STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: DEORAJ RAMNAUTH AND SCORPIO CONSTRUCTION, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 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, all dated September 3, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-338 RESOLUTION OF DECISION

APPEARANCES

Deoraj Ramnauth, petitioner pro se, and for Scorpio Construction, Inc.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Jeffrey G. Shapiro of counsel), for respondent.

WITNESSES

Deoraj Ramnauth and Ildiko Trien for the petitioners.

Dennis Chetram and Labor Standards Investigators Emily Nieves and Maria Cueva for the respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on November 1, 2010 and was subsequently amended. Upon notice to the parties a hearing was held on October 19 and December 20, 2012 in New York, New York, before Devin A. Rice, Associate Counsel to 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, and to make statements relevant to the issues.

The order to comply with Article 19 (minimum wage order) under review was issued by the respondent Commissioner of Labor (Commissioner) on September 3, 2010 against petitioners Deoraj Ramnuath and Scorpio Construction, Inc. The minimum wage order directs compliance with Article 19 and payment to the Commissioner for minimum wages (overtime) due and owing to Dennis Chetram in the amount of $333.36 for the time period from March 1, 2008 through May 23, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the wage order, in the amount of $121.73, and assesses a 100% civil penalty in the amount of $333.36, for a total amount due of $788.45.

The order to comply with Article 6 (wage order) under review was issued by the respondent Commissioner of Labor (Commissioner) on September 3, 2010 against petitioners. The wage order directs compliance with Article 6 and payment to the Commissioner for wages due and owing to Dennis Chetram in the amount of $4,500.00 for the time period from March 1, 2008 through May 23, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the wage order, in the amount of $1,643.18, and assesses a 100% civil penalty in the amount of $4,500.00, for a total amount due of $10,643.18.

The order under Article 19 of the Labor Law (penalty order) was also issued on the same date against the same parties. The penalty order imposes a $1,000.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee from on or about March 1, 2008 through May 10, 2008.

SUMMARY OF EVIDENCE

On or about July 24, 2008, claimant Dennis Chetram a/k/a Navin, filed a claim for unpaid wages with DOL's Division of Labor Standards alleging that the petitioners had failed to pay wages earned during the period from March 2, 2008 through May 23, 2008. His claim states that the petitioners agreed to pay him $100.00 per day for construction work, and that he worked 45 hours per week during the claim period.

Chetram testified that he found work with the petitioners through a friend and after meeting Ramnauth, was hired as a construction worker. Chetram said that Ramnauth agreed to pay him $100.00 a day in cash, or, if he worked late, $120.00. Chetram did not work late very often, typically only working eight hours a day, although there were occasions he worked more than eight hours and was not paid. Chetram testified that Ramnauth stopped paying him, promising that he would pay him when he "finished the last job." Chetram denied that Ramnauth ever made an alleged $1,500.00 or $700.00 payment to him, and that he owed him "more" than $2,000.00 for a job in Queens and a job in Manhattan. He stopped working for the petitioners because they owed him money.

Petitioner Deoraj Ramnauth testified that Chetram worked for him for $100.00 a day. Ramnauth explained that Chetram worked with him at a private apartment in Manhattan. The owner, Ildiko Trien, contracted with "Chris", who subcontracted the job to the petitioners. Ramnauth testified that Chetram worked 22 days at Trien's apartment and was paid $1,500.00. According to Ramnauth, the hours of work were from 8:00 a.m. to 4:00 p.m. Ramnauth also testified that at one point, Trien gave him $1,000.00 in cash and that in her presence he paid $700.00 of it to Chetram. Ramnauth kept no records of the hours Chetram worked or the wages he was paid. Ramnauth testified in rebuttal that nobody worked at Trien's apartment past 4:00 p.m.

Ildiko Trien testified that she hired Chris Davindra to do construction work in her apartment in Manhattan. Davindra brought Ramnauth in to do the work. Trien testified that Chetram, who she knew as Navin, worked for Ramnauth. According to Trien, the working hours were "from 9 o'clock in the morning to 4 o'clock. It's a condominium, that is the hours you can work, you cannot work after that. You cannot come earlier, you cannot come later, work late." Trien estimated that the project lasted over six months, but only a month of working days. Trien testified that her husband took $5,000.00 from the bank one day and that she saw him give it to Ramnauth. Trien further testified that she saw Ramnauth give the entire $5,000.00 to Chetram. She did not recall when that happened.

Labor Standards Investigator Emily Nieves testified that she investigated the claim filed by Chetram. As part of her investigation, she made the initial visit and the re-visit to the petitioners' business address in South Ozone Park, New York. Since nobody was present on the first visit, she left a notice of revisit. After leaving the notice of revisit, Ramnauth contacted Nieves to inform her that he no longer lived at the South Ozone Park location. Nieves testified that the petitioners never produced the records requested by the notice of revisit.

Nieves testified that she calculated the wages due and owing based on the claim form. Chetram stated that he worked 45 hours a week at a rate of $100.00 per day for the period of March 2, 2008 through May 23, 2008. Nieves never met with the claimant, but did speak to him once. Nieves imposed a 100% civil penalty against the petitioners, because she "never heard from the employer. Got the runaround." However, Nieves also testified that during a phone call with Ramnauth, he informed her that he no longer lived at the South Ozone Park address. She did not recall whether he told her his new address.

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and law pursuant to the provision of Board Rules 65.39 (12 NYCRR 65.39).

Burden of Proof

The petitioner has the burden to show that the Orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103; 12 NYCRR 65.30).

The Minimum Wage Order

It is undisputed that the petitioners failed to maintain any records of time worked and wages paid to the claimant. In the absence of such 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 818, 821 [3d Dept 1989]; *Heady v Garcia*, 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."

Therefore, the petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimant worked and that he was 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 no 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.*). In this case, the Commissioner used the best available evidence, which was the claimant's statement. However, based on the credible testimony of Ramnauth and Trien, we find that the claimant did not work 45 hours per week as claimed and is therefore not entitled to overtime. Chetram, himself, testified that he normally worked 8 hours per day and did not work overtime very often. Ramnauth and Trien each credibly testified that the hours of work in Trien's apartment could not be later than 4:00 p.m. and that work started either at 9:00 a.m. (Trien's testimony) or 8:00 a.m. (Ramnauth). Additionally, the claim form indicated that Chetram was permitted an hour break each day. We do not find it reasonable based on such evidence that the respondent charged the petitioners with overtime wages owed to the claimant for every week of the claim period and we revoke the minimum wage order.

The Wage Order

As discussed above, where an employer fails to produce payroll records, the Commissioner may use an employee's statement to determine the amount of wages due and owing. Chetram claimed that he worked 45 hours per week; however, as discussed above, based on Chetram's own testimony as well as the credible testimony of Ramnauth and Trien, we did not find the respondent's determination that the claimant worked over 40 hours every week of the claim period reasonable. We find based on the evidence most favorable to the claimant due to the absence of payroll records, that he worked five days a week from 8:00 a.m. (Ramnauth's testimony) to 4:00 p.m. (Ramnauth and Trien's testimony) with a one hour break each day (claim form). This is consistent with the claimant's own testimony that he seldom worked overtime. We find that Chetram worked seven hours per day, five days per week for a wage rate of $100.00 a day or $500.00 a week. We do not credit the petitioner's testimony that he made payments to the claimant in the presence of Trien, because he kept no records of such payments, and his testimony differed from Trien's as to what took place and the amount of money paid. We

likewise do not credit the petitioners' version of the number of weeks spent on the Trien project. Accordingly, the wage order is affirmed as to wages due and owing.

Civil Penalty

The wage order assesses a 100% civil penalty. Nieves testified that the penalty was based on the petitioner giving her the "runaround" and the "background information – imposition of civil penalty" worksheet indicates that the petitioners were not generally cooperative because "left recap @ the [South Ozone Park address] employer called me and stated he did not live there but did not give me his home address nor telephone number. Accurint search gave the above mentioned address as correct address for employer. Served recap which employer has ignored."

Labor Law § 218 (1) provides that where the Commissioner determines that an employer has willfully or egregiously failed to pay wages, he may direct payment of a civil penalty in the amount of 200% of the unpaid wages. In assessing the amount of this penalty, the Commissioner shall give due consideration to, inter alia, the good faith of the employer and the failure to comply with record-keeping requirements. Nieves testified that the basis for assessing a 100% civil penalty in this case was that the petitioners gave her the "runaround." We do not find that this explanation alone supports the imposition of a civil penalty, where the record shows that Ramnauth had informed her that he no longer resided at the address the respondent was using to contact him and where the recap was served. Nieves did not testify as to the steps she took to ascertain Ramnuth's correct address and did not recall whether he gave it to her. Therefore, we revoke the civil penalty.

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."

Penalty Order

The penalty order imposes a $1,000.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee from on or about March 1, 2008 through May 10, 2008. It is undisputed that the petitioners failed to maintain and produce such records. Accordingly, the penalty order is affirmed.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is revoked;

2. The wage order is modified to revoke the civil penalty;

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office of
the Industrial Board of Appeals,
at New York, New York, on
April 29, 2013.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is revoked;

2. The wage order is modified to revoke the civil penalty;

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, denied.

Anne P. Stevason, Chairman

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
April 29, 2013.