STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
VITO GIAMBANCO AND DREAM COME TRUE FARM, INC.,	
Petitioners,	
	DOCKET NO. PR 11-053
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, an Order to Comply with Article 19, and an Order under Article 19-A of the Labor Law, all issued January 7, 2011,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Vito Giambanco, *pro se* petitioner and for petitioner Dream Come True Farm, Inc.

Pico Ben-Amotz, Esq., Acting Counsel, NYS Department of Labor (Matthew Robinson-Loffler of counsel), for respondent.

WITNESSES

Vito Giambanco, and Enrique Tocay, for petitioners.

Segundo Encalada, and Senior Labor Standards Investigator Frank King, for respondent.

WHEREAS:

The Petition for review in the above-captioned case was timely filed with the Industrial Board of Appeals (Board) on February 25, 2011. An answer was filed on April 21, 2011. Upon notice to the parties, a hearing was held on May 6, 2013, in Hicksville, New York with respondent Department of Labor (DOL) appearing by videoconference connection to Albany, 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, and to make statements relevant to the issues.

The Orders to Comply under review in this proceeding were issued by the Commissioner on January 7, 2011 and direct compliance with Articles 6 and 19 of the Labor Law. The Order to Comply with Article 6 of the Labor Law (Wage Order) directs payment to the Commissioner for wages due and owing to Angel Boconsaca in the amount of $232.10, and Segundo Encalada in the amount of $2,081.80, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $521.46, and assesses a civil penalty in the amount of $1,156.95, for a total amount due of $3,992.31. The Order to Comply with Article 19 of the Labor Law (Minimum Wage Order) directs payment to the Commissioner for wages due and owing to six former employees of petitioners in the amount of $23,319.70, with interest continuing thereon at the rate of 16% calculated to the date of the Order, in the amount of $6,459.64, and assesses a civil penalty in the amount of $11,659.85, for a total amount due of $41,439.19. The Order to Comply under Article 19-A of the Labor Law (Penalty Order) assesses a civil penalty against the Petitioner pursuant to various provisions of the Minimum Wage Order for the Farm Industry, Part 190 of 12 NYCRR, in the amount of $2,000.00: (1) $500 for failing to keep and/or furnish true and accurate payroll records for each employee;.(2) $500 for failing to furnish each employee a wage statement; (3) $500 for failing to post a notice summarizing Article 19-A of the Labor Law and the Minimum Wage Order for Farm Workers and a copy of any generally applicable Work Agreement; and (4) $500 for failing to notify each employee in writing of the conditions of employment (work agreement).

SUMMARY OF EVIDENCE

Petitioner's Evidence

Petitioner Vito Giambanco (petitioner or Giambanco) testified that he has owned the Dream Come True horse farm for about 16 years. From 2007 to 2010, the period in question, there were two to three people employed as horse caretakers at any one time. The employees worked five to six days a week and were responsible for feeding the horses, taking them out of their stalls, cleaning the stalls, replacing shavings in the stalls, cutting grass, and then returning the horses to their stalls and feeding them in the evening. The farm had about 40 to 45 horses either being boarded or used for lessons.

Petitioner testified that the usual workday began at 6:00 a.m. when the horses were fed. At 7:00 a.m. the horses were taken out. Most of the work done by the employees was done in the morning. The horses were back in their stalls by 12:00 p.m. The employees were then given a break and then returned to work in the late afternoon to feed the horses. If a horse required special attention, either a veterinarian would be called or petitioner or sometimes Segundo Encalada would tend to the horse.

Petitioner admitted that he did not keep track of the hours worked by his employees or the wages paid to his employees. The hours differed week to week. Employees were paid in cash at the end of the week when petitioner would calculate their wages by multiplying the number of hours worked by the current minimum wage. In addition, all employees were supplied free housing on the farm. Petitioner could not state the names of his employees or the periods of time in which they worked.

Enrique Tocay testified on behalf of the petitioner that he has worked at the horse farm for approximately four years and was still employed there. Horses are fed at 6:00 a.m. but Tocay starts work at 7:00 a.m. and works four hours in the morning and then four hours in the afternoon, starting at 1:00 p.m. He works about 38 hours a week.

Respondent's Evidence

Senior Labor Standards Investigator (SLSI) Frank King testified that the investigation was initiated after two claims were filed with DOL in 2009. One claim was filed by Secundo Encalada and indicated that he worked from 6:00 a.m. to 8:00 p.m. six days per week and was paid $450.00. He also claimed that he was not paid for the last three weeks of work. A claim was also filed by Angel Boconsaca for the last three days of his employment. Angel Boconsaca was also interviewed by DOL and indicated that he worked from 6:00 a.m. to 6:00 p.m. six days a week and was paid $60 per day. He also stated that his brother, Luis Boconsaca also worked at the farm from 2004 to 2008, working the same hours and earning the same rate of pay as Angel.

On June 3, 2010, DOL paid a visit to the horse farm and interviewed two employees, Carlos Rodriguez and Enrique Tocay, who stated that they worked from 6:00 a.m. to 5:00 p.m. six days per week and were given a one hour meal period. Rodriguez was paid $300 per week in cash and Tocay was paid $320 per week. They both lived rent free at the farm.

Since the employer failed to maintain the legally required time and payroll records, DOL made its determinations as to hours worked and wages paid based on the employee statements. After determining that the employees were not being paid minimum wage for all hours worked according to the Minimum Wage Order for the Farm Industry, even allowing for an $88.55 housing credit per week, an audit was conducted and the instant Orders to Comply were issued. A 50 % civil penalty was added to the Wage Order and the Minimum Wage Order after considering the cooperation of petitioner, the amount of wages due, the lack of prior violations and the fact that petitioners did not maintain records.

Also testifying for respondent was Secundo Encalada who confirmed the facts indicated in his claim and further testified that he worked from 6:00 a.m. to 8:00 p.m. six days per wekk, was paid $450 per week and rarely received breaks. In addition to caring for the horses, he cut grass and fixed fences. He testified that he was paid for his last week of work.

GOVERNING LAW

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 Claimants' 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).

I. The Wage Order - Petitioners have admitted that they have failed to maintain required records.

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, § 190-8.2 provides, in pertinent part:

> "(a) Every employer shall establish, maintain and preserve for not less than three years, the following payroll records which shall show for each employee:
> (1) name and address;
> (2) social security number;
> (3) total hours worked daily and weekly, ...;
> (4) when a piece-rate method of payment is used, the number of units produced daily and weekly;
> (5) gross wages;
> (6) deductions from gross wages;
> (7) allowances claimed as part of the minimum wage;
> (8) any cash advanced; . . .
> (10) net wages paid; and
> (11) copy of applicable employee work agreement.
>
> "(b) Every employer shall make such records...available upon request of the commissioner at the place of employment."

§ 190-8.1 provides:

> "For each payroll period every employer shall furnish to each employee a statement showing the following:
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> "(a) full name and address of the employer;
> (b) name of the employee;

(c) hours worked by the employee;
(d) when wages are based on piece rate, the size or weight of the piece-rate unit and the number of units produced during the pay period;
(e) rates paid;
(f) gross wages;
(g) allowances and deductions; and
(h) net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid and to provide its employees with a wage statement every time the employee is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides, in relevant part:

> "Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements."

In the absence of payroll records, DOL may issue an order to comply based on employee complaints and interviews.

In *Anderson v Mt. Clements Pottery Co.* (328 US 680, 687-88 [1949]), superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

> "[W]here the employer's records are inaccurate or inadequate....[t]he solution...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 conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Anderson further opined that the 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." (*Id.* at 688-89.) 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 CA 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"]).

As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, (156 AD2d 818, 821 [3rd 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."

Article 19-A of the Labor Law, known as the Minimum Wage Act, requires every employer to pay each of its employees in accordance with the minimum wage orders promulgated by the Commissioner (Labor Law § 652). The Minimum Wage Order for Farm Workers, 12 NYCRR Part 190, requires an employer to pay an employee the basic minimum wage for each hour worked (12 NYCRR 190-2.1). From January 1, 2007 to July 23, 2009 the minimum wage was $7.15 per hour (12 NYCRR 190-2.1). It was raised to $7.25 per hour thereafter (Labor Law § 652, 29 U.S.C. § 206 [c]).

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 claimants worked and that they were paid for the 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, June 11, 2011, *appeal pending*.)

B. Calculation of Unpaid Wages Due

DOL has calculated the unpaid wages due based on the claims and statements that it received. This is a reasonable basis for the calculation since Petitioners have failed to keep or maintain time or payroll records. However, the hearing before the Board is *de novo* (Board Rule 66.1 [c]), and therefore, we must consider the testimony and evidence received at the hearing in making our determination whether to affirm, revoke or modify the Orders.

We find, in general, that DOL's Minimum Wage Order and the Wage Order contained reasonable approximations of the hours worked by the employees and it was reasonable for the Commissioner to rely on that approximation to calculate back wages, even if possibly over-inclusive. To fault the order for its possible imprecision, even when caused by petitioners' failure to keep records, would reward the employer for its unlawful conduct. In the present case, DOL relied on the claims filed, and employee interviews. In addition, the Wage Orders allowed $88.55 per week in credit against the minimum wage for the free board received by the employees.

The evidence presented by petitioner consisted of his testimony and the testimony of Enrique Tocay. Giambanco failed to specify hours worked by his employees and could not remember the names and dates of their employment. He stated that most work was done in the morning and that the horses were all usually back in their stalls at 12:00 p.m. and in general, the employees worked 35 to 38 hours per week. In contrast, Tocay testified that he usually worked 4 hours in the morning and 4 hours in the afternoon starting at 1:00 p.m. six days per week. Given the lack of specificity and inconsistency in the testimony we find that petitioner failed to meet his burden of proof. We also find that the weekly hours for the employees ranged from 60 hours per week to 84 hours per week and that Secundo Encalada, worked an average 84 hours per week, based on his claim and his testimony at hearing.

Each order imposes a 50% civil penalty against the petitioners. Senior Labor Standards Investigator King testified that the penalty was determined after he considered various factors, such as size of the business, good faith, the gravity of the violation, any previous violations and the failure to comply with record keeping requirements.

Given the testimony of Secundo Encalada at hearing that he was paid for his last week of work, the wage order must be modified to credit petitioners for these paid wages. With this modification, as well as the accompanying modification to the interest and penalty due on the Wage Order, the Wage Order and Minimum Wage Order are otherwise affirmed in full.

II. The Penalty Order is affirmed in full.

The Order to Comply under Article 19 of the Labor Law (Penalty Order) assesses a civil penalty against the petitioners pursuant to various provisions of the Minimum Wage Order for the Farm Industry, Part 190 of 12 NYCRR, in the amount of $2,000.00: (1) $500 for failing to keep and/or furnish true and accurate payroll records for each employee;.(2) $500 for failing to furnish each employee a wage statement; (3) $500 for failing to post a notice summarizing Article 19-A of the Labor Law and the Minimum Wage Order for Farm Workers and a copy of any generally applicable Work Agreement; and (4) $500 for failing to notify each employee in writing of the conditions of employment (work agreement).

There was no evidence submitted to indicate that petitioners complied with any of these provisions of the Labor Law and Order and therefore, the Board affirms the penalty order in full.

III. Interest is due.

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." Therefore, the interest imposed by the wage order is affirmed.

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NOW THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is affirmed as modified; and

2. The Minimum Wage Order is affirmed in full; and

3. The Penalty Order is affirmed; and

4. 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
January 16, 2014.