STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: KARL GEIGER A/K/A KARL RICHARD GEIGER AND GEIGER ROOFING COMPANY, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply With Article 19 of the Labor Law and an Order Under Article 19 of the Labor Law, each dated September 10, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-303 RESOLUTION OF DECISION

APPEARANCES

John D. Rapoport, Esq., for petitioners.

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

WITNESSES

Karl Geiger and Gordon Puran, for the petitioners.

Poonardeo Shiwram, Labor Standards Investigator Carla Valencia, and Senior Labor Standards Investigator Angela Dean, for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on October 4, 2010, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Karl Geiger a/k/a Karl Richard Geiger and Geiger Roofing Company, Inc. on September 10, 2010. Upon notice to the parties a hearing was held in this matter on March 13 and 14, 2013, in New York, New York, before Anne P.

Stevason, Chairperson of the Board, and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, make statements relevant to the issues, and file post-hearing briefs.

The order to comply with Article 19 (Wage Order) under review directs compliance with Article 19 and payment to the Commissioner for minimum wages due and owing to two known claimants in the amount of $149,195.25 for the time period from December 1, 2000 through September 3, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $72,077.18, and assesses a civil penalty in the amount of $149,195.25, for a total amount due of $370,467.68.

The order under Article 19 (Penalty Order) assesses a $1,000.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to maintain and furnish true and accurate payroll records for each employee for the period from December 1, 2000 through November 30, 2006; and a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages for the period from December 1, 2000 to September 3, 2008 for a total due and owing on the Penalty Order of $2,000.

The amended petition, filed on August 11, 2011, alleges that the Wage Order is not reasonable or valid because no wages are due the two employees listed since no overtime hours were worked; that petitioners maintained adequate time and payroll records which substantiate that no wages are due; and that the employees are represented by a union and no complaint was made by their union that there were unpaid overtime hours worked.

Respondent answered the petition on August 26, 2011 alleging that the Wage Order was based on a claim filed by Poonardeo Shiwram (Shiwram or claimant); an interview sheet returned by Chandracant Singh; an investigation; and information that petitioner's payroll and time records were inaccurate.

SUMMARY OF EVIDENCE

Petitioner's Case

Testimony of Karl Geiger

Geiger Roofing is a family business that started operations in 1888. Weather conditions affect whether work is done on any particular day since rain, snow, cold, and heat affect working conditions and the ability to use certain roofing materials. When it rains there will be some inside work to do, such as plastering or cleaning but most employees will not work in inclement weather.

Geiger Roofing maintains time sheets that are generated every day for each jobsite and are usually completed by the foreman assigned to each job. Geiger Roofing has never used a time clock. There are days that workers report to the office first before going to the jobsite and return to the office at the end of the day, and there are days that the workers go straight to the jobsite and don't come back to the office. The time sheets indicate the number of hours worked

per day and do not include start and stop times. The sheets also indicate the work done during that day. At the end of each day the time sheets were given to the supervisor and the general manager of the company. The information is then transmitted to ADP, the company's payroll company, who then generate the paychecks.

Geiger Roofing reports the number of hours worked and wages paid to the union and the union audits the company's records on a regular basis to determine the appropriate union fees and contributions from the employer. During the period in question, the roofers were represented by a union. The union never complained that the workers were working unpaid overtime hours. Geiger does not allow overtime because its clients do not pay overtime rates.

Shiwram worked for Geiger Roofing for approximately 15 years but he never worked 11 hours per day or 55 hours per week. Geiger does not know of any workers who worked more than 40 hours per week.

On cross-examination, Geiger admitted that at times his employees would work over 8 hours in a day and that the time records would not reflect the extra hours and that he would pay the employees in cash for that time, but that this happened rarely.

Separate time sheets would be maintained for work that was done within the contract and work that was "extra." The workday usually starts at 7:30 a.m. when the workers appear at the office and are assigned out on work crews. They would change into their work clothes and start work around 8:00 a.m. They load the truck and go to the job with the work order in hand. The workers would return to the office around 4:00 or 4:30 p.m., change clothes again and go home.

Testimony of Gordon Puran

Puran testified that he has worked for petitioner for 30 years, starting as a laborer, then foreman, then supervisor and finally as manager where he assists in estimating jobs, supervising the work, overseeing the progress of the work, checking on the reports, timesheets and making sure that work is being done properly and in a timely manner. Timesheets came into the office on a daily basis. Workers were taught not to work overtime since the company could not afford to pay overtime rates.

Puran spoke with Chandracant Singh who told him that he was not owed any money by the company and signed an affidavit to that effect, which was admitted into evidence at the hearing. Although Mr. Puran received complaints from Shiwram about a supervisor, Shiwram never complained about overtime. None of the workers complained about not being paid overtime. Puran was unaware of anyone ever working 55 hours per week and he never witnessed anyone working at 7:00, 7:30 or 8:00 p.m. at night.

On cross-examination, Puran stated that between 2000 and 2008, someone would work more than 8 hours a day maybe three or four times a year. It is common for employees to work less than 40 hours in a week.

Respondent's Case

Testimony of Poonardeo Shiwram

Shiwram testified that he worked for Geiger Roofing for approximately 18 years. He usually arrived at work at 7:30 a.m., changed clothes and then went to the work site and then left the jobsite at 4:30 p.m. and returned to the office. He would get back to the office around 6:30 or 7:00 p.m., clean up, do the timesheet, get it approved and make a list of the next day's materials and he would leave the office around 7:30 p.m. He filed a claim with DOL on November 30, 2006 while he was still employed by Geiger. The claim indicated that Shiwram worked 7:30 a.m. to 7:00 p.m 5 days a week with a daily half hour meal period.

Shiwram's supervisor instructed him not to put overtime on a timesheet. If he put overtime on a time sheet, it would be scratched out by his supervisor. He complained about it to Geiger and the manager and sometimes would get cash for overtime. When it rained, Shiwram still reported to work and did other jobs.

Shiwram never filed a report with the union about not being paid overtime but he did complain to the shop steward. Shiwram sometimes worked with Singh but Singh was a driver and went to different jobsites. Singh also arrived at 7:30 a.m. and finished work at 5:00, 6:00, 6:30 or 7:00 p.m.

Shiwram worked job sites in different areas - Long Island, New Jersey and mostly in Manhattan. He usually left the jobsite at 4:30 p.m. when he would be picked up by the truck. The truck would then pick up other workers at other jobsites and they would get back to the office around 5:00 or 5:30 p.m. He testified that he worked one to five days per week but worked 5 days per week most of the time and then stated that he worked five days per week three to four months per year. He had a lunch break of one-half hour per day.

Testimony of Carla Valencia

Valencia, DOL Labor Standards Investigator (LSI), testified that she visited Geiger Roofing on September 3, 2008 and, after failing to receive cooperation from Geiger, left a notice of revisit to review payroll and time records. On September 23, 2008, Valencia met with Gordon Puran and reviewed payroll records for 2000 to 2007. No daily time records were produced. The records indicated that all employees worked less than 40 hours per week. In addition, the claimant Shiwram was not listed in the records until 2004. She also discovered that a union represented the employees and the collective bargaining agreement indicated that all overtime had to be specifically authorized.

Based on the information received in reviewing the payroll records, Valencia contacted the claimant asking if he had any additional proof that he worked more than 40 hours per week. In response, claimant wrote to Valencia indicating that he had worked for Geiger for approximately 17 years, that he worked 12 to 13 hours per day, Monday through Saturday, and that he was paid in both cash and check and also enclosed a copy of a wage stub for 1997 and two time cards. He also provided a list of former employees and their phone numbers who could verify the information, and two written statements from former employees that Shiwram worked from 7:30 a.m. to anywhere from 6:00 to 8:00 p.m.

During the investigation, Valencia also sent out employee questionnaires since all of the employees except for the secretary worked out in the field. Three interview sheets were returned, one from Chandracant Singh who indicated that he worked seven days per week from 7 or 7:30 a.m. to 6:30 p.m. and received a 30 minute meal break. He was paid a flate rate for Saturday and Sunday work and only received overtime if he worked after 6:30 p.m.

Based on the all of the information received from the claimant, employees and former employees, it was determined that Geiger's payroll records were inaccurate and DOL relied on the claim form and employee statements in determining what was owed in unpaid overtime wages. No daily time records were ever produced to Valencia.

On cross-examination, Valencia admitted that she did not speak with any of the individuals, including Singh, who submitted statements regarding the hours worked.

Testimony of Angela Dean

Dean, Senior LSI, testified that she supervised Valencia's investigation. She prepared the computation of unpaid wages. Based on the nature of the roofing business, three months per year were struck from the original audit to allow for winter months, three weeks were struck for vacation and holiday weeks were also struck. Therefore, the total hours were reduced.

ANALYSIS

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 a Commissioner's order 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 the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board 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."); State Administrative Procedure Act § 306; *Angelo 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, that claimant's wages are not due and owing. It is also petitioners' burden to prove, by a preponderance of evidence that the civil penalty is invalid or unreasonable.

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).

A. An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 142-2.6 provides, in pertinent part:

> "(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) the wage rate;
> (4) the number of hours worked daily and weekly, ...;
> (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;
> (9) net wages paid; and
> (10) student classification.
> " . . .
> "(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

§ 142-2.7 further provides:

> "Every employer. . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

In the absence of sufficient payroll records, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Gracia v Heady*, 46 AD3d 1088 [3d Dept 2007]). 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 calculation to the employer." (*see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013], *cert denied* 2013 NY Slip Op 76385 [2013]). Therefore, the petitioners have the burden of showing that the minimum wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011] [appeal pending]). Where incomplete or unreliable wage and hour records are available, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-*

Tech Coatings v New York State Dept. of Labor, 226 AD2d 378, [(1st Dept 1996], *citing Mid-Hudson Pam Corp.*; *see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571).

In *Anderson v Mt. Clemens Pottery Co.* (328 US 680, 687-88 [1949]), superseded on other grounds by statute, the U.S. Supreme Court opined that a court may award damages to an employee, "even though the result be only approximate. . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . .the Act." Wages may be found due even if it is based on an estimate of hours (*Reich v Southern New England Telecommunications Corp., (*121 F.3d 58, 67 [2d Cir 1997] [finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records"]).

B. An Employee Must be Compensated for all Hours Worked

The Minimum Wage Order for Miscellaneous Industries provides that an employee must be paid minimum wage for the "time the employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee" (12 NYCRR 142-3.1 [b]). If an employee is required to travel from job site to job site or is required to travel to or from the employer's premises as part of the work day, all of the that time is work time. (*See* 29 CFR 785.38).

Labor Law § 2 (7) defines "employed" as including "permitted or suffered to work." Thus even if overtime hours were not specifically authorized as required by the union contract, if the hours worked were permitted or suffered by the employer, he must be paid for those hours under New York Labor Law.

In determining that an employer was liable for unauthorized overtime since it suffered or permitted the work, the court in *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287 (2d Cir 2008) stated that "an employer's actual or imputed knowledge that an employee is working is a necessary condition to finding the employer suffers or permits that work." (Citations omitted.) Conversely, the court found that "[a]n employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance." *Id.* at 288.

> "[A] presumption arises that an employer who is armed with knowledge has the power to prevent work it does not wish performed. Where that presumption holds, an employer who knows of an employee's work may be held to suffer or permit that work."

Id. at 290. In *Gotham Registry* the court found that the employer was liable, even though it lacked some control over the employees' work hours. "[T]he law does not require Gotham to follow any particular course to forestall unwanted work, but instead to adopt all possible measures to achieve the desired result. . . . Gotham has not persuaded us that it made every effort to prevent the nurses' unauthorized overtime." *Id.* at 291.

In *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 NY 25, 30 (1918), the New York State Court of Appeals found an employer liable for illegally employing a minor where there was a "sufferance" of the employment by the employer. "Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge."

C. Wages Due to Shiwram

We credit Shiwram's testimony that his work day started when he reported to the petitioners' office at 7:30 a.m. where he received his work assignment, changed into his work clothes, gathered necessary equipment and materials and then left in the petitioners' truck for the work site. It ended after Shiwram returned to the office, turned in his time sheets, changed and prepared the equipment and materials for the next day. The time records produced by petitioners do not include these hours before and after the work done at the work site. The time sheets indicate the work done and petitioner stated that if there was work not done pursuant to the contract, i.e. extra work, it would be on a separate sheet. These hours worked were permitted and suffered by petitioners in that they were under the control of petitioners and with their knowledge since Shiwram was transported in petitioners' truck and was on petitioners' premises at the time.

Given the fact that petitioners' time records are incomplete and inaccurate, since Geiger himself indicated that not all hours are reported, it was reasonable for the Commissioner to compute the hours worked based on Shiwram's complaint. Even if Shiwram did not work 55 hours every week, as the courts have stated, time and again, reasonable estimates are allowed since it is the employer's burden to maintain accurate records.

LSI Dean testified that in computing her audit, she took into account weather conditions, vacation and holidays. At hearing Shiwram testified that he worked five days per week three to four months of the year. Therefore, based on an 11 hour day, the case is remanded to DOL to recompute the overtime hours worked by Shiwram to reflect that he worked five days per week an average of 3.5 months per year and four or fewer days the rest of the time, still crediting petitioners for those weeks whether weather, vacation or holidays prevented the working of overtime.

D. No Wages Are Due to Singh

DOL determined that wages were due Singh based on the questionnaire it received concerning Singh. DOL credited the questionnaire since it was sent to the address listed for Singh on the payroll records and returned in an envelope with Singh's return address. Although Section 306 of the Administrative Procedures Act requires the admission of records kept in DOL's file, we find that we cannot rely on evidence which lacks foundation. There was no corroboration that the information contained in the questionnaire was correct or that Singh was actually the person who completed it. DOL did not follow up with a phone call or in person interview with Singh and no one authenticated Singh's signature on the questionnaire.

That is not to say that we give any credence to the affidavit submitted by petitioner. We agree that the conclusory statements contained therein that Singh was properly paid is insufficient to counter evidence that Singh was not properly paid. However, we find that it was

unreasonable for DOL to rely on an unsubstantiated questionnaire that was returned in the mail and revoke the Wage Order as it applies to Singh.

E. Civil Penalty

The Order assesses civil penalties in the amount of 100% of the wages ordered to be paid. Labor Law § 218 provides, in relevant part:

> "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, 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 . . . 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."

The Board finds that the considerations required to be made by the Commissioner in connection with the imposition of the civil penalty percentage in the Order is proper and reasonable in all respects, however the amount must be modified to reflect the reduced amount of wages due.

F. Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." The amount of interest must be modified to reflect the reduced amount of wages due.

G. Penalties Order

Count 1

The penalty order found that the petitioners violated Labor Law § 661 and 12 NYCRR 142-2.6 by failing to furnish true and accurate payroll records for each employee for the period from December 1, 2000 through November 30, 2006, and imposed a $1,000.00 civil penalty for

such violation. As discussed above, the time and payroll records the petitioners furnished to DOL were incomplete. Accordingly, the civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.1 (2009) is upheld and we note that the amount of the penalty was not specifically challenged by the petitioners was therefore waived (Labor Law § 101 [2]).

Count 2

The penalty order also finds that the petitioners violated Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages for the period from December 1, 2000 through September 1, 2008, and imposed a $1,000.00 civil penalty for such violation. The petitioners provided no proof that such statements were provided. We uphold this portion of the penalty order, and, again note that the amount of the penalty was not specifically challenged.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply with Article 19 (wage order) is remanded to the Department of Labor to recalculate the wages, interest and penalties due as outlined in this decision; and

2. The order under Article 19 (penalty order) is affirmed; and

3. The petition for review be, and the same hereby is, granted in part and denied in part.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
January 16, 2014.