STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MICHAEL J. WALDRON AND TITAN MECHANICAL CONTRACTING, INC., Petitioners, To Review Under Section 101 of the New York State Labor Law: An Order to Comply with Article 19 and An Order under Article 19 of the Labor Law, both dated November 9, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 11-375 RESOLUTION OF DECISION

APPEARANCES

Michael J. Waldron, petitioner *pro se*.

Pico Ben-Amotz, General Counsel to the New York State Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

David S. De LaMater, claimant; Domini Vasquez, Labor Standards Investigator, for respondent.

WHEREAS:

On December 2, 2011, petitioners Michael J. Waldron and Titan Mechanical Contracting, Inc. (Petitioners) filed a petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR Part 66), seeking review of an Order to Comply with Article 19 of the Labor Law (Order), and an Order under Article 19 of the Labor Law (Penalty Order) both of which were issued against them on November 9, 2011, by the Commissioner of Labor (Commissioner). The Order finds that the Petitioners paid thirteen (13) named employees a wage rate below the Minimum Wage Order of Title 12 NYCRR Part 142, in violation of Article 19 of the Labor Law. The Order demands payment of $26,956.79 in unpaid wages for the period January 19, 2008 to December 25, 2010, interest at the rate of 16% calculated to the date of the Order in the amount of $7668.55, liquidated damages at 25% in the amount of $3829.35 and a civil penalty in the amount of $26, 956.79, for a total amount due of $65, 411.48. The Penalty Order demands

payment of $300.00 as a civil penalty for failure to keep and/or furnish true and accurate payroll records for each employee for the period May 4, 2008 through December 25, 2010.

The petition alleges that the Order is invalid and unreasonable because the calculations of wages due from time sheets for several hourly employees are in error. Petitioners also dispute the liquidated damages amount that was added twice in the Order and claim that certain salaried employees were believed to be exempt from overtime pay. Petitioners claim that certain "salaried" employees were hired at 50 hours per week and others at 40 hours per week but the Order's calculations assumed all salaried employees worked 50 hours per week. Petitioners provide their calculations of wages owed and claim only two hourly employees who are owed $81.12 and four 50 hour per week salaried employees who are owed $4995.00, with five 40 hour per week salaried employees owed nothing, for a total amount owed of $5076.12. Petitioners also dispute the interest and penalties.

In his answer, the Commissioner alleges that the investigation of the Petitioner's business began on or about August 24, 2010, when a former employee filed a claim for unpaid minimum wages with the Department of Labor (DOL). An investigator conducted a field visit in late December 2010, and a revisit was made in early March 2011. As a result of a review of certain payroll records and interviews with some employees, the investigator issued a recapitulation sheet to the Petitioners documenting that 13 employees were owed a total minimum wage underpayment of $26,956.79. The Order to Comply of November 9, 2011, was subsequently issued.

Upon review of the petition, Respondent reviewed the investigative file and concluded that the recapitulation sheet incorrectly included the liquidated damages amount in the minimum wage underpayment amount of $26,956.79 and that figure should be reduced to $23,893.36. The answer further notes that based on the revised minimum wage underpayment, the recalculated interest amount at 16% should be $6980.19. The recalculated liquidated damage amount of 25% of the wage claim is $5973.34, the revised civil penalty of 100% of the wage claim is $23,893.36, making a revised total on the wage claim Order of $60,700.25.

Upon notice to the parties, the Board held a hearing in Albany, New York on February 25, 2014, before Board Counsel Wendell P. Russell, Jr., the designated hearing officer in this case. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

SUMMARY OF EVIDENCE

Petitioner Michael J. Waldron (Petitioner or Waldron) created and operated Titan Mechanical Contracting, Inc. (Titan) in approximately 2003 as a mechanical contracting company handling all phases of mechanical construction particularly new residential construction. The company had divisions for plumbing, heating ventilation air-conditioning refrigeration (HVACR) and electrical. The company also did central vac structure wiring known as specialty systems and fireplaces; either wood burning, pellet stove or insert.

Waldron testified that the number of employees of the business varied over time from five to seven to as little as one or two depending on work load. At the beginning, Waldron's

wife handled the office manager duties but starting in 2008, Terri Ballard was hired as the office manager. Ms. Ballard was an experienced office manager in the construction industry and was with the company until 2012. Ms. Ballard prepared the petition in this case and was the Petitioner's designated representative. At some point Waldron lost contact with Ms. Ballard and even though she had prepared the petition and was most familiar with the payroll system and records, Waldron did not act to arrange for her presence as a witness at the hearing.

Waldron was unprepared to present his case at the hearing and in particular, he was unable to present documentary evidence to support his case. He testified that his company generally operated based upon having two classes of employees, hourly employees "...which are, more or less, in our eyes, considered laborers. You know, they come in to help get the work done that the managers put on scope, and were less skilled, less experienced, and under the direction of the managers." The other class were the "...salaried employees, who, what we understood by reading the laws...were under the responsibility of having the ability to hire and fire, order materials without purchase orders from any higher command, be able to put purchase order materials on our account, you know, set work scopes, set schedules for the other employees...that we saw those as executive employees. Those folks were hired on a fifty-hour basis." Waldron testified that the salaried "managers" were expected to work fifty hours per week and that work in excess of that would be at a "half time" rate that was calculated as their weekly salary divided by 50 to derive their hourly rate and the extra time would be paid at one-half of the hourly rate. Waldron also testified, however, that not all salaried employees were hired at fifty hours and that due to "market conditions" some employees were hired at fifty and some were hired at forty hours per week.

Waldron testified that the company handbook that was given to every employee and was signed by each employee set forth what the employee's position was, the pay scale, how they were paid, the benefits, etc. When asked if he had a copy of this handbook to enter into evidence Waldron said that he did not know if he had a copy. He was given an opportunity at the hearing to look through his documents and produce a copy of the handbook but no such copy was produced and entered into evidence. Waldron also testified that the salaried employees received other benefits like eleven paid holidays and benefits that the hourly workers did not get.

David S. DeLaMater, one of the claimants considered by the Petitioner as a salried employee testified that he worked for the Petitioners for approximately a year and a half between 2010-2011. DeLaMater stated that he was hired to do mechanical work including electrical, plumbing, carpentry, HVAC and his title was Director of Operations. He testified that he was a worker: "...I was a worker. That's all I ever did. I never managed anybody, never, you know, fired or hired anybody." DeLaMater said that everyone worked as a team to get the work done. His work was physical labor and he was paid a weekly salary. He testified that on average he worked sixteen hours a day often six days a week and there were times they would work around the clock to get jobs finished. He said that he was paid the same salary every week and that he was never paid overtime.

Waldron made a brief cross-examination of DeLaMater and introduced into evidence DeLaMater's business card that noted his title of Director of Operations. The business card was the only document that Waldron entered into evidence in support of his petition.

Labor Standards Investigator Domini Vasquez (Vasquez) testified about her investigation for this case. Vasquez was assigned the case and she did an initial visit to the business and interviewed several of the employees. She testified that she requested payroll records, time records, time cards, a time log and spoke to Waldron and his office manager Terri Ballard. She stated that she advised them that the focus of the investigation was with overtime and salaried employees. Vasquez testified that she told Waldron and Ballard about record keeping requirements for time cards and time logs.

During a revisit, Vasquez interviewed several employees. There were time records for hourly employees but no time records for the salaried employees. Vasquez testified that to develop the hours worked for the salaried employees she created a weighted average of hours worked for salaried employees based upon her employee interviews. She went on to testify that it was the DOL's determination that none of the salaried employees could be considered exempt as executives from the wage and hours laws regarding entitlement to overtime because they didn't supervise more than two employees and they didn't have the ability to hire and fire. During cross-examination Vasquez confirmed that the weighted average was developed based upon her interviews with Brett Butler, Frank Adams and the claim form information from David DeLaMater.

GOVERNING LAW

Standard of Review and Burden of Proof

When a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in the [petition] shall be deemed waived" (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid. (Labor Law § 103 [1]). It is a Petitioner's burden at hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable. *See* Board Rule § 65.30 [12 NYCRR § 65.30] ("The burden of proof of every allegation in a proceeding shall be upon the person asserting it"); *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 (3d Dept 2003).

It is therefore Petitioners' burden in this case to prove by a preponderance of the evidence the allegations in the petition that the claimants are not entitled to overtime pay and that Petitioners maintained accurate payroll records.

An Employer's Obligation to Maintain Records and DOL's Calculation of Wages in the Absence of Adequate Employer Records.

The law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rate, and gross and net wages paid. (Labor Law §§ 195 and 661, and 12 NYCRR § 142-2.6.) Employers are required to keep such records open to inspection by the Commissioner or his designated representative. *Id.*

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must

credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. (Labor Law § 196-a; *Angello v National Finance Corp.*, 1 AD3d 850 [3d Dept 2003]). 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."

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 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."

Citing to *Anderson v Mt. Clemens,* the Appellate Division in *Mid-Hudson Pam Corp., supra,* agreed: "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee.... Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here."

Requirement to Pay Overtime

The Minimum Wage Order for Miscellaneous Industries provides that an employer shall pay a non-residential employee for overtime at a wage rate of 1 ½ times the employee's regular rate for hours worked over 40 in a work week, subject to any applicable exemptions. *See* 12 NYCRR § 142-2.2.

The term "regular rate" shall mean the amount that the employee is regularly paid for each hour of work. When an employee is paid on a salary or on any basis other than an hourly rate, the regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee's total earnings. *See* 12 NYCRR § 142-2.16.

FINDINGS

The Board having given due consideration to the pleadings, hearing testimony, arguments, and documentary evidence, makes the following findings of fact and law pursuant to the provisions of Board Rule 65.39 (12 NYCRR § 65.39).

We find that Petitioners failed to meet their burden of proving that the Order was invalid or unreasonable. Petitioners were unprepared at the hearing and presented no evidence in support of their petition. The only document Petitioners introduced into evidence was a business card for claimant David S. DeLaMater to show his title was Director of Operations but there was no other evidence introduced to support Petitioners' position that most of the employees were salaried managers who would not be subject to overtime for hours worked in excess of 40 hours per week. While Waldron testified about an employee handbook that was allegedly given to each employee and signed by the employee to indicate agreement, he was unable to produce and introduce into evidence a copy of the handbook. The business card proved nothing related to overtime entitlement while DeLaMater's uncontested testimony was that he was never more than a worker who worked long hours in excess of 40 hours per week and he was never paid any overtime.

The presumption under the Labor Law is that the Commissioner's Order is valid and reasonable and with no evidence to the contrary the Board finds that the Petitioners did not meet the preponderance of evidence standard that is required for Petitioners to prevail.

Civil Penalties for Failure to Pay Wages and for Failure to Have Required Payroll Records are Affirmed

The Order additionally assessed a civil penalty in the amount of 100% of the wages due. The Petitioners offered no evidence to contest the basis for this penalty and the Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amount set forth in the Order is proper and reasonable in all respects. The Penalty Order's civil penalty of $300.00 for failure to keep required payroll records was uncontested by Petitioners at the hearing and therefore is deemed reasonable and valid.

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 financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-a sets the "maximum rate of interest" at "sixteen per centum per annum." Accordingly, the find the interest assessed in the Order as valid and we affirm it.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 19, dated November 9, 2011, is modified to reflect a revised minimum wage underpayment calculation of $23,893.36 instead of $26,956.79. The recalculated interest amount is $6980.19 and the recalculated liquidated damages at 25% of the wage claim is $5973.34. The civil penalty is $23,893.36, for a revised total amount on the Minimum Wage Order of $60,700.25;

2. The Penalty Order is affirmed; and

3. The Petition for Review is denied.

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
May 22, 2014.