STATE OF NEW YORK
*IN*DUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: JOHN D. GIVENS AND JDG INVESTIGATIONS, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, and an Order Under Article 19 of the Labor Law, both dated February 25, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-076 RESOLUTION OF DECISION

APPEARANCES

John D. Givens, petitioner pro se, and for JDG Investigations, Inc.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Michael O. Pagliolonga, of Counsel), for respondent.

WITNESSES

John D. Givens, for petitioners.

Mayra Mendez and Favio Escudero, Labor Standards Investigator, for respondent.

WHEREAS:

The petition filed with the Industrial Board of Appeals (Board) in this matter seeks review of two orders issued by respondent Commissioner of Labor (Commissioner) against petitioners John D. Givens and JDG Investigations, Inc. on February 25, 2010.

Upon notice to the parties, a hearing was held on January 10, 2012, in New York, New York before J. Christopher Meagher, Member of the Board and the Board's designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (wage order) directs that petitioners pay the Commissioner wages owed claimant employees Mayra Mendez and Debbie Merced in the amount of $1,005.50, together with interest continuing thereon at the rate of 16% to the date of the order in the amount of $87.03, and a civil penalty of $1,005.50. The total amount due is $2,098.03.

The second order (penalty order) directs petitioners to pay a civil penalty of $500.00 for failure to keep and/or furnish true and accurate payroll records regarding claimant Merced's employment for the period July 1, 2009 through July 6, 2009.

The petition, as clarified at a pre-hearing conference held with the parties, asserts the orders should be reversed because: (1) claimant Mendez was fully paid for the hours she worked during the period of her claim; (2) claimant Merced, a process server, was paid for the services she performed and was an independent contractor, and; (3) the civil penalties are invalid and unreasonable.

For the following reasons, we affirm that portion of the wage order directing petitioners to pay wages and interest to claimant Mendez but modify the order to revoke the penalty assessed for such violation because the Commissioner failed to sufficiently explain the basis for his administrative determination. We revoke that portion of the order directing payment of wages, interest, and penalties regarding claimant Merced since we find she was fully paid prior to issuance of the order. Finally, we revoke the penalty order for failure to keep and/or furnish payroll records because the Commissioner failed to explain the basis for his determination.

SUMMARY OF EVIDENCE

Mendez' Claim

Petitioner John D. Givens operates JDG Investigations, Inc., a business located in Queens, New York that provides investigative and trial preparation services, including service of legal documents by process servers.

Claimant Mayra Mendez testified she was employed by petitioner as a secretary and assistant manager from February 17, 2009 to November, 5, 2009. On November 5, 2009, she filed a claim with DOL stating she worked five days per week at the rate of $10.00 per hour and was owed $367.50 in wages for the payroll weeks ending August 5, 12, and 19, September 2 and 16, and October 14, 2009.

Mendez testified she was correctly paid at the beginning of her employment but soon noticed she was "missing hours" on her weekly paychecks. Whenever shorted hours she went to Givens and showed him her pay-stub and a daily log of hours she kept that listed entering and leaving times, days when she had "no lunch", and total hours worked each day. Givens reviewed the hours listed on the pay-stub with those in the log and adjusted Mendez' pay the following week to compensate her for the underpayment. The cooperative relationship with petitioner changed near the end of her employment, however, and Givens

failed to pay her the wages listed in the claim. Mendez submitted a copy of her "notebook" of daily hours and testified it accurately reflects the hours she worked throughout the course of her employment.

Mendez testified she was issued a "swipe card" and swiped in and out when she entered and left work each day but not on breaks. She did not punch in or out at lunchtime "because [Givens] said it didn't matter because [she] would still be reduced the amount anyway". Mendez testified she often worked through lunch entirely and the dates at issue in her claim include days when she worked through lunch and was not paid her time. Mendez stated Givens was aware of the practice "[b]ecause some of those days he was the one providing the lunch for us, buying the pizza or something."

Givens testified that employees punch in and out with swipe cards on a digital timekeeping system. He submitted time card reports and payroll journals for Mendez for the period August 5, 2009 to October 28, 2009 and argued they show she was fully paid for all hours worked during the period of the claim. Claimant's time card reports do not include reports for July 29 to August 4, 2009, August 29 to September 2, 2009, and other single days during the weeks listed in the claim. The reports also state that Mendez was "Out-1:00" hour each day but do not list punch in or out times for lunch on those days.

Givens submitted a copy of the company's "Operations Manual and Associate Handbook" that provides:

> "The New York State Labor Law Section 162 states every employee must have a one hour mandatory lunch. Salary and manual employees may choose **not** to take their **mandatory one hour** lunch. However, it should be noted that working through your lunch hour doesn't constitute overtime or additional hours in your pay. A lunch hour is considered a non paid hour. It is **suggested** that lunch break **be** taken (emphasis in original)".

Givens testified that Mendez received the manual when she was hired but did not return a signed copy. Mendez denied she received it.

Givens testified that each employee swipes in and out when they enter and leave work, and on breaks, and denied his time system automatically deducts one hour for the lunch period. According to Givens, the "Out-1:00" hour entries in Mendez' time card reports show she punched in and out for exactly that time every day. He believed the system rounds off in five minute increments. Givens stated his policy does not permit employees to do a "working lunch" and either Givens or his office manager goes through the office each day and tells employees to take a lunch break. Asked whether everyone takes exactly one hour, Givens replied "yes". Givens denied he had seen Mendez' "notebook" of hours during the time she was employed.

Merced's Claim

Claimant Debbie Merced filed a claim with the Department of Labor (DOL) on August 11, 2009 stating she worked for petitioners as a "process server" during the period April 8, 2008 to July 6, 2009 and was not paid for the last week she performed services ending July 7, 2009. Merced stated she was paid at the rate of "$10.00 per subpoena, summons, court order of [of] protection, etc."; her paychecks "varied because it depends on the amount of services that were served" each week; and at $10.00 per service she was owed $580 for the services she performed during the period of her claim. DOL amended the claim to add overtime and it totaled $638.

Givens explained that he initially withheld payment for Merced's last week because she failed to complete the services agreed to, took the documents with her when she left, and caused petitioner to incur penalties for not having timely served the documents. Merced completed the services in her possession, was paid for them, and engaged in business with Givens again after the dispute was resolved. Mendez testified she had spoken with Merced about her claim two months before the hearing and claimant told her she returned to work for Givens but quit to go back to a prior employer.

Merced did not testify at the hearing. DOL submitted a letter from Merced to Givens dated December 3, 2009 advising him that she had received her last paycheck but it was marked "void after 30 days". Merced could not cash the check and requested that petitioner issue her a new payment. Givens testified he did so and claimant was paid in full for all monies owed on the claim.

Givens testified Merced spoke with him prior to the hearing and told him she did not have time to come to the hearing because all issues were resolved. DOL investigator Favio Escudero testified he had reviewed the investigative file prior to the hearing but had no information as to whether Merced had been paid.

For the reasons discussed below, we need not address the evidence concerning Merced's status as an independent contractor or an employee.

DOL's Investigation

Following receipt of Merced's claim, DOL issued petitioners a "collection notice" on September 15, 2009 advising that Merced had filed a wage claim against the company for the period July 1, 2009 to July 6, 2009, the details of the claim, and that if petitioners agreed with the claim they should remit payment within ten days. The notice further advised that if petitioners disagreed, they should respond in writing stating the basis of their dispute and include "any payroll record, policy contract, etc." to substantiate their position. On September 25, 2009, Givens responded by asserting that Merced was an independent contractor and was not owed further payments because she had walked out without completing services in a timely manner.

By letter dated November 16, 2009, Senior Labor Standards Investigator Jeremy Kuttruff advised Givens he had failed to submit sufficient evidence substantiating that Merced was an independent contractor. Kuttruff added that Mendez had also filed a claim, provided the details of the claim, and advised Givens that the matter would be referred for an order to comply. On November 20, 2009, Givens submitted copies of a sample DCA application for license as a process server, Merced's license, and time card reports and payroll records for Mendez.

By letter dated January 27, 2010, Kuttruff advised petitioner that based on compelling evidence supporting both claims the case would be referred for an order to comply. On February 25, 2010, the Commissioner issued the orders under review.

In support of the 100% civil penalty assessed in the wage order, Kuttruff completed an investigative report titled "Background Information – Imposition of Civil Penalty" providing information relating to the size of petitioner's firm, their good faith, gravity of the violation, and records provided or not provided. Escudero testified that in his judgment a 100% penalty was justified but did not explain how the penalty was arrived at or why it was appropriate. Responding to petitioner's questions on cross examination as to how the penalties were determined, Escudero stated he had not done the investigation and his knowledge came solely from the report in the file. DOL did not submit testimony supporting the determination to assess a $500 penalty for failure to maintain/furnish records.

GOVERNING LAW

A. Standard of Review and Burden of Proof

When a petition is filed, the Board reviews whether an order issued by the Commissioner of Labor is "valid and reasonable" (Labor Law § 101[1]). Any objections not raised in the petition shall be deemed waived (*Id.* § 101[2]). The Labor Law provides that an order of the Commissioner shall be presumed "valid" (*Id.* §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 (*Id.* § 101[3]).

A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (*Id.* § 101[2]). Pursuant to Rule 65.30 of the Board's Rules, "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR § 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306[1]).

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. Civil Penalties

Labor Law § 218 provides that once the Commissioner determines that an employer has violated Article 6 or 19 of the Labor Law, he shall issue to the employer an order directing compliance therewith, which shall describe with particularity the nature of the violation. The statute also provides:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions [of the Labor Law], rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due,

> plus the appropriate civil penalty. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation. In assessing the amount of the penalty, the commissioner shall give due consideration 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."

FINDINGS

Petitioners Failed to Meet Their Burden to Prove That Claimant Mendez Was Not Owed Wages

The federal Fair labor Standards Act (FLSA) and the Labor Law similarly define "employ" to include "suffer or permit to work" (29 USC § 2[g]); Labor Law § 2[7]) A basic principle underlying the wage and hour protections of both statutes is that an employer is liable not just for work it requires employees to perform, but for all work it "suffers or permits" employees to perform. The reason an employee continues to work beyond her shift is immaterial. If the employer is on actual or constructive notice that the employee continues to work, the additional hours must be counted:

> "In all cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so."

(*Reich v Department of Cultural Resources,* 28 F3d 1076, 1082-83 [11th Cir 1994] [employer knew or should have known parks employees worked overtime hours that must be compensated].

We credit Mendez' testimony that she frequently worked through lunch, that Givens was aware of the practice, and that she was not paid for work performed during the weeks listed in her claim. Mendez' testimony was specific, credible, and corroborated by a personal log of hours she maintained throughout her employment listing her entering and leaving times, days when she had "no lunch", and total hours each day. Claimant credibly explained that whenever shorted hours, including days where she worked through lunch, she went to Givens with her pay stub and the daily log of hours she kept. Givens reviewed the records and adjusted her pay the following week. A review of the log shows numerous days when Mendez had "no lunch" throughout the nine month period of her employment. Mendez testified Givens was also aware of her practice on days he brought claimant and her

co-workers lunch in the office. The cooperative relationship with petitioner changed near the end of Mendez' employment, however, and Givens failed to fully compensate her for the work performed during the period of the claim.

We do not credit Givens' testimony that his time records show Mendez was fully paid for all hours worked and he did not permit employees to work through lunch. The company policy plainly states that employees will be deducted a full hour for the lunch period.[1] Claimant's time card reports do not contain specific punch in and out times for lunch but instead uniformly state "Out-1:00" hour each day. Givens testified the reports reflect Mendez' actual punch in and out times and all employees take exactly one hour for lunch. He denied his time system automatically deducts one hour for the lunch period. We find it implausible employees uniformly take one hour for lunch, or punch in and out for exactly one hour each day, even with rounding off. We find petitioner's time system automatically deducts one hour for the lunch break, regardless of actual time worked, and Givens was not candid in his testimony on the issue. We credit claimant's testimony and find petitioner was on actual or constructive notice that she worked through the lunch hour. Claimant must be compensated for those hours.

A review of claimant's log with petitioner's time records shows a majority of the underpayment involves unpaid lunch hours worked during the weeks listed in the claim. The remainder involves hours for which petitioner did not submit time records. 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,* 156 AD2d at 821). We find petitioners failed to meet their burden to establish that Merced was fully paid for the work performed during the period of the claim.

Labor Law § 219(1) provides that when the Commissioner issues a compliance order finding wages are due, 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."

Petitioner did not challenge the assessment of interest made by the wage order. The Board finds the considerations and computations required to be made by the Commissioner in connection with the interest set forth in the order concerning Mendez are valid and reasonable in all respects. We affirm that portion of the wage order directing payment of wages and interest to claimant Mendez.

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[1] Petitioners' policy mistakenly states that Labor Law § 662 requires a mandatory one hour lunch break. Subdivision two of that statute, governing employees who are employed in mercantile or other establishments, provides that an "employee who works a shift of more than six hours which extends over the noon day meal period" is entitled to at least a thirty minute break within that time frame for the meal period. The "noon day meal period" is defined as "extending from eleven o'clock in the morning to two o'clock in the afternoon".

Petitioners Met Their Burden to Establish Claimant Merced Was Fully Paid the Wages Owed For the Period of the Claim

Givens testified he initially withheld payment for Merced's last week because she failed to complete the services agreed to, took the documents with her when she left, and caused petitioner to incur penalties for not having timely served the documents. Merced completed the services in her possession, was paid for them, and engaged in business with Givens again after the dispute was resolved. Mendez corroborated Givens' testimony that Merced returned to work for him after the claim was resolved.

Merced did not testify at the hearing. DOL submitted a letter from Merced to Givens dated December 3, 2009, almost two months before the order was issued, advising petitioner she had received the last paycheck but it was marked "void after 30 days". Merced requested that Givens issue her a new payment. Givens credibly testified that he issued the payment, Merced was paid in full for the claim, and he had spoken with claimant about the issue prior to the hearing. Merced told him she did not have time to come to the hearing because all issues were resolved. The investigator testified he had reviewed the investigative file but had no information as to whether claimant had been paid.

We find petitioner's unrebutted testimony regarding payment to Merced credible and find that she was paid in full for the wages owed during the period of the claim. As the issue was resolved before the wage order was issued, we revoke that portion of the order directing payment of wages, interest, and penalties concerning Merced. We need not address the issue whether claimant was an independent contractor or an employee.

Civil Penalties

Investigator Escudero testified in conclusory fashion that he believed the 100% penalty assessed in the wage order was justified. He did not explain how the penalty was arrived at or why it was appropriate. DOL failed to submit any testimony supporting the determination in the penalty order to assess a $500 civil penalty for petitioner's failure to keep and/or furnish payroll records. Responding to questions on cross examination as to how the penalties were determined, Escudero stated he had not done the investigation and his knowledge came solely from the report in the file.

We have previously held that DOL's failure to adequately explain its application of the criteria that must be given "due consideration" under Labor Law § 218 in assessing civil penalties is unreasonable. The investigator's testimony simply establishing a foundation for submission of the penalty form does not satisfy the particularization required by the statute (*Matter of Hoffman*, PR 08-115 (2009) (civil penalties assessed by Commissioner revoked where insufficient testimony offered re factors to be applied under statute authorizing penalties for unpaid wages, recordkeeping, and other violations).

We revoke the civil penalties in the wage order regarding claimant Mendez and the penalty order for failure to keep and/or furnish payroll records because the Commissioner failed to adequately explain the basis for his administrative determination.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to revoke the civil penalty to be paid regarding claimant Mendez and the wages, interest, and civil penalty to be paid regarding claimant Merced, and in all other respects is affirmed, and;

2. The penalty order is revoked, and;

3. 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
February 6, 2013.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to revoke the civil penalty to be paid regarding claimant Mendez and the wages, interest, and civil penalty to be paid regarding claimant Merced, and in all other respects is affirmed, and;

2. The penalty order is revoked, and;

3. 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 by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
February 14, 2013