STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
ALDO R. MOSQUERA AND H.A.B. INC. (T/A HOME BOYS AUTO BOUTIQUE),	:	
Petitioners,	:	DOCKET NO. PR 12-031
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order Under Article 19 of the New York State Labor Law, both dated August 2, 2011,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Aldo R. Mosquera, petitioner *pro se*.

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

WITNESSES

Aldo R. Mosquera and Boris Douglas, for petitioner.
Alfonso Ramirez and Labor Standards Investigator Emily Nieves, for respondent.

WHEREAS:

On January 31, 2012, petitioners Aldo R. Mosquera (petitioner or Mosquera) and H.A.B. Inc. (T/A Home Boys Auto Boutique) (H.A.B.) filed a petition with the Industrial Board of Appeals (Board) to review an order to comply with Article 19 and an order under Article 19 of the New York State Labor Law issued against them on August 2, 2011 by respondent Commissioner of Labor (Commissioner, respondent, or DOL). Respondent filed a motion to dismiss the petition for being filed more than 60 days after the orders were issued, which the Board denied by an Interim Resolution of Decision, dated September 10, 2012 on the ground that service had been defective. The first order (minimum wage order) directs payment of minimum wages in the amount of $69,850.05 to claimant Alfonso Ramirez (Ramirez) for the period April 6, 2003 through March 21, 2009, and $9,210.68 to claimant Raymond Martinez (Martinez) for

the period July 11, 2009 through April 10, 2010, together with $19,765.18 in liquidated damages, $35,486.23 in interest calculated to the date of the order, and a $79,060.73 civil penalty, for a total amount due of $213,372.87. The second order (penalty order) directs petitioners to pay a civil penalty of $1,000.00 (Count 1) for failure to keep and/or furnish true and accurate payroll records for their employees, and $1,000.00 (Count 2) for failure to issue wage statements to their employees, for a total amount due of $2,000.00. Petitioners filed a petition on January 31, 2012, and an amended petition on March 9, 2012.

The amended petition alleges that the petitioners do not have employees; Martinez "was a friend and was watching the facility while Petitioner went off for coffee;" and the petitioners "never employed or ha[d] any knowledge of Alfonso Ramirez. This is a fictitious individual." The respondent filed an answer on October 16, 2012. Upon notice to the parties, a hearing was held in New York, New York on June 11, 2014, before Jean Grumet, Esq., then Member 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.

SUMMARY OF EVIDENCE

Petitioners' evidence

Mosquera testified he is the sole proprietor of H.A.B., "a one man operation" that has sold and repaired tires in Jamaica, New York since 2003 or 2004. The hours of operation are 9 a.m. to 5 p.m. Mosquera has always worked by himself and never employed anyone else.

On April 12, 2010 he opened at 8:15 a.m., then "had to leave and I didn't have anybody to leave in my shop. I called Mr. Martinez and I asked if he could please stay in the shop while I go get some coffee and he said okay." When Mosquera returned 10 or 15 minutes later, he found Martinez talking to a woman who did not speak to Mosquera, but who returned two weeks later and identified herself as DOL Investigator Nieves. According to Mosquera, he received no paperwork from the DOL prior to notice that he was "found guilty," apparently, referring to the August 2, 2011 Order to Comply.

Mosquera testified that: "Mr. Alfonso Ramirez, I don't even know. I know him from the neighborhood." During his rebuttal, Mosquera testified that the only reason he knows who Ramirez is, is because Ramirez "hangs around the shops and he helps everyone out"; that Mosquera knows of Ramirez's whereabouts because Ramirez works at a tire shop that Mosquera passes on his way to drop his son off to school; that on more than one occasion, Ramirez has come to Mosquera's shop to say hello; and that Ramirez "reads perfectly fine."

Boris Douglas, who lives on the same street as Mosquera's shop, testified that he passes H.A.B. every day and has never seen anyone besides Mosquera working there. For about ten years until 2009, Douglas worked at Kennedy Airport and during the relevant period he worked from 9 a.m. to 4 p.m.; after that job ended Douglas often came to Mosquera's shop, and since 2011 (after the relevant period ended) has been there almost every day. Mosquera sometimes leaves Douglas at the shop when Mosquera has to leave. "He'll say to me there's no customers in there, wait here I will be right back. I would hang out there, and before he leaves he puts the

chain up" across the bay door to prevent customers from driving into the shop. Before 2009, Douglas was a customer, and had his flat tires repaired at the shop three times per year, sometimes without charge.

Respondent's evidence

Claimant Ramirez testified[1] that Mosquera hired him to work on tires in 1995, when Mosquera operated at a location in Elmhurst, and continued to work for Mosquera at the present location in Jamaica. He worked six days per week from 8 a.m. to 8 p.m. Ultimately Mosquera fired Ramirez, who then went to both the DOL and the Immigrant Worker Legal Service Association to provide information. An unsigned and undated DOL Minimum Wage/Overtime Complaint form in English was introduced in evidence by respondent as part of its investigative file. Ramirez was unable to read the form and could not identify it. The claim form indicates that Ramirez started working for petitioner in 1995 and was paid $340.00 per week. Ramirez recognized, but was unable to read a one page document in Spanish that was appended to the DOL complaint form entitled "Immigrant Worker Legal Service Entrevista [Interview]," dated June 10, 2008. This document, filled out by a worker at the immigrant organization based on Ramirez's answers to questions listed on the form, states that Ramirez was paid $200.00 per week in 2002 and 2003 and beginning in 2004, began earning $340.00 per week. Ramirez testified he was paid $200.00 per week in cash and worked 15 years for petitioner starting in 1995. Ramirez testified that he does not know claimant Martinez.

On cross-examination by Mosquera, Ramirez testified that he signed an affidavit in Spanish and English dated June 8, 2014,[2] stating that he never worked for Mosquera or H.A.B. and that "[t]he shop never gave me cash, or owe me anything so please do not cause harm to this man or his shop please drop all charges," because Mosquera "asked me to do it." Mosquera came to Ramirez's workplace and said that "because of the problem that we are having now," Mosquera needed him "to sign this paper." Ramirez testified he reads "a little. To be honest I don't read that much," and that he did not understand or know what the document said before signing it. Mosquera did not threaten Ramirez. Ramirez has worked at his present workplace, which is near Mosquera's shop, for three years and once came to Mosquera's shop to say hello. Mosquera often passes by Ramirez's new workplace in his car.

Labor Standards Investigator Emily Nieves testified she was not originally involved in receiving Ramirez's complaint but was assigned to the matter by her supervisor on a subsequent unstated date. She first visited Mosquera's shop on April 12, 2010 at about 8:30 a.m.; saw Martinez "taking calls, he was on the phone;" and interviewed him. Martinez told her his hours, pay, duties and dates of employment. Nieves did not testify about what, specifically, Martinez said.

Nieves testified that Martinez told her Mosquera was out, and that as Nieves was leaving after speaking with Martinez for 30 minutes to an hour, she saw Mosquera enter the shop and head for the back, but did not talk to him. On April 26, 2010 Nieves returned about 8:30 a.m. and spoke to Mosquera, who said he had no employees, had never had employees and never had payroll records. Nieves testified Mosquera "was surprised" she was there. According to Nieves,

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[1] Ramirez testified in Spanish through a certified Spanish-English interpreter provided by the Board.
[2] The hearing in this matter took place on June 11, 2014, three days later.

it was a "known fact" that Mosquera "knew I was coming back because [he] had the revisit notice," but she admitted that she gave the notice of revisit to Martinez, not Mosquera. Nieves testified that she received a voice-mail message from a voice she recognized as Ramirez stating that Martinez was fired after her first visit to the shop.

Nieves calculated underpayment to Ramirez and Martinez based on the assumption that Ramirez worked 69 hours per week for $340.00 per week from April 12, 2003 to March 21, 2009 and Martinez worked 63 hours per week for $340 per week from July 18, 2009 to April 10, 2010.

A May 26, 2010 "Narrative Report" by Nieves introduced in evidence as part of respondent's investigative file states that when she visited the shop on April 12, 2010, Martinez told her that he began working for petitioners in July 2009, and worked six days per week from 8:00 a.m. to 7:00 p.m. for $340 per week. According to the "Narrative Report," LSI Nieves found out through Ramirez that Mosquera fired Martinez after her initial visit on April 12, 2010, and Ramirez was still working for petitioners as of her April 26, 2010 revisit, but was told by Mosquera to stay home that day.

STANDARD OF REVIEW

In general, 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).

Pursuant to the Board Rules of Procedure and Practice (Rules) 65.30 (12 NYCRR 65.30): "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the petitioner to prove by a preponderance of the evidence that the orders are not valid or reasonable (*see also* State Administrative Procedures Act § 306).

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 (NYCRR 65.39).

Claimant Ramirez Was Employed by the Petitioner

The threshold issue is whether petitioner employed one or both claimants or whether, as he asserted, he never had any employees. Labor Law § 190[3] defines "employer" as including "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service." Labor Law § 190[2] defines "employee" as "any person employed for hire by an employer in any employment." Furthermore, to be "employed" means that a person is "permitted or suffered to work" (Labor Law § 2 [7]). We find that on the record presented, it was reasonable and valid to find that Mosquera employed Ramirez, whose testimony that he worked for Mosquera was credible and generally consistent with information in the interview sheet attached to the claim form and included in respondent's

investigative file. We also credit Ramirez's testimony that he did not understand the affidavit presented to him by Mosquera, which was signed three days before the hearing, especially in the absence of any evidence from petitioners to explain or clarify the circumstances under which the affidavit was signed and notarized.

By contrast, Mosquera's testimony, including but not limited to his testimony that he never employed Ramirez or anyone else, was not credible and included contradictions and inconsistencies. For example, Mosquera's petition stated he never had "any knowledge of Alfonso Ramirez. This is a fictitious individual," and Mosquera began the hearing by stating that "Ramirez, I don't even know. I know him from the neighborhood," yet Mosquera knew where to find and obtain an affidavit from Ramirez three days before the hearing, and insisted in his closing statement that Ramirez "reads perfectly fine."

While Ramirez testified work began at 8 a.m., Mosquera testified the shop was open only 9:00 a.m. to 5:00 p.m., yet acknowledged opening at 8:15 a.m. on April 12, 2010, the first day Nieves visited. (She also found Mosquera in the shop at 8:30 a.m. on her other visit.) Mosquera did not explain why he needed to call Martinez, a non-employee, to "stay in the shop while I go get some coffee" at a time when the shop, according to Mosquera's testimony, was not even open. Nor did Nieves or even Mosquera himself state that Mosquera left a chain in front of the store so customers would not come in while only Martinez was in the shop, as Mosquera's friend, Douglas, testified Mosquera did if Douglas, as a non-employee, was left in the shop for a few minutes. That on the first day Nieves visited, the shop was concededly open before what Mosquera claimed was its opening time, and that Nieves found Martinez working there, undercut Mosquera's credibility and his denial that he ever had employees.

Having found that Ramirez worked for petitioners as he testified, notwithstanding Mosquera's denial, the Board finds that a preponderance of the credible evidence supports a finding that both petitioners employed Ramirez in that Mosquera hired and fired Ramirez, determined his pay rate, supervised his work, and set his work schedule (*see Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]). Ramirez so testified, and there is no evidence that anyone but Mosquera could have hired, fired and supervised employees since Mosquera testified he was a sole proprietor and a "one man operation."

We also find that Martinez was an employee, based on Nieves' testimony of seeing him working and interviewing him at the shop on April 10, 2010, which was confirmed by Mosquera's acknowledgement that Nieves was in the shop that morning.

An Employer's Obligation to Maintain Records

An employer's obligation to keep adequate employment records is found in Labor Law § 661 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR § 142-2.6 provides among other things, that employers maintain and preserve for not less than six years, weekly payroll records which show each employee's name and address, wage rate, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, and allowances, if any, claimed as part of the minimum wage. Section 142-2.7 further provides that every employer shall furnish each employee with a statement with every payment of wages listing hours, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages. This required recordkeeping provides proof to

the employer, the employee, and the Commissioner that the employee has been properly paid. In the instant case, it is undisputed that petitioners did not maintain payroll records or provide wage statements to employees, and the penalty order is affirmed.

Burden of Proof in the Absence of Adequate Employer Records

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 properly. 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 *Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 687-88 [1946], 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" *Id.* at 688-89.

> "When 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 such a situation the amount and extent of underpayment is a matter of just and reasonable inference and may be based upon the testimony of employees."

New York courts, following *Mt. Clemens Pottery Co.* have consistently held that when incomplete or unreliable wage and hour records are available, DOL is "entitle[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Matter of Mid-Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 [3rd Dept 1989]; *Matter of Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, [2nd Dept 1996]; see also *Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013]; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2013]). Wages may be found due even if based on an estimate of hours (*Reich v Southern New England Telecommunications Corp.*, 121 F.3d 58, 70 [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"]).

The Wage Order is Affirmed as Modified

In the present case, in the absence of lawfully required records, it was reasonable and valid to base an underpayment calculation for Ramirez on his testimony that he worked 8:00 am to 8:00 pm six days a week, and in that respect the DOL's calculation based on an assumed 69-hour work week cannot be faulted as excessive. Nor was the DOL's assumption that Ramirez was paid $340.00 per week unreasonable. That was the amount recorded in his interview sheet for the relevant period (he testified that he earned $200.00 per week, which the interview sheet showed he was paid from 2002 until 2004). The petitioners did not allege that Ramirez was paid a different amount, only that he was never employed. The best available evidence supports that Ramirez was paid $200.00 per week during 2003, and $340.00 per week thereafter. We find the petitioners underpaid him by $260.93 per week in 2003, $120.93 per week in 2004, $197.00 per week in 2005, $264.13 per week in 2006, and $299.93 per week from January 1, 2007 to March 21, 2009, for a total due and owing of $74,673.13[3]. To the extent this amount exceeds the amount the Commissioner found due and owing, we find the order reasonable with respect to Ramirez.

However, the record before us provides no support for the finding that Martinez was underpaid at all, much less a particular amount. While Nieves testified Martinez told her his hours, pay, duties and dates of employment, there was no evidence, other than her May 26, 2010 "Narrative Report" of what Martinez's wages, hours, duties, or dates of employment actually were. The Narrative Report states that Martinez – interviewed by Nieves on April 12, 2010 – stated he worked "July of 09 through 4/17/10 he worked Mon.-Sat. from 8:00 am-7:00 pm 63 hrs./wk and was paid a of [sic] $340.00/wk.... I computed for Mr. Martinez based on the information he provided on the interview sheet." Martinez could not possibly have told Nieves on April 10, 2010 that he worked through April 17, 2010, as the Narrative Report implies. Although the Narrative Report states that Nieves based her computation "on the information he provided on the interview sheet," no interview sheet was introduced in evidence.

The reliability of Nieves' Narrative Report is further undermined by her testimony that she concluded Martinez was fired based on a voice mail message from a voice she recognized as that of Ramirez. Ramirez testified he did not even know Martinez. Nor is there any record evidence that Nieves ever even spoke to Ramirez, much less that she did so often enough to recognize his voice.

We find that the Narrative Report in this investigation did not provide a reasonable basis for a finding of underpayment with respect to Martinez. While Nieves' testimony of actually seeing Martinez at the shop on April 10, 2010, confirmed by Mosquera's acknowledgment that Martinez was in the shop that day, supports a finding that Martinez was working for petitioners that day, there is simply no reasonable or valid basis in the record to support the respondent's findings about how long he worked or how much he was paid.

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[3]In 2003, petitioners underpaid Ramirez a greater amount than assumed by the order because his salary was lower than what DOL used to calculate the underpayment. He worked 69 hours per week for a weekly salary of $200.00, which, when including six spread shift payments per week, resulted in an underpayment of $260.93 per week for 38 weeks, calculated as follows: 40 hours at $5.15 (the applicable state minimum wage) is $206.00, plus 29 hours of overtime at $7.73 an hour (1 ½ x the applicable state minimum wage) is $224.03, plus six additional hours at minimum wage because the claimant worked a spread of hours in excess of 10 hours six days a week, which is $30.90, for a total earned of $460.93 less $200.00 paid. DOL's calculations after 2003 were correct.

Accordingly, we find that the wage order is affirmed only with respect to Ramirez and revoke the wage order with respect to Martinez.

The Civil Penalty in the Wage Order is Affirmed

The Wage Order assesses a 100% civil penalty. The petitioners failed to challenge the civil penalties in the wage order in their petition, and they have waived the right to appeal the civil penalties in the wage order.

Petitioners Failed to Maintain Required Records and the Penalty Order is Affirmed

In the instant case, it is undisputed that petitioners did not maintain payroll records or provide wage statements to employees, and the penalty order is affirmed.

Liquidated Damages

The Wage Order includes liquidated damages in the amount of 25% of the wages owed. Labor Law § 663 (2) provides in relevant part that:

> "On behalf of any employee paid less than the wage to which the employee is entitled under the provisions of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim, and the employer shall be required to pay the full amount of the underpayment, plus costs, and unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law, an additional amount as liquidated damages. Liquidated damages shall be calculated by the commissioner as no more than one hundred percent of the total amount of underpayments found to be due the employee."

In the present case, the petitioners produced no evidence of, and certainly did not prove, a good faith belief that their wage and hour practices were in compliance with the law. Accordingly, we affirm the imposition of liquidated damages.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed as modified and remanded to the Department of Labor for recalculation of the wages, interest, civil penalty, and liquidated damages due, in accordance with this decision.

2. The penalty order is affirmed; and

3. The petition is otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
November 5, 2014.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed as modified and remanded to the Department of Labor for recalculation of the wages, interest, civil penalty, and liquidated damages due, in accordance with this decision.

2. The penalty order is affirmed; and

3. The petition is otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
in Rochester, New York, on
November 5, 2014.