STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ROBERT REITMAN AND B. REITMAN BLACKTOP, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply With Article 6 of the New York State Labor Law and an Order Under Article 19 of the New York State Labor Law, both dated January 13, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-075 RESOLUTION OF DECISION

APPEARANCES

Shari Lee Sugarman, Esq., for Petitioners.

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

WITNESSES

Elizabeth Walker, Robert Reitman, Teresa Difusco, for Petitioner;

Jeanette Saladino, Penny Wickman, Labor Standards Investigator Frederick Seifried, for Respondent.

WHEREAS:

On March 12, 2010, Robert Reitman (Reitman), as president of B. Reitman Blacktop, Inc. (Reitman Blacktop) (together, Petitioners), filed a Petition 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 an Order to Comply with Article 6 of the New York State Labor Law (Labor Law) and an Order Under Article 19 of the Labor Law (together, Orders) that the Commissioner

of Labor (Commissioner, Respondent or DOL) issued on January 13, 2010 against Petitioners and Sandra Reitman.

The Order to Comply with Article 6 of the Labor Law (Wage Order) finds that Petitioners and Sandra Reitman failed to pay wages to Roberta Clingan (Clingan), Penny Wickman (Wickman) and Sal Saladino (Saladino) (Claimants). It finds that Clingan was owed $880.00 in earned wages for the period August 3 to August 19, 2009, Wickman was owed $1,325.00 in earned wages for the period May 17 to May 28, 2009, and Saladino was owed $800.00 in earned wages for the period July 30 to August 7, 2008, for a total of $3,005.00 in unpaid wages. The Wage Order demands payment of $3,005.00 in wages, interest at the rate of 16% calculated through the date of the Order in the amount of $374.16, and a 100% civil penalty, for a total amount due of $6,384.16. The Order under Article 19 of the Labor Law (Penalty Order) finds that Petitioners and Sandra Reitman failed to keep and/or furnish true and accurate payroll records for each employee for the period from on or about July 30, 2008 through August 18, 2009, and assesses a $1,000.00 civil penalty.

The Petition alleges that Clingan was paid in full, that Petitioners will reissue a $600.00 check to Wickman to replace the one she ripped up, that the most Saladino is owed is $150.00 for 1 ½ days of work and that civil penalties should be voided. The Respondent filed an Answer on April 28, 2010. Upon notice to the parties, a hearing was held on January 3, 2012 in Old Westbury, New York 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.

I. SUMMARY OF EVIDENCE

Reitman has owned Reitman Blacktop, which patches, paves and seals Long Island driveways and blacktop, for 25 years. At relevant times, with seasonal variation, Blacktop employed about ten to twenty people including Claimants, night dispatcher Teresa Difusco (Difusco), office worker Elizabeth Walker (Walker), and office manager Sandra Romangnuolo (Romangnuolo), referred to in the Orders as "Sandra Reitman."

Claim of Roberta Clingan

A Claim for Unpaid Wages (Claim) filed with the DOL by Clingan on September 9, 2009 and affirmed by her to be true states that she was hired by "Sandra Ruminello-Reitman" as a bookkeeper on August 3, 2009 at $20.00 per hour, worked until August 19, 2009, and was owed $870.00 in unpaid wages, having been given an August 31, 2009 check for that amount which was returned for insufficient funds. Reitman testified that although he signed this check without noticing the error, Clingan herself mistakenly wrote the check on the wrong account, resulting in the return for insufficient funds. He testified that when Clingan called to say the check had bounced, he told her to redeposit it after waiting for him to put enough funds in the account for the check to clear.

Labor Standards Investigator Frederick Seifried (Seifried) agreed at the hearing that shortly after filing her claim, Clingan successfully redeposited the check, and that

Respondent's remaining wage claim concerning Clingan is for $92.00 in fees she incurred as a result of the check bouncing. At a pre-hearing conference, Reitman acknowledged that Clingan incurred $92.00 in fees because the check bounced twice and agreed to pay this amount.

Claim of Penny Wickman

A Claim filed with the DOL by Wickman on June 3, 2009 and affirmed by her to be true states that she was hired by Reitman as a bookkeeper on May 17, 2009 at $25.00 per hour, worked until May 28, 2009, and was owed $1,325.00 in unpaid wages. According to the Claim, Wickman worked a total of 22.5 hours on three days and 30.5 hours on four days during the weeks ending May 22 and May 29, 2009 respectively, and was owed, at $25.00 per hour, $1,325.00 for a total of 53 hours' work.

Reitman testified that he hired Wickman at $20.00 per hour on Sunday, May 17, 2009, and that after starting work the next day and working just three hours, she disappeared and then called in sick. After calling a few times to see when she was coming back, Reitman hired a different bookkeeper. When Wickman unexpectedly returned the following Monday, May 25, Reitman agreed to let her do data entry, a different task from the QuickBooks work for which she had initially been hired. Reitman sometimes slept at the office. On Tuesday or Wednesday, Wickman banged at midnight on the door of the room where he was sleeping, and Reitman told her she would be terminated effective Thursday, May 28, the end of the work week.

Reitman testified that on Friday, Wickman came in at 5:00 p.m., payday, and was given a $600.00 check for her total 30 hours of work. Reitman was not there but an office worker phoned him to state that Wickman was making a scene, and had ripped up the check. According to Reitman, the most Wickman could possibly be owed is the $600.00 for 30 hours worked at $20.00 per hour.

Difusco, who has worked for Blacktop for 13 years, testified that her work hours were from 3:00 p.m. to about 9:00 p.m., that she was generally the last person out the door, and that she saw Wickman leave work by 4:00 or 5:00 and never later than Difusco.

Walker, who has worked for Blacktop for four and a half years, testified that her work hours were from 9:00 a.m. to 4:00 p.m. and that she and Wickman arrived at and left work around the same time. Walker recalled Wickman working about four to five days, disappearing for a while and then reappearing. .

Walker, Reitman and Difusco all testified that Reitman Blacktop recorded office workers' hours through time sheets that were kept in a folder in Reitman's office, on which Romangnuolo wrote down the workers' times in and out. For the week ending Thursday, May 28, 2009, such a sheet records Wickman working from 9:00 a.m. to 3:00 p.m. on May 25, 9:00 to 4:00 on May 26, 9:00 to 4:00 on May 27 and 9:00 to 4:00 on May 28, for a total of 27 hours over four days. No time sheet for the week ending May 21 was introduced in evidence. Reitman testified that the time sheets were Reitman Blacktop's standard way of keeping track of office employees' hours, that Romangnuolo faxed the sheets to the DOL in response to its request for records, and that the DOL faxed the sheet for the week ending

May 28, 2009 back to him at his request. Reitman believes Romangnuolo also faxed the DOL a sheet for the week ending May 21 (the week when, he testified, Wickman worked only three hours), but he does not have it.

Wickman testified she was hired at a $25.00 per hour rate. When Reitman asked her rate at her Sunday hiring interview she stated that rate, and Reitman agreed. According to Wickman, she started work that same Sunday, although she does not now remember how many hours she worked that day. Reitman never stated that she would be paid $20.00 per hour, nor did anyone explain the basis for the $600.00 check she was tendered. Wickman was out sick with bronchitis for three days and called in sick.

Wickman did not know whether anyone beside herself kept track of her hours, but she always greeted co-workers when arriving or leaving, so it should have been known when she was at work. Because Wickman was out sick her first Friday at work, she expected to be paid the following Friday, May 29. When she was handed a $600.00 check, Wickman attempted to hand it back and when the person who tendered it wouldn't take it, Wickman ripped it up in front of her. Romangnuolo was in the office when Wickman worked until midnight, and Reitman was there sleeping as well.

Between May 29 and June 5, 2009 Wickman and Reitman exchanged e-mails. The e-mail messages faxed by Wickman to DOL included one she sent Reitman on May 29 (the day she was later tendered the $600.00 check) stating that she had forgotten to give him her hours, would be at the office shortly, and that her hours worked were the following:

Sunday 5/17/09	6:00 pm – 12:00 pm	6 Hours
Monday 5/18/09	1:30 pm – 10:00 pm	8.5 Hours
Tuesday 5/19/09	10:00 pm – 6:00 pm	8 Hours
Wednesday-Friday 5/20-5/22/09	OUT SICK	
Monday 5/25/09	HOLIDAY	
Tuesday 5/26/09	9:00 am – 11:30 pm	14.5 Hours
Wednesday 5/27/09	9:30 am – 10:30 pm	13 Hours
Thursday 5/28/09	10:30 am – 1:30 pm	3 Hours

On June 1, 2009 Reitman e-mailed Wickman stating "when you fill out your paperwork Paychex will process payment for the trial period." Wickman responded at 4:06 a.m. that she had never been given paperwork, that Reitman did not "even appreciate someone that will stay until 11:30 pm and midnight," that Reitman had agreed to pay $25.00 per hour, and that Wickman was "not trespassing when I am there to get my wages."

On June 5 (apparently, in response to posts by Wickman), Reitman e-mailed countywideinvestigations.com, with a copy to Wickman and stating that she "has refused to use the call-in and call out time tracking to monitor the few days she was trying out for the bookkeeping position.... We have had all intentions of paying for the inadequate few additional days she performed data entry."

Claim of Sal Saladino

A Claim filed with the DOL by Saladino on October 26, 2008 and affirmed by him to be true states that he was hired by Reitman as a laborer in July 2008 at $20.00 per hour, worked until August 7, 2008, and was owed $800.00 in unpaid wages for five days worked the week ending August 7. Walker testified that Saladino worked for Reitman Blacktop for three days at most, coming to the office for customer lists, going out to work sites, and calling the office (with Walker answering the phone) if there were problems during his work day. Saladino was issued a cell phone, which he never returned. Saladino's employment ended when he disappeared for two days. Blacktop tried unsuccessfully to reach Saladino on his company-issued phone, and had to cancel scheduled work for customers. Saladino's mother, with whom he lived, called to say that Saladino had been arrested and requested his pay. When Walker told Reitman of the call, Reitman responded: "Have him return the phone and he can receive his pay."

Reitman testified that Saladino worked a week or two at a rate of $160.00 per eight-hour day, with a company-issued cell phone to call customers and the office. No time records were kept for Saladino. During his final pay period, Saladino worked only one and a half days and then disappeared for two or three days. Reitman knows that Saladino worked less than two full days because he knows which customers Saladino serviced before disappearing. Subsequently, Reitman himself spoke by telephone with Saladino's mother, who asked for $1,000 bail money; Reitman responded that Saladino was a nice guy but he was not providing bail money, and that he needed the cell phone back. Saladino's mother stated that the police had the cell phone. When she came to the office on pay day, demanding $800.00 for the week, Reitman "told the office to get the phone back before we pay her anything, and we don't owe more than a couple days worth of pay. I think it was a day and a half that he worked that week, Monday and Tuesday. So it was like 240 bucks. That's all we owed him." Reitman testified that he was willing to pay $240.00 but Saladino's mother, who "kept coming back to the office," wanted $800.00 and never returned the phone.

Jeanette Saladino (Ms. Saladino), Saladino's mother, testified that Saladino worked for Reitman Blacktop for "[p]robably a little over a month." Ms. Saladino testified that when her son was arrested on August 8, 2008, she telephoned Reitman to tell him he would not be in to work. Reitman offered to lend Ms. Saladino money to get her son out of jail, but she refused. She never again spoke to Reitman, but did call the office again to try to collect her son's pay, which Saladino told her was for "just about a week's worth of work." A man whose name she does not remember answered the phone, became verbally abusive and stated, "You know, try and collect it. He's in jail." This man also told her that if she came to the property, they would call the police. She testified that she subsequently filled out her son's Claim, and he signed it in her presence. She further testified that while out on bail, Saladino repeatedly called Reitman Blacktop "and I believe he spoke to one of the secretaries," but was never paid for his work.

The DOL's Investigation

On December 16, 2008 the DOL wrote to Reitman Blacktop stating that Saladino claimed $800.00 for the period July 30 to August 7, 2008 and requesting that Blacktop, within ten days, either remit payment or provide a statement of its reasons for disagreeing, including copies of payroll records or other substantiating documents. On June 23, 2009 the

DOL wrote to Reitman Blacktop stating that Wickman claimed $1,325.00 for the period May 17 to May 28, 2009 and making a similar request. On July 7, 2009 Reitman Blacktop sent the DOL an unsigned response "to a letter that Robert Reitman, owner of B Reitman Blacktop Inc. received." The response stated that Wickman "worked for us on a trial basis at $20 and worked a total of 30 Hours.... She was let go after the trial period.... $20 an hour at 30 hours does not add up to $1325 it adds up to $600 and she would not accept that." Reitman testified that while he did not recall this unsigned letter, it was on Reitman Blacktop stationery and "I believe one of the girls in the office typed that up." Labor Standards Investigator Seifried testified that this letter, supplying no substantiating records, did not invalidate any Claim.[1]

On July 15, 2009 Senior Labor Standards Investigator Annemarie Culberson (Culberson) wrote to Reitman, stating that in the absence of documentary evidence to refute it, the DOL was upholding Saladino's Claim, and requesting payment within two weeks. The letter further stated that failure to respond within that time could result in collection activities including issuance of an Order to Comply including interest and penalties and an audit of company records, and that a company's owners, officers and agents are personally liable for employee wages. On September 17, 2009 Culberson again wrote to Reitman at Blacktop, responding to its July 7 letter and stating that since he had submitted no documentation with respect to Wickman's Claim, "we are upholding her claim.... As you are also aware, Mr. Sal Saladino has also filed a claim.... I wrote you concerning this claim on July 15, 2009. I have yet to receive a reply....Absent documentary evidence to the contrary, we are upholding these claims." This letter, too, requested payment within two weeks and stated that failure to respond could lead to issuance of an Order to Comply and that "owners, officers and agents of the company are personally responsible for the payment of employees' wages."

On December 7, 2009 Culberson completed an Issuance of Order to Comply Cover Sheet recommending that orders including a $1,000.00 civil penalty for record-keeping violations and a 100% civil penalty for non-payment of wages be issued. The cover sheet stated that the employer failed to exhibit good faith in that it was not generally cooperative, had no records, and had violated Labor Law § 191[1][d] on two prior occasions, in May 1998 and October 2007.[2] The DOL issued the Orders on January 13, 2010.

Reitman testified that he called Culberson when he received one of the DOL's papers, and "I spoke to her, and I was incensed about Sal Saladino – I explained about Clingan.... And I also spoke about – I talked to her about Penny Wickman."

II. STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether the Commissioner's order is "valid and reasonable" (Labor Law § 101[1]). The petition must specify the order

[1] Seifreid had no personal knowledge of the investigation.

[2] Reitman's June 1, 2009 e-mail to Wickman stated that there had been three complaints against Reitman Blacktop in its 26 years; he testified that those complaints were settled. "The truck driver said 250 instead of 180, something like that.... I believe I went to pay it."

"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" (§ 101 [2]). The Board is required to presume that an order of the Commissioner is valid (§ 103[1]). 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 the Board Rules (12 NYCRR § 65.30), "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the petitioners' burden of proof in this matter is to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

Burden of Proof in the Absence of Employer Records

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Rather, where complaints demonstrate a violation of the Labor Law, DOL must calculate wages due based upon the best available information, and 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 Matter of Angello v. Nat. 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." Such decisions are rooted in the U.S. Supreme Court's discussion and decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680, 687-688 (1946), *superseded by statute on other grounds*:

> "The solution [where the employer's records are inadequate]... 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 such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. 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. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR § 65.39). Since "Sandra Reitman," named in the Orders along with Petitioners, did not request review, the Board's findings of fact and conclusions of law are limited to Petitioners

Reitman is an Employer and is Individually Liable

The Orders were issued against Reitman personally, as well as against Reitman Blacktop and "Sandra Reitman." Under the Labor Law, an individual may be found personally liable for unpaid wages if he or she is deemed an "employer." Article 6 of the Labor Law defines "employer" as "any person, corporation or association employing any individual in any occupation, trade, business or service" (Labor Law § 190[3]). "Employed" means 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]). Because the statutory language is nearly identical, the Second Circuit uses the same test to determine whether a person is an employer under both New York Labor Law and the FLSA (*see e.g. Chu Chung v The New Silver Palace Rest Inc.*, 272 F Supp 2d 314, 319 n 6 [SDNY 2007]). The Board has found individual corporate owners and officers to be employers if they possess the requisite authority over employees (*See, e.g., Matter of David Fenske [T/A AMP Tech and Design, Inc.]*, PR 07-031 [Dec. 14, 2011]; *Matter of Robert H. Minkel and Millwork Distributors, Inc.*, PR 08-158 [Jan. 27, 2010]).

The central inquiry in determining the employer status and responsibility of an individual under these expansive definitions 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" (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]). Factors to consider when examining the "economic reality" of a particular situation include: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employee records," though no single factor is dispositive. Instead the "economic reality" test encompasses the totality of the circumstances, no one of which is exclusive. "[E]conomic reality is determined based upon *all* the circumstances, [and] any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition" (id).

On the record presented, it is clear that Reitman met all of these standards. He hired and/or fired all three Claimants, supervised and controlled their work schedules, determined the rates and methods of payment, and kept the time sheets allegedly prepared by Romangnuolo in his office. He was also advised of his potential personal liability in two letters from Culberson. It was not unreasonable or invalid to find him personally liable.

<u>The Penalty Order is Affirmed</u>

Labor Law §§ 195 (4) and 661 require employers to maintain true and accurate payroll records showing hours worked, gross wages, deductions and net wages for each employee, and make them available to the Commissioner on demand. The Commissioner's

implementing regulations provide at 12 NYCRR § 142-2.6 that such records, to be maintained for at least six years, must include employees' daily and weekly hours, wage rate and gross wages, among other items of information.

Petitioners did not comply with these statutory and regulatory requirements. Reitman acknowledged in his testimony that there were no time records for Saladino; that he had no time records for office employees for the week ending May 22, 2009; and that time sheets for the week ending May 29, 2009 omitted Maryanne, the just-hired bookkeeper who Reitman stated worked from home that week. Time sheets which Petitioners stated that Romangnuolo kept for office employees for the week ending May 29, 2009 also did not include all information required by the statute and implementing regulation. And, Petitioners failed to make payroll records of payments to employees available to the Commissioner on demand (nor did Petitioners even produce such records at the hearing).

Labor Law § 218 (1) provides for a civil penalty "in an amount not to exceed one thousand dollars for a first violation," with due consideration to factors including the employer's good faith, the gravity of the violation and the history of previous violations. We find that in light of Petitioners' nearly total failure to maintain time records and make payroll records available on demand, as well as the non-cooperation during the investigation, and Petitioners' previous violations, the Penalty Order was valid and reasonable.

The Wage Order Is Affirmed as Modified

Clingan Claim

The Wage Order states that $880.00 in unpaid wages is owed to Clingan, apparently, based on her Claim as originally filed in September 2009.[3] Yet Seifreid agreed at the hearing that shortly after filing her Claim, Clingan successfully redeposited the $870.00 original check, leaving a balance due on her Claim of $92.00 in bounced check fees. Reitman acknowledged that such fees were incurred, because the check bounced twice.

While Reitman testified that Clingan herself mistakenly wrote a check (which Reitman signed) on the wrong account, he provided no explanation as to why the check bounced twice. Pursuant to Labor Law § 193, "No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction."[4] Under this statute, an employer is liable for a charge for a bounced wage check. Accordingly, the Wage Order as it relates to Clingan is affirmed as modified by reducing the total due from the $880.00 stated in the Order, to $92.00.

[3] The $880.00 amount stated in the Wage Order includes a $10.00 bounced check fee as well as the $870.00 paid to Clingan but returned for insufficient funds.

[4] The statute enumerates the few legally permissible deductions from wages: those made in accordance with a law or regulation, for example for taxes, and certain deductions that "are expressly authorized in writing by the employee and are for the benefit of the employee."

Wickman Claim

It is undisputed that Wickman is owed unpaid wages. Reitman claimed that they do not amount to $1,325.00 for 53 hours worked at a rate of $25.00 per hour, but to $600.00 for 30 hours worked at a rate of $20.00 per hour. We find that Petitioners did not meet their burden to show that the Wage Order was unreasonable or invalid in this respect.

As discussed above, where complaints demonstrate a violation of the Labor Law and the employer has failed to keep and make available adequate records, DOL must calculate wages due based upon the best available other information, "even though the result be only approximate" (*Anderson v. Mt. Clemens Pottery Co.*, 328 US at 628). Petitioners in the present case failed to keep adequate records and the statute and regulations placed the responsibility to maintain accurate records of employee hours on Petitioners, not on Wickman. And, her Claim to have worked a total of 53 hours over a two-week period, including late-night work on the Sunday she was hired and three other days, is credible.[5] It was reasonable and valid for the DOL to accept the Claim, not Reitman's unsupported statement that Wickman worked only 30 hours.

Reitman provided no basis for his claim that Wickman worked no more than 30 hours. The time sheets allegedly kept by Romangnuolo and introduced by Petitioners (partly prepared, according to Reitman's unexplained testimony, by Romangnuolo's son and not Romangnuolo herself) covered only one of the two weeks at issue. While Petitioners implied that Wickman never worked later than 9:00 p.m. when Difusco's work day ended, Reitman's own testimony showed that Wickman was in the office until midnight at least on the night she woke him and thereby brought about her termination.[6] Reitman testified this occurred on Tuesday or Wednesday, May 26 and 27, days when the time sheets relied on by Petitioners show Wickman employed only until 4:00 p.m. Discrepancies in the recollections of Petitioners' witnesses further undermine the reliability of the claim that Wickman worked only 30 hours. While Reitman testified that Wickman worked just three hours on May 18, then disappeared until a week later, Walker recalled her working four to five days before disappearing.

Reitman's e-mails also further undermine the reliability of his claim that the $600.00 tendered to her on May 29 constituted payment in full. On June 1, Reitman stated that "when you fill out your paperwork Paychex will process payment for the trial period." On June 2 he stated, apparently falsely, that Petitioners had surveillance cameras to track employees' hours, and asked Wickman to "provide the few dates and hours you claim before wed pm." On June 5 he stated that "We have had all intentions of paying for" a "few additional days." In his June 2 and June 5 e-mails, Reitman also stated that Wickman had refused to use "the call-in and call-out" system of time tracking. Petitioners mentioned no such system at the hearing, where Reitman testified that Petitioners used Romangnuolo's time sheets to keep track of hours.

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[5] While Reitman denied that bookkeepers ever worked Sunday, he acknowledged interviewing Wickman on Sunday and it is clear there was a backlog in bookkeeping work. Wickman testified that Reitman, whose documents were not in order, needed a collection list and soon switched her to working on other tasks including clearing up liens on Reitman's bank account. Reitman himself testified that there was enough work to employ both Wickman and the newly hired bookkeeper, Maryanne, during Wickman's second week.

[6] Walker testified that Wickman did not have an office key, making it unlikely she left work and later returned.

For similar reasons, it was not unreasonable or invalid to accept Wickman's credible statement that her agreed-on rate was $25.00 per hour, rather than Reitman's claim that the rate was only $20.00. Here again, the statute and regulations required Petitioners to keep and make available to the Commissioner contemporaneous payroll records stating the hourly rate, which they failed to do. Walker's and Difusco's testimony that they were respectively paid $12.00 and $14.00 per hour does not, as Petitioners implied, prove that Reitman Blacktop's maximum pay rate was $20.00 per hour.[7] Accordingly, the Wage Order as it relates to Wickman is affirmed.

Saladino claim

The record clearly indicates that Reitman was unwilling to pay Saladino his earned wages until Saladino returned the company cell phone he had been issued, which according to Reitman, was worth $200.00. Reitman himself testified that he told Walker, "You need to get his phone back before we pay him" and told Ms. Saladino that he needed the cell phone back. Walker testified that Reitman said: "Have him return the phone and he can receive his pay." Labor Law § 193, discussed earlier, prohibits holding earned wages in this manner.

We find, however, that even taking into account Petitioners' acknowledged failure to keep time records concerning Saladino and the DOL's resulting right and obligation to calculate wages due based upon the best available other information, it was not reasonable and valid to find that Saladino worked and was owed wages for a full 40 hours during the week ending August 7, 2008, as stated in his Claim. Walker, as well as Reitman, testified that Saladino disappeared at least two days before Ms. Saladino telephoned to say he had been arrested, that during the interval Blacktop tried repeatedly and unsuccessfully to reach Saladino, and that numerous customers complained about his failure to appear for scheduled appointments, making the disappearance memorable. Furthermore, the Claim stating that Saladino worked 40 hours before becoming incarcerated "on evening 8/8/08" was filled out by Saladino's mother, who testified that Saladino told her he had done "just about a week's worth of work" but who had no direct knowledge of how much work he had done. While Ms. Saladino testified she saw her son sign the Claim, that alone is not a valid or reasonable basis to conclude that he had worked and was owed wages for a full week in light of her vague and general testimony and the contrary testimony. Accordingly, the Wage Order as it relates to Saladino is affirmed as modified by reducing the total due from the $800.00 stated in the Order, to $480.00, for the approximately three days' work implied by Walker's testimony.

[7] Perhaps mixing up Walker and Difusco, Reitman testified that he paid the former $14.50 and the latter $12.00 per hour, which further undermines the reliability of his testimony.

The Civil Penalties are Affirmed

Labor Law § 218 (1) provides for "the appropriate civil penalty" for a failure to pay wages. In assessing the amount of the penalty, due consideration is given to "the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements." For an employer "who previously has been found in violation... or... whose violation is willful or egregious," the statute specifies a 200% civil penalty. We find the imposition of a 100% penalty in this matter was valid and reasonable.

By Reitman's own admission, Petitioners were found to have violated the Labor Law on three previous occasions. At the hearing, with regard to Labor Law § 218's element of good faith, Petitioners suggested that they did not exhibit more cooperation or correct violations because they did not receive the Orders or earlier correspondence. Reitman testified that Reitman Blacktop has had three addresses at relevant times, "[a] lot of mail was all over the place" as a result, and "I never saw" the Orders issued on January 13, 2010. Most correspondence from the DOL, including the Orders, was addressed to the East Jericho Turnpike address listed as Blacktop's by the New York State Department of State Division of Corporations.[8] The record, however, indicates that Petitioners knew about the Orders and correspondence.[9] Reitman's own testimony confirms that Petitioners received the DOL's June 23, 2009 letter (to which they replied on July 7, 2009) and that Reitman discussed all three Claims with Culberson. While Reitman claimed that "I never saw" the Orders, a copy of them was attached to the March 10, 2010 Petition to the Board which he signed.[10]

We therefore affirm the imposition of a 100% penalty in the Wage Order but find that the amount of the penalty must be recalculated to $1,897.00 based on the $1,897.00 found due and owing. As stated above, we also affirm the $1,000.00 Penalty Order for failure to keep and/or furnish true and accurate payroll records.

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.

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[8] Reitman testified that he personally never notified the Department of State that Blacktop changed its address, and "I'm not sure if somebody did it for my office."

[9] Reitman testified that Blacktop moved from East Jericho Turnpike to East Deer Park Road in the latter part of 2008, and to West Hills Road in 2010. With the exception of its July 15, 2009 letter, addressed to West Hills Road, all DOL correspondence was addressed to the Jericho Turnpike address. However, other evidence calls in question the dates Reitman stated that Blacktop moved, and/or suggests it had more than one address at a time. For example, Reitman testified that Blacktop's July 7, 2009 response to the DOL bore the Jericho Turnpike address "because we just moved." Wickman's June 3, 2009 Claim lists Blacktop's Deer Park Road address, but her e-mail to Reitman of the same day states that she "went to your office at 332 E. Jericho" the week before. The August 31, 2009 check to Clingan also bears the Jericho Turnpike address.

[10] Reitman testified that Romangnuolo, who helped him prepare the Petition, "might have put it in there. She might have seen it. I didn't see it."

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Penalty Order is affirmed;

2. The Wage Order is modified to $1,897.00 by reducing the total wages found owed to Roberta Clingan from $880.00 to $92.00 and reducing the total wages found owed to Sal Saladino from $800.00 to $480.00, and by reducing the interest and civil penalty on such amount proportionally, and in all other respects is affirmed;

3. Except as stated above, the Petition is denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Absent

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
September 10, 2012.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Penalty Order is affirmed;

2. The Wage Order is modified to $1,897.00 by reducing the total wages found owed to Roberta Clingan from $880.00 to $92.00 and reducing the total wages found owed to Sal Saladino from $800.00 to $480.00, and by reducing the interest and civil penalty on such amount proportionally, and in all other respects is affirmed;

3. Except as stated above, the Petition is denied.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, 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
September 10, 2012.