STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: PATRICK HORAN (T/A HORAN COMMUNICATIONS LLC), Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply With Article 19 of the Labor Law, and An Order Under Articles 5 and 19, both dated July 27, 2011; - against - THE COMMISSIONER OF LABOR, Respondent,	DOCKET NO. PR 11-300 RESOLUTION OF DECISION

APPEARANCES

Raymond Nardo, Esq., for petitioner.

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

WITNESSES

Patrick Horan, Michael Fender, Marvin Rodriguez, and Elesar Pastor Acosta for petitioner.

Rene Castro and Senior Labor Standards Investigator Pierre Magloire for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on September 21, 2011, and seeks review of two orders issued against petitioner Patrick Horan (T/A Horan Communications LLC). Respondent Commissioner of Labor filed an answer to the petition on September 11, 2012.

Upon notice to the parties hearings were held in this matter, and the related matter of Patrick Horan (T/A Scart Communications LLC), Board Docket No. PR 11-301, on December 23, 2013 and February 21, 2014, in Hicksville, New York, before Administrative Law Judge Jeffrey M. Bernbach, 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 to file legal briefs.[1]

The order to comply with Article 19 (minimum wage order) under review directs compliance with Article 19 of the Labor Law and payment to the Commissioner for unpaid minimum wages due and owing to 50 employees for the time period from June 7, 2007 to August 2, 2008 in the amount of $95,657.83, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $57,080.35, liquidated damages in the amount of $23,914.68, and assesses a 100% civil penalty in the amount of $95,657.73 (*sic.*), for a total amount due of $272,310.59.

The order under Articles 5 and 19 of the Labor Law (penalty order) assesses a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about June 9, 2007 through August 2, 2008; 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 each payment of wages from on or about June 9, 2007 through August 2, 2008; and a $1,000.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o'clock in the morning to two o'clock in the afternoon from on or about July 18, 2007 through August 2, 2008, for a total amount due of $3,000.00.

The petition alleges in relevant part that the orders are unreasonable because during the relevant time period Horan Communications LLC did not employ employees in New York, the employees listed in the minimum wage order were employees of Scart Communications, and by reference to the petition filed in the related matter of Patrick Horan (T/A Scart Communications), PR 11-301, employees of Scart Communications did not work more than 40 hours a week.

SUMMARY OF EVIDENCE

Petitioner's Evidence

Testimony of Patrick Horan

Petitioner Patrick Horan testified that in 2007 he established Scart Communications, a Georgia corporation, and subcontracted with CCG Construction Group to install cable for Verizon at various locations in New York in residential areas of Nassau, Suffolk, and Westchester Counties. Petitioner testified that he had two crews of his own employees that he supervised each day on the project. Each crew consisted of approximately seven to eight unskilled laborers whose work consisted of digging holes for the placement of

[1] After petitioner rested, respondent moved to dismiss the petition for failure to produce evidence upon which relief could be granted. The hearing officer reserved decision on the motion, which is denied, because as discussed in this decision, the petitioner met his burden of proof. Respondent also moved to dismiss the petition for only alleging that Horan Communications LLC, which is named in the orders as a trade name and not as a liable entity, is the employer. We deny that portion of respondent's motion as well because the petition incorporates the petition in the related case, PR 11-301 by reference, and that petition alleges no overtime was worked by the individual petitioner's employees.

telecommunication pipes. The work was accomplished by using compressors, jackhammers, shovels, pickaxes, and missiles, which are a pneumatic tool used to dig a path. Since much of this work is loud, particularly the use of missiles and jackhammers, petitioner explained that CCG's supervisor, Michael Fender, restricted the hours during which work could be done so as to minimize the disturbance to residents. Petitioner testified that no work could be done prior to 8:00 a.m. and that all work had to be finished by 5:00 p.m. Petitioner believes these restrictions were based on local ordinances and the permits held by CCG for the work. He further testified that on Friday work ended by 12:00 p.m., because Fender lived in Pennsylvania and wanted to get home for the weekend. Petitioner additionally testified that employees took an hour lunch break each day. There was no work on Saturdays or Sundays. Petitioner's employees also did not work during inclement weather such as rain or snow, when it was cold enough outside that the ground was too frozen to dig into, and on certain holidays.

Petitioner testified that some employees arrived at the job by personal vehicle. Other employees met him at the motel where he was staying and either drove to the job site with him or in another truck if one was available. Petitioner also explained that some of the employees, who were from out of state, stayed at the same motel as him.

Petitioner testified that employees were paid every Friday for the work performed that same week. He kept track of employees' hours on a notepad and on Excel spreadsheets saved on a laptop computer. During the relevant time period, petitioner used the "gross up calculator method" for paying employees. This method allowed petitioner to make sure his employees received the net pay amount he promised them by calculating the gross pay based on the net amount due to each employee. The gross amounts, therefore, varied, but the net amounts were the promised rates, which petitioner explained were guaranteed daily amounts based on $8.00, $12.00, or $15.00 an hour. Petitioner stated that employees were guaranteed the full daily amount, even if they only worked two hours, because the actual daily hours were too inconsistent due to Fender's work rules. Petitioner explained that the payroll records show more hours than the employees actually worked, because the payroll company required him to call in the hours even though he paid daily rates. This led him to call in hours that were more than the employees actually worked.

Petitioner testified that in 2008 he was the target of an investigation by the "Department of Justice," which his attorney clarified was actually the Suffolk County District Attorney's Office. The District Attorney seized petitioner's laptop computer, payroll sheets, checks, and time sheets. Petitioner testified that ultimately he was not criminally prosecuted and in 2011 some of his property was returned to him, but the checks and timesheets were never returned, and the spreadsheets on his computer were erased and unrecoverable as a result of law enforcement officials bypassing his password.

Testimony of Michael Fender

Michael Fender testified that he is a field supervisor for CCG and oversees the daily operations of underground utilities work. During the relevant time period he worked in New York as a project supervisor overseeing an underground Verizon project in residential neighborhoods. Fender knows petitioner as the contact person for "Horan Communications," which worked on the Verizon project. Fender testified that he had his own restrictions for when the work could be done on the Verizon project, and that generally the work had to be done from

8:00 a.m. to 3:30 or 4:00 p.m. Monday to Thursday, and 8:00 a.m. to 12:00 p.m. on Friday. He restricted the work to those times out of concern for residents. The work was loud and could not start before 8:00 a.m., and he wanted all work to be finished by 4:00 p.m. because of the danger of the work causing a utility outage that could not be repaired if it happened too late in the day. Fender also testified that there was generally no work done on the project if it was raining or snowing, and that no work was done on holidays. Fender was present and visible at the job sites and never knew of petitioner's employees working later than 4:30 p.m.

Testimony of Marvin Rodriguez

Marvin Rodriguez testified that he worked for petitioner from 2007 to 2010 digging holes and installing underground pipes and cables in Nassau, Suffolk, and Westchester Counties. He testified that he worked Monday to Thursday and sometimes Friday until 12:00 p.m. He never worked before 8:00 a.m. or after 5:00 p.m. and did not work weekends or holidays. He had a one hour lunch break each day. Rodriguez further testified that his schedule was the same as the schedule for the rest of the crew.

Testimony of Elesar Pastor Acosta

Elesar Pastor Acosta testified that he worked for petitioner doing excavations to place cables. He testified that he worked Monday to Thursday from 8:00 a.m. to 4:30 p.m. and Friday until 11:00 a.m. or 12:00 p.m. with a one hour lunch break each day. Pastor testified he did not work on days when it rained or snowed. He further testified that he did not recall speaking to a DOL investigator in July 2008, did not recall ever telling an investigator he worked 8:00 a.m. to 5:00 p.m., and did not recall saying he had only 30 minutes for his lunch break.

Respondent's Evidence

Testimony of Rene Castro

Rene Castro testified that he worked for petitioner from 2008 to 2009 excavating and placing pipes. He testified that he worked on jobs for petitioner "everywhere in Long Island," and explained that he met petitioner and other workers at petitioner's hotel each day and then they left together to the job site at 6:30 a.m. because they "didn't know the places." It took 45 minutes to an hour or more to get from the hotel to the job site each day. However, Castro also testified that he sometimes went from his home straight to the work site if he knew the location in advance. Castro testified that he worked for petitioner until 5:30 or 6:30 p.m. Monday to Friday, and sometimes until 8:30 p.m. He had a 30 minute lunch break each day. He explained that he worked the same hours Monday to Friday and that the schedule was not different on Friday, however, he later testified that he always worked a half-day on Friday. He further testified that he worked every Saturday and never on Sunday, but later clarified he did not work "every single" Saturday and only recalled working on a Saturday once for petitioner.

He sometimes started digging holes as early as 7:00 a.m., which was before the missiles were used. He explained that he was told no work could begin before 8:00 a.m. because the job sites were in residential areas and they were not allowed to make noise before 8:00 a.m., but "the trenches were already done because that is not a problem. The problem was the missile." Castro further testified that there was no work when it snowed, but the crew did work in the rain.

Castro testified that his rate of pay was $12.00 an hour. Petitioner never told him he was being paid a daily rate of $125.00. He testified he was not paid extra for overtime hours. Petitioner terminated Castro in 2009. Castro testified that after petitioner terminated him in 2009, he wrote a letter to DOL[2] complaining that his termination was unfair.

Testimony of Senior Labor Standards Investigator Pierre Magloire

Senior Labor Standards Investigator Pierre Magloire testified that he did not actively participate in DOL's investigation of petitioner. He explained that his role was limited to reviewing the investigative file and preparing the orders. Magloire testified that Adrian Beckles, who no longer works for DOL, was the lead investigator. Magloire does not recall whether he supervised Beckles in 2009.

Magloire testified that the amount of overtime liability found due by the orders was based on interviews of petitioner's employees by DOL. Magloire has no personal knowledge of the information DOL used to make the overtime liability calculations and played no role in the computations, although he did review them before preparing the orders. Magloire testified that he is not certain whether the hours worked as reflected in the calculations were reduced to account for holidays. Magloire further testified that he recommended a 100% civil penalty in this matter because petitioner should have known that employees must receive overtime pay.

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

Burden of Proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30; *see also Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [2011]).

Employer Status

Petitioner alleges that the orders are unreasonable because Horan Communications LLC, a Georgia company, did not employ workers in New York during the relevant time period. The orders, however, were not issued against Horan Communications, but were issued against petitioner "trading as Horan Communications LLC." Since the business entity was not named by the orders as a liable party, they cannot be unreasonable for allegedly naming the wrong company petitioner was trading as, particularly where the record is unclear as to whether petitioner may have indeed been trading as Horan Communications during the relevant time period based on Fender's testimony that he knew petitioner as the contact for "Horan Communications." Petitioner does not deny that he employed employees in New York during the relevant period and was properly named in the orders as an employer.

[2] It is not clear from the testimony exactly which agency Castro complained to, but presumably his complaint was made to DOL or forwarded to DOL from another agency.

The Minimum Wage Order is Unreasonable

Article 19 of the Labor Law, entitled "Minimum Wage Act" sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]), and its implementing regulations require payment of time and one-half a non-residential employee's regular hourly rate for each hour worked over 40 in a week (12 NYCRR 142-2.2).

12 NYCRR 142-2.6 provides that every employer is required to maintain weekly payroll records for each employee that includes, in relevant part, the wage rate, number of hours worked daily and weekly, the amount of gross wages, and deductions from gross wages. The payroll records in evidence are unreliable. Petitioner testified that his records do not accurately reflect the hours employees worked, because he promised employees a guaranteed daily rate irrespective of the number of hours they worked. The hours he called into the payroll company, which are reflected in the records, were engineered by petitioner in order to arrive at the correct daily rates and weekly net pay. We cannot credit these records for the hours employees worked, although wages paid may be accurate.

The minimum wage order finds that the petitioner failed to pay 50 named employees overtime required by Article 19 of the Labor Law in the amount of $95,657.83 from June 7, 2007 to August 2, 2008. In the absence of sufficient payroll records, petitioner has 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" (*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 petitioner has 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]). 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). Here, DOL's investigator testified that employee statements were used to calculate the unpaid overtime; however, none of the statements in evidence show that overtime is owed, there are no statements in evidence for the employees listed in the minimum wage order, and no DOL investigator with personal knowledge of the interviews testified. We find based on the record before us that petitioner met his burden of proof by presenting credible evidence to show that the minimum wage order is unreasonable.

Petitioner credibly testified that employees did no work before 8:00 a.m. or after 5:00 p.m. Monday through Thursday, and that on Fridays no work was done before 8:00 a.m. or after 12:00 p.m. He also credibly testified that employees had a one hour lunch break each day.

Petitioner's evidence showed that none of his employees could have worked over 40 hours a week, which means no overtime is owed. Petitioner's testimony was corroborated by Michael Fender, the general contractor's site supervisor, and by two employees – Marvin Rodriguez and Elesar Pastor Acosta. Petitioner's testimony is also supported by numerous employee statements in evidence that show no overtime was worked. We also accept petitioner's explanation that his payroll records inaccurately show overtime hours worked because his use of the "gross up" payment method combined with a promise to pay employees a net daily wage rate led him to report more hours to the payroll company than employees actually worked since he was required to report hours in order to engineer the correct net wage amounts irrespective of how many hours were worked. Petitioner met his burden of proof that no overtime wages are owed.

Respondent failed to rebut petitioner's evidence. The investigator who testified had no personal knowledge of the investigation, never spoke to the employees, and did not make the calculations of overtime liability. The employee who testified for respondent, Rene Castro, offered conflicting testimony, which undermined his credibility. He testified that he worked six days a week, but later admitted he only recalled working six days a week on one occasion. He also said he worked the same number of hours each day, including Friday, but conceded he worked only a half-day on Fridays. His testimony about when he started work each day was also vague. He credibly testified that "sometimes" he started at 7:00 a.m. because work on the trenches could start before 8:00 a.m. when the missiles were used, but did not testify as to what time work would end on days when he started at 7:00 a.m. or how often he started work before 8:00 a.m. He also credibly testified that he sometimes met petitioner and other employees at petitioner's hotel at 6:30 a.m. on days when he did not know the location of the work site, but drove to work directly from home when he knew the location. He offered no testimony as to how often this occurred. Horan agreed that some employees met him at the motel and drove to work with him or in a separate truck. While Castro's testimony may demonstrate that if his compensable work time began each day upon arriving at the hotel at 6:30 a.m. he may have worked more than 40 hours some weeks, this evidence alone is too general and equivocal to support DOL's determination that 50 employees whose statements are not in evidence are owed overtime wages for the time period in question. The minimum wage order, therefore, is unreasonable and must be revoked.

Penalty Order

The penalty order assesses a $1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about June 9, 2007 through August 2, 2008; 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 each payment of wages from on or about June 9, 2007 through August 2, 2008; and a $1,000.00 civil penalty for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o'clock in the morning to two o'clock in the afternoon from on or about July 18, 2007 through August 2, 2008, for a total amount due of $3,000.00. We affirm the first two counts of the penalty order, and revoke the third count.

Count 1: Failure to keep and/or furnish payroll records is affirmed

The record shows that although petitioner maintained some payroll records, they were, on their face, inaccurate. Petitioner testified that he reported more hours than employees actually worked in order to engineer or back into the agreed daily wages he promised his employees. We find petitioner violated Labor Law § 661 and 12 NYCRR 142-2. By failing to keep and/or furnish true and accurate payroll records.

Count 2: Failure to give each employee a wage statement with each payment of wages is affirmed

Labor Law § 661 and 12 NYCRR 142-2.7 require employers to provide a complete wage statement with each payment of wages that includes hours worked, rates paid, gross wages, allowances, deductions, and net wages. Petitioner offered no evidence that wage statements were provided, and the employees who testified indicated they were paid by check with no wage statement. We find petitioner violated Labor Law § 661 and 12 NYCRR 142-2.7.

Count 3: Failure to provide a 30 minute break is revoked

The penalty order imposes a $1,000.00 civil penalty against petitioner for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o'clock in the morning to two o'clock in the afternoon. The record shows that employees received at least a 30 minute meal period each day and we revoke this count of the civil penalty.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is revoked; and
2. The penalty order is modified to reduce the civil penalty due and owing to $2,000.00; and
3. The petition for review be, and the same hereby is, granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 2, 2016.

Count 1: Failure to keep and/or furnish payroll records is affirmed

The record shows that although petitioner maintained some payroll records, they were, on their face, inaccurate. Petitioner testified that he reported more hours than employees actually worked in order to engineer or back into the agreed daily wages he promised his employees. We find petitioner violated Labor Law § 661 and 12 NYCRR 142-2. By failing to keep and/or furnish true and accurate payroll records.

Count 2: Failure to give each employee a wage statement with each payment of wages is affirmed

Labor Law § 661 and 12 NYCRR 142-2.7 require employers to provide a complete wage statement with each payment of wages that includes hours worked, rates paid, gross wages, allowances, deductions, and net wages. Petitioner offered no evidence that wage statements were provided, and the employees who testified indicated they were paid by check with no wage statement. We find petitioner violated Labor Law § 661 and 12 NYCRR 142-2.7.

Count 3: Failure to provide a 30 minute break is revoked

The penalty order imposes a $1,000.00 civil penalty against petitioner for violating Labor Law § 162 by failing to provide employees with at least thirty minutes off for the noon day meal when working a shift of more than six hours extending over the noon day meal period from eleven o'clock in the morning to two o'clock in the afternoon. The record shows that employees received at least a 30 minute meal period each day and we revoke this count of the civil penalty.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is revoked; and
2. The penalty order is modified to reduce the civil penalty due and owing to $2,000.00; and
3. The petition for review be, and the same hereby is, granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
March 2, 2016.