were maintained contemporaneously with her workdays. Gattegno testified that she did not issue Claimant a paystub showing the pay period covered by the final paycheck, or a letter of termination verifying Claimant's last day of employment, but asserted that the check and "Hours Book" entries establish the pay period and that Claimant's last date of employment was April 8, 2006.

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[1] Also in evidence from the Commissioner's file are copies of entries from two other employees from the "Hours Book" that Petitioner attached to the Petition along with the Claimant's time and pay entries. The entries cover the period 11/05 to 5/06 and list the employees' names, dates, times, hours, and check payments.

DOL's Investigation

DOL's file reveals that on June 20, 2006 and January 12, 2007, DOL issued collection notices to the Boutique at 220 East 60th Street, New York, New York 10022 notifying it of the claim; requesting that it remit payment or respond in writing if it disagreed; and that it substantiate its reasons with payroll records, contracts, and documentation demonstrating payment of the wages claimed. DOL did not receive a response to the first notice. The second was returned by the Postal Service as undeliverable. On December 10, 2007, Labor Standards Investigator (LSI) Julie Mondragon made a field visit to the employer's premises but found the establishment out of business.

Mondragon testified that on July 10, 2008 she reached Gattegno by telephone and advised her of the details of the investigation. Mondragon said she left a voice mail message and had a second phone conversation with Gattegno where she reiterated the information and requested that Gattegno send DOL payroll records to substantiate that she did not owe the wages claimed. However, Gattegno declined to discuss the claim any further, said she did not care about the matter, and hung up the phone.

By letter dated July 11, 2008 to 220 East 60th Street, Mondragon issued Gattegno a notice recapitulating the details of the claim and requesting that by July 25, 2008 Gattegno forward any payroll records covering the Claimant. DOL did not receive a response to the notice.

Mondragon testified that because the employer's business premises were closed, she requested an "Accurint Search" be done to find the most recent address for Petitioners. The "Accurint Report" revealed a current address for Gattegno. On July 25, 2008, the Postal Service confirmed that mail was delivered to Gattegno at the address given, which is the same address that Petitioners identified in their Petition filed with the Board.

Senior Labor Standards Investigator (SLSI) Giovanna Giraldo testified that all further correspondence from DOL to the employer was thereafter sent to the verified address. By letter dated August 1, 2008 and Notice of Labor Law Violation dated September 2, 2008, DOL issued Petitioners final notices recapitulating the wages owed and requesting they remit payment or the matter would be referred for an Order to Comply. The notices did not request that Petitioners submit payroll records. No response was received.

On January 28, 2009, the Commissioner issued Petitioners the Order under review, which includes the assessment of a 75% civil penalty of $173.00. The Commissioner's calculation of $230 wages owed was drawn from the information provided in the written claim. No payroll records were received from Petitioners. In support of the penalty, Giraldo testified that she completed an investigative report titled "Background Information – Imposition of Civil Penalty" that provides information relating to the size of Petitioners' firm, their good faith, gravity of the monetary violations, and records provided or not provided concerning non-wage violations. Under the section titled "Recommendations", the report referenced the statutory language of Labor Law § 218 relating to civil penalties to support Giraldo's recommendation of a 75 % penalty. Geraldo testified that the basis for her

recommendation was, "[b]asically the fact that we had made contact with the employer on various occasions, requested payroll records and none were provided."

Gattegno testified in rebuttal that DOL had been sending documents to a location that was no longer in business and that she never received a request to provide employment records regarding the Claimant. Gattegno said she had only one phone conversation with Mondragon on July 10, 2008 and told the investigator that she had discussed the matter with Claimant and did not owe her any money. Gattegno denied that Mondragon requested copies of her employment records.

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 by a preponderance of the evidence the allegations in the Petition that the wages, interest, and penalty were improperly assessed because Petitioners fully paid the Claimant all her wages for the period of the claim and do not owe her for any additional hours of work.

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.; *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."

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

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

FINDINGS

Petitioners Met Their Burden To Establish Claimant Was Paid All Wages Due And Owing For the Period Of the Claim

In *Anderson v Mt. Clemens Pottery Co., supra*, the Supreme Court set forth the burden shifting applicable when an employer fails to maintain adequate records of actual wages and hours. When an employer has not kept such records, an employee suing for lost wages may carry her burden by submitting "sufficient evidence from which violations of the [FLSA] and the amount of an award may be reasonably inferred" (*Id.* at 687). The burden then shifts to the employer to 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" (*Id.* at 687-88). If the employer fails to produce such evidence, the court may then award damages to the employee, "even though the result may be approximate" (*Id.* at 688).

The Court in *Mt. Clemens* further defined the nature of evidence the employer must produce to establish the "precise" amount of work performed or to "negative the reasonableness" of the inference drawn from the employee's evidence. In finding that employees were entitled to compensation for preliminary activities after arriving at their places of work, the Court rejected the trial court's refusal to award such compensation -- not because it was not compensable work -- but because the amount of time spent doing these activities had not been proven by the employees with any degree of reliability or accuracy. The Court held that employees cannot be denied recovery on such basis. "Unless the employer can provide *accurate estimates* [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time" (*Id.* at 693 [emphasis added]; *Brock v Seto*, 790 F2d 1446, 1448-49 [9th Cir.1986] [quoting *Mt. Clemens*, at 693] [unless employer provides "accurate estimates" of hours worked, District Court permitted to approximate award based on reasonable inferences from the employees'

testimony]; *Matter of Aldeen,* PR 07-093 at pp.13-15 [May 20, 2009] [*appeal pending*] [employer's burden to establish "accurate estimates" of hours worked to overcome approximation drawn by Commissioner from employee statements]).

Given the interrelatedness of wages and hours, the *Mt. Clemens* burden shifting standard also applies to wages and requires the employer to present evidence either of the "precise wages" paid or evidence "'to negative the reasonableness of the inference to be drawn from the employee's evidence'" (*Doo Nam Yang v ACBL Corp.*, 427 F. Supp.2d 327, 331 [SDNY 2006] [quoting *Mt. Clemens* at 688]).

We find Petitioners' testimony and records in this case sufficient to establish an "accurate estimate" of the hours worked by the Claimant relative to the period of the claim and the "precise wages" paid for those hours. Petitioners thereby overcame the approximation drawn by the Commissioner from the Claimant's written claim form. Since the Claimant did not testify to rebut the Petitioners' evidence, the Commissioner's Order is vacated as invalid and unreasonable.

Petitioner Gattegno testified that the "Hours Book" was a record where her employees would enter the time they arrived at work, left work, and their total hours worked each day. Entries from the "Hours Book" for Claimant list Claimant's arrival times, leaving times, and total hours per day for two days just before and two days during the time frame of the claim, including her last day worked on April 8, 2006. There are no entries for Claimant after that date. The entries state that Claimant worked a total of 21.5 hours on the four days and that a check payment of $315 was issued covering the period March 23 through April 8, 2006. The payment includes $100 for work performed on "Jean Skirts" and "Jeans." Petitioners' records show that a paycheck was issued to Claimant on April 13, 2006 for $315 and cashed on April 20, 2006. The check has a reference that reasonably corroborates the 21.5 hours listed in the "Hours Book" and the $100 payment for sewing work.

Taken together, we find Petitioners' records sufficient to establish a reasonably "accurate estimate" of 21.5 total hours worked by the Claimant relative to the time frame of the claim. The records establish the "precise wages" Claimant was paid for those hours since Claimant listed her wage rate on the claim form as "10 p/h (no taxes deducted)" and the records show she was paid $215 gross wages for 21.5 total hours at $10 per hour. The rate of pay may be derived by dividing the number of hours into the payment and coincides exactly with that stated by Claimant. The Claimant did not testify at hearing to contradict the authenticity, accuracy, or completeness of the time and payment records submitted by Petitioner. Since the Commissioner's calculation is an approximation for a period that Claimant stated was an "estimated guess", the calculation falls in the face of Petitioners' precise and accurate proof.

The Commissioner argued in closing that the check issued Claimant has no proof that it covers the claim period from April 1 to 24, 2006 and that Petitioner provided no evidence to show that Claimant *did not work* during that period. However, there was no legal duty on Petitioners to issue Claimant a letter of termination in this case verifying that Claimant's last date of employment was April 8, 2006. There are no "Hours Book" entries

for work performed by Claimant on any days during the claim period other than April 1 and 8, 2006. Claimant did not testify at hearing to contradict the accuracy and completeness of the entries she made in the "Hours Book." The "Hours Book" and April 13, 2006 check also show that Claimant was paid for a period that covers the hours she worked during the claim period. We find that Petitioners records establish that Claimant was fully paid for the hours she *did work* during the claim period and thereby negate any inference she is owed additional wages for the amount and extent of work performed.

The Commissioner also argued that Petitioners failed to meet their burden of proof because Petitioners' records do not comply with Labor Law § 661 and 12 NYCRR § 142.2.6 since they fail to list Claimant's social security number, wage rate, gross wages, deductions, and net wages. However, the Commissioner did not issue Petitioners an Order in this case for failure to maintain or furnish adequate payroll records or wage statements required by statute (Labor Law §§ 195 and 661). The issue in this appeal is whether Petitioners met their burden to present evidence of the precise wages paid Claimant for the amount and extent of work she performed. Claimant's social security number, deductions, and net wages are unnecessary to make that determination since the records show Claimant received $215 gross wages for 21.5 hours worked at the wage rate of $10 per hour. The wage rate may be derived by dividing the number of hours into the payment and coincides exactly with that stated on Claimant's claim form as "$10 p/h (no taxes deducted)."

Finally, the Commissioner argued that there were numerous occasions via letter where payroll records were requested of Petitioners but none were ever provided. The Commissioner asserts that Petitioners have thereby failed to meet their burden because they had the opportunity to prove the claim was invalid but failed to do so. We reject this argument because DOL's investigative file shows that written collection notices were sent to a business address that had closed or did not request records when sent to a verified address. The record does not establish that Petitioners failed to respond to written demands for production of records.

The evidence does establish that investigator Mondragon made a verbal request of Petitioner for employment records and that Petitioner failed to submit them. While Petitioner's failure to respond to the investigator may be relevant to other issues in this appeal, such as the civil penalty assessed were the Order upheld, it does not support a reasonable inference in the circumstances of this case that Petitioners' records submitted at hearing are not authentic, accurate, or complete or that Petitioners have not met their burden. The records are regular on their face and Claimant did not testify at hearing to contradict the accuracy or completeness of the records. In the absence of such proof, we find Petitioners' records establish that Claimant was paid the wages owed for the work she performed during the period of the claim.

For the foregoing reasons, we find that Petitioners satisfied their burden of proof to establish that the Commissioner's Order directing Petitioners to pay wages, interest, and civil penalty is invalid and unreasonable and vacate it accordingly.