STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: KONSTANTIN PAVLOV AND PAVLOFF, 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 July 19, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-275 RESOLUTION OF DECISION

APPEARANCES

Robert Valitutto, Harvard Accounting & Tax Services, for petitioner.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Melanie L. Scotto, of counsel), for respondent.

WITNESSES

Konstantin Pavlov, for petitioners.

Cuiyuan Zhu, 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 Konstantin Pavlov and Pavloff, Inc. on July 19, 2010.

Upon notice to the parties, a hearing was held on November 29, 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) requires payment of wages owed to claimant employee

Ramiro Falcon in the amount of $400.00, together with interest continuing thereon at the rate of 16% to the date of the order in the amount of $46.29, and a civil penalty of $400.00, for a total amount due of $846.29.

The second order (penalty order) requires payment of a civil penalty of $500.00 for failure to keep and/or furnish true and accurate payroll records for each employee. The order states that the employer was duly requested to provide payroll records for the period from on or about October 6, 2009 through October 28, 2009.

The petition asserts that the wages and penalties should be removed because claimant was hired as a laborer on a day-to-day basis, worked one day, and was told the second day that the job was cancelled. Claimant was paid for his work and is owed no further wages for the work performed.

For the following reasons, we find petitioners met their burden to establish that claimant worked one day and was paid wages at the agreed rate of $100 for the work performed. Claimant did not testify at hearing to rebut such proof. However, since the claimant reported to work the second day before the job was cancelled, he is entitled to "call-in pay" pursuant to 12 NYCRR § 142-2.3 for four hours at the applicable minimum wage of $7.25 per hour. We affirm the wage order to the extent of finding that claimant is owed $29 wages for the period of the claim and modify the wages, interest, and civil penalty in the order accordingly. We revoke the penalty order for failure to furnish payroll records because the notice requesting them was insufficient to support a penalty for such violation. In addition, the order for failure to both keep and/or furnish payroll records is revoked for failure of the Commissioner to explain the basis for his administrative determination.

SUMMARY OF EVIDENCE

The Wage Claim

On May 27, 2009, claimant Ramiro Falcon (Falcon) filed a claim for unpaid wages with the Department of Labor (DOL) stating that he was employed by petitioners as a laborer at the rate of $100 per day during the period October 6, 2009 to October 28, 2009. The claim form stated that he worked one day during the payroll week ending October 10, 2009, three days during the week ending October 31, 2009, and was owed $400 in wages for the period of the claim.

Claimant did not testify at the hearing.

Petitioners' Evidence

Petitioner Konstantin Pavlov (Pavlov) testified that he was president and sole operator of Pavloff, Inc., a business in Staten Island, New York that made custom woodworking from 1996 to 2011.

In August, 2009, petitioner was approached by Aldo DiLorenzo (DiLorenzo), an individual acting on behalf of a religious retreat on Staten Island known as "Mount Manresa"

who was soliciting proposals to construct a memorial on the grounds of the retreat to be called the "Father McGivney Memorial Garden". Petitioner was recommended for the job by a business associate and had worked with DiLorenzo in the past. Even though the project differed from his ordinary work, petitioner bid on the job "[b]ecause it was a very hard time, financial time for me" and promised more profit in a short period of time "than what I do on a daily basis."

Petitioner submitted a proposal that involved excavation of the site and installation of a walkway, pavers, shamrock circle, Celtic cross monument, benches, shrubs, and landscaping. The proposal was accepted and the parties signed an agreement on September 4, 2009 providing that petitioner would be paid the sum of $14,800 for the work, including a deposit of $7,400 to start. A copy of the agreement was submitted into evidence. Petitioner was issued a check for the deposit, signed by a representative of the retreat, on September 4, 2009.

Following acceptance of his proposal, petitioner contacted an employment agency to obtain a helper to assist with the excavation because it involved physical work he could not do alone. The agency referred claimant, Ramiro Falcon. At the hiring interview, petitioner informed claimant he was hired for the few days it would take to excavate the grounds and his employment would not be permanent. Petitioner and Falcon agreed that claimant would work from 8:00 AM to 4:00 PM at the rate of $100 per day.

Petitioner testified that the job started in early September, 2009, on the Monday following his receipt of the deposit check. After a half day's work, the retreat's maintenance employees approached petitioner and questioned him regarding approval of the job. Petitioner contacted DiLorenzo, who said he would take care of the problem and they should keep working. When petitioner and claimant returned to the site the next morning, however, the staff told petitioner "You have to leave the premises. It is not approved. We don't know who you are." Petitioner took the claimant out for breakfast, apologized for cancellation of the job, and told him he would be in touch when and if the job was to resume. Petitioner paid claimant $100 cash for his day of work, with no receipt.

Following cancellation of the job, claimant appeared at petitioner's shop and asked him to call the employment agency to inform them the job was cancelled so he might be refunded $400 in fees charged by the agency. Petitioner did so but was told that claimant owed the fees from other jobs. Petitioner informed claimant he could do nothing further for him. Petitioner contacted DiLorenzo numerous times over the next several years about when the job might resume and what to do with the deposit. DiLorenzo told him to hold the deposit because the retreat still intended to do the job. The property was later sold. The parties have since agreed that petitioner will complete the work when a new site has been selected.

Petitioner testified that he is a carpenter and cabinet maker by trade. Because his business involved craftwork that is not easily taught, when hired for a job he did the work himself "even if it takes a year" and did not hire other employees. "Because it has to be [a] very educated person in this matter, in that kind of -- I can't teach [a] person in a month or two or three months, like to play a violin. It is considered craftwork, very craftwork." Around 1998, petitioner had family members on payroll and kept time sheets for them. "In the very beginning, my business was just starting. I have like family members hired on the payroll. I wanted to do everything correctly. There was my sister-in-law and there was my stepmother." When petitioner did the job in this case in 2009, however, he did not keep a time sheet for the hours worked by

the claimant because he was employed for "only one day". In January, 2010, he received a letter from DOL asking if he had "any payroll" concerning the claim. Petitioner did not forward any records "because there were no payroll records". As evidence that claimant was not listed in any payroll records at the time, petitioner submitted federal and NYS 45 quarterly tax forms for the third and fourth quarters of 2009. The records show petitioner listed as an employee in the third quarter and no employees in the fourth.

Responding to the period of employment listed in the claim, petitioner testified that he had no work for claimant during the period October 6, 2009 to October, 28, 2009 and no dealings with him during the month of October, 2009.

DOL's Evidence

Labor Standards Investigator (LSI) Cuiyuan Zhu (Zhu) testified concerning the investigation that resulted in the orders under review.

On January 7, 2010, DOL issued petitioners a collection notice advising that claimant had filed a wage claim against them, the details and period of the claim from October 6, 2009 to October 28, 2009, and that if petitioners agreed with the claim they should remit payment to the Commissioner within ten days. The notice further advised "If, however, you do not agree that these amounts are due and payable to the claimant(s), we would appreciate a full statement from you stating your reasons. You should include a copy of any payroll record[s], policy, contract, etc. to substantiate your position." Petitioner replied by letter of March 16, 2010 but did not provide any records.

By letter of April 18, 2010, Senior Labor Standards Investigator (SLSI) Mary Coleman (Coleman) responded and advised petitioner that he should remit payment within ten days or the matter would be referred for an Order to Comply, including additional interest and penalties. In addition, there would be a $500 penalty for failure to provide requested payroll records.

On July 19, 2010, the Commissioner issued the orders under review. In support of the 100% civil penalty assessed in the wage order, Coleman 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 violation, and records provided or not provided. In addition, a report titled "Labor Law Articles 6, 19 and 19-A Violation Recap" was completed that cited petitioners for a violation of the recordkeeping requirements of Labor Law § 661. The report stated that "[t]he employer failed to furnish requested payroll records" for the period 10/6/2009 to 10/28/09 and the penalty imposed would be $500. DOL did not submit testimony or further documentation explaining how the $500 civil penalty assessed in the penalty order was arrived at.

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]).

It is therefore petitioners' burden in this case 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 [his] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [his] 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 (2010) provided 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 provided:

> "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

A. Petitioner Violated Article 6 of the Labor Law by Failing to Pay Claimant Four Hours' "Call- In Pay"

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 818, 821 [3d Dept 1989]). 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 employees' evidence" (*Anderson v Mt. Clemens Pottery,* 328 US 680, 688 [1949]).

The Court in *Mt. Clemens* defined the nature of evidence the employer must produce to meet this burden. 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]); *Matter of Aldeen,* PR 07-093 [2009], [employer burden to establish "accurate estimate" of hours worked to overcome approximation drawn by Commissioner from employee statements], *aff'd. sub nom, Matter of Aldeen v Industrial Board of Appeals*, 82 AD3d 1220 [2d Dept 2011]).

Given the interrelateness of wages and hours, the burden shifting 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]); *Matter of Gategno,* PR 09-032 [2010]).

In the circumstances of this case, we find that petitioner established an "accurate estimate" of the work performed by the claimant and the "precise wages" paid for that work. Petitioner credibly testified that in early September, 2009 he hired claimant at the rate of $100 per day to help him excavate the grounds of the construction site. Claimant worked one day before the job was abruptly cancelled by the owner on the morning of the second day. Petitioner paid the claimant $100 cash for his single day worked. Petitioner's testimony that the work took place in early September, 2009, and not in October, 2009 as stated in the claim, is consistent with the written agreement dated September 4, 2009 submitted in evidence. There is no dispute in this case over the rate of pay or the hours worked per day, but only the number of days worked and whether claimant was paid for those days. Given that petitioner was self employed, had never before hired an employee to assist him, and the unique circumstances of the job and its termination, we credit his recollection that claimant worked a single day and was paid $100 wages for that work as accurate and reliable. Petitioner's proof was sufficient to negate the inference drawn by the Commissioner from the claimant's statements. In the absence of testimony from the claimant or other reliable evidence rebutting such proof, that portion of the wage order requiring that petitioner pay him four days' pay at $100 per day is revoked as invalid and unreasonable.

The Commissioner's regulations implementing Article 19 of the Labor Law at 12 NYCRR § 142-2.3 provide that an employee shall be paid "call-in pay": "An employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage." Petitioner acknowledged that claimant reported for work on the second day before the job was cancelled. He is therefore entitled to "call-in pay" at the applicable minimum wage rate of $7.25 for four additional hours.[1]

We affirm the wage order to the extent of finding claimant is owed $29 wages and modify the wages, interest, and civil penalty in the order accordingly.

B. The Penalty Order Is Revoked

DOL issued petitioner a collection letter in January, 2009 advising him of the claim for

[1] The minimum wage applicable on or after July 24, 2009 was $7.25 per hour (12 NYCRR § 142-2.1 [a] [5]).

the period October 6, 2009 to October 28, 2009. The letter stated "If, however, you do not agree that these amounts are due and payable to the claimants, we would appreciate a full statement from you giving your reasons. You should include a copy of any payroll record[s] ... to substantiate your position." The penalty order states that the employer "was duly requested to provide payroll records for the period from on or about October 6, 2009 through October 28, 2009".

First, we revoke the penalty order for failure to "furnish" payroll records, as the Board has held that a collection letter to an employer stating that DOL would "appreciate" a statement of reasons why it disagrees with the claim and it should "substantiate" its position with "any payroll record[s]" is insufficient to support a penalty for failure to provide records (*Matter of Mercendetti,* PR 07-104 [2009] [failure to provide records "in support of the defense of a claim" is not the basis for a penalty for a failure to provide records]).

Second, petitioner testified that he was the sole operator of a small business with no other employees and had never hired employees to assist him on jobs in the past. When he first started the business around 1998 he had family members on payroll and was careful to keep time records for them. When petitioner did the construction job in this case in 2009, however, he did not keep a time sheet for the hours worked by the claimant because he was employed for "only one day". Petitioner did not forward records to DOL regarding the claim because "there were no payroll records".

Petitioner's testimony sufficiently invoked the statutory factors the Commissioner must weigh involving the size of the business, gravity of the violation, petitioner's claimed good faith, and any history of prior violations. The burden of going forward thereby shifted to DOL to explain why a $500 penalty is reasonable for the one day records violation, versus a lesser penalty within the Commissioner's discretion. DOL did not submit any testimony explaining how the penalty was arrived at or why it is reasonable under the circumstances.

We have previously held that the Commissioner's failure to adequately explain 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]). The penalty order for failure to both "furnish and/or keep" payroll records is therefore revoked for failure of the Commissioner to explain the basis of his administrative determination (*Matter of Givens,* PR 10-076 [2013]).

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to reduce the amount of wages due and owing to $29.00, and the interest and civil penalty on such amount proportionally, 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
July 25, 2013