STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
RAFAEL MARTINEZ,	
Petitioner,	
	DOCKET NO. PR 13-055
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 of the Labor Law, all dated March 13, 2013,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Rafael Martinez, petitioner *pro se*.

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

WITNESSES

Rafael Martinez, for petitioner.

Virginio Ramirez and Julie Mondragon, Labor Standards Investigator, for respondent.

WHEREAS:

On June 10, 2013, petitioner Rafael Martinez filed a petition with the Industrial Board of Appeals (Board) seeking review of three orders issued against him by the Commissioner of Labor (Commissioner) on March 13, 2013. The Commissioner filed an answer on July 24, 2013.

Upon notice to the parties, a hearing was held on June 19, 2014 in New York, New York before Board member and designated hearing officer J. Christopher Meagher, Esq. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (minimum wage order) demands compliance with Article 19 of the Labor Law and payment of $18,100.78 in minimum wages due and owing to claimant employee Virginio Ramirez for the period March 1, 2004 through November 30, 2011, interest continuing thereon at the rate of 16% in the amount of $18,402.15, liquidated damages in the amount of $4,525.80, and a civil penalty in the amount of $9,050.39, for a total amount due of $50,079.12.

The second order (wage order) demands compliance with Article 6 of the Labor Law and payment of $4,008.31 in regular wages due and owing to claimant for the same period, interest continuing thereon at the rate of 16% in the amount of $1,968.98, liquidated damages in the amount of $318.76, and a civil penalty in the amount of $2,004.16, for a total amount due of $8,300.21.

The third order (penalty order) under Article 19 of the Labor Law assesses petitioner a civil penalty of $500.00 for failure to keep and/or furnish true and accurate payroll records during the period from March 1, 2009 through August 29, 2009, and $500.00 for failure to provide each employee a complete wage statement with every payment of wages during the same period, for a total penalty of $1,000.00.

The petition alleges that the orders should be vacated because petitioner does not "own or operate any business" and has "never employed anyone or anybody."

SUMMARY OF EVIDENCE

On November 30, 2009, claimant Virginio Ramirez (claimant) filed claims for unpaid wages under Articles 6 and 19 of the Labor Law with the Department of Labor (DOL) stating that he was employed by petitioner Rafael Martinez (petitioner) as a laborer from March 1, 2004 through August 29, 2009.

Claimant's overtime claim stated that he worked six days per week, Monday to Saturday from 8:00 a.m. to 5:00 p.m., with a half hour break each day for lunch. He was paid a flat rate of $700 per week for all hours worked, including those over forty per week. His claim for regular wages stated that he received partial or no wages for the payroll weeks ending December 20, 2008, March 7, 2009, April 11, 2009, May 9, 2009, August 22, 2009 and August 29, 2009. In September 2012, claimant amended the claim to add that he was reemployed by petitioner in 2011 and received partial or no wages for the weeks ending November 5, 12, 19, and 26, 2011.

Claimant testified that he has known petitioner since childhood and started working for him immediately after coming to the United States in 1988. Petitioner operates a construction business that performs jobs at various building sites throughout the New York City area. Claimant was employed by petitioner as a laborer from 1988 through 1992 and again from 2003 through 2011. During the latter period he worked six days per week, Monday to Saturday from 8:00 a.m. to 5:00 p.m., with a half hour off for lunch. He was paid $700 per week. Four or five employees worked together on petitioner's crew at various jobs in Queens, Brooklyn, Manhattan, and the Bronx. Claimant explained that he filed claims with DOL because petitioner owed him money for his work and refused to pay him.

Petitioner Rafael Martinez testified that he and claimant have known each other since childhood. Petitioner denied that he ever hired or employed claimant to perform construction work during the period 2004 through 2011, or at anytime. Petitioner said he supports himself as a handyman working for other people and has never owned or operated his own business.

Labor Standards Investigator Julie Mondragon (Mondragon) testified concerning DOL's investigation that resulted in the orders under review. Various documents and reports from the investigative file were submitted into evidence, including a "contact log" recorded by the investigators on a daily basis describing the investigation.

On March 24, 2011, Mondragon attempted an inspection of petitioner's premises at 40-45 Warren Street in Elmhurst, New York. As petitioner was not present, Mondragon left a "Notice of Revisit" advising him that DOL would conduct a second inspection on April 7, 2011 where petitioner was requested to produce payroll records of all employees' hours worked and wages paid for the period from March 2004 to August 2009. Petitioner was not present on the second inspection and did not produce the requested records or otherwise respond to the Notice of Revisit.

Based on the information provided from claimant, Mondragon issued petitioner an initial recapitulation of wages due on September 14, 2011. On October 8, 2011, petitioner visited DOL's office and stated that he had never owned his own company or employed claimant or any other employees. Petitioner requested an opportunity to meet with the claimant to resolve the matter.

In response to petitioner's contentions, claimant provided DOL with the addresses of several of the most recent locations the crew had worked at and the names of five of his co-workers. Claimant stated that petitioner did general construction work, including demolition, and that petitioner was not a licensed tradesman but hired employees who were. Claimant advised DOL that petitioner had a red van to transport employees and that the crew met him at his house at 8:00 AM each day to be taken to the work site.

Mondragon testified that on April 20, 2012 she and investigator Guillermo Avelos performed a surveillance of petitioner's premises at 7:30 a.m. The investigators observed a red van parked in petitioner's garage with a license plate number FDN4281. There were no other vehicles parked in the driveway. At approximately 7:50 a.m. five employees arrived at the premises and waited for petitioner to put them inside of the van. Mondragon attempted to interview the employees but they declined to speak with her. One of the employees spoke with investigator Avelos and stated that petitioner was good to them and they could not turn their back on him. Mondragon testified and stated in a report that petitioner was present during the visit and was very upset. He told the investigators that the employees arrive each morning looking for work from a friend of his named Orlando. Petitioner said he sometimes gave the workers a ride to help out but was not the employer and did not operate a construction company.

On September 6, 2012, Mondragon and two senior investigators held a meeting with claimant and petitioner at DOL's office to resolve the issue of whether an employment relationship existed between the parties. In an entry in DOL's contact log and her final report, Mondragon stated that petitioner contended he was never an employer engaged in construction work but rather provided assistance to various contacts he knew who wanted to obtain handyman

services. He would arrange the jobs, collect the payment, and pay the workers from the money collected. Petitioner informed the investigators that he was unwilling to make restitution and wished to appeal any findings made.

On cross-examination, petitioner denied that he had ever recommended or assisted people in obtaining the services of a handyman and said he could not recall whether he told the investigators he did so or paid workers from the money collected. Asked whether he paid claimant to work for someone else, petitioner replied "No." Asked whether there were any people he did pay between 2004 and 2011, petitioner replied "Not that I remember."

Petitioner also acknowledged that he owned a red van with the above license number. He denied that the workers observed by DOL on April 20, 2012 were his employees and asserted that they gather at his house each morning because they work for a friend named Orlando. Petitioner testified that he permits Orlando to use his garage and to park his truck in petitioner's driveway because he closed his shop and lives in an apartment. The driveway holds five cars and Orlando parks his truck on one side "at the bottom."

On December 27, 2012, DOL issued petitioner a letter summarizing the investigation and enclosing a final recapitulation of wages due. Based on its investigation, and in the absence of adequate payroll records establishing that claimant was paid the wages due, DOL determined that petitioner was an employer responsible for the wages and issued the orders under review on March 13, 2013.

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 commissioner under the provisions of this chapter" (Labor Law 101 § [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (*id.* § 101 [3]). An order issued by the Commissioner shall be presumed "valid" (*id.* § 103 [1]).

A petition that challenges such order shall "state ... in what respects [the order] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). Any objection "not raised in such appeal shall be deemed waived" (*id.*).

The Board's Rules provide that "the burden of proof" of every allegation in a proceeding "shall be upon the person asserting it" (12 NYCRR § 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306 [1]).

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.

Claimant Was Petitioner's Employee Under the Labor Law

Labor Law § 190 [3] defines the term "employer" as including "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (*see also* § 651 [6]). An "employee" is described as "any person employed for hire by an employer in any employment" (*id.* § 190 [2]); *see also* § 651 [5]). "Employed" means that a person is "permitted or suffered to work" (*id.* § 2 [7]).

We credit claimant's testimony and find that petitioner failed to meet his burden of proof to establish by credible evidence that he did not employ claimant during the period of his claims. Claimant credibly testified that petitioner operates a construction business that performs jobs at various building sites throughout the New York City area. From 2003 through 2011 he worked as a laborer for petitioner six days a week at jobs in Queens, Brooklyn, Manhattan, and the Bronx. He was paid $700 per week. During the course of DOL's investigation he provided details of petitioner's business operations, the most recent jobs he worked at, and the names of his co-workers. Claimant advised DOL that petitioner had a red van to transport employees and that the crew met him at his house at 8:00 AM each day to be taken to the work site. Claimant's description of the meeting was corroborated by DOL's surveillance of petitioner's residence on the morning of April 20, 2012.

Petitioner's testimony concerning the meeting with his crew was evasive and not credible. Petitioner denied that the individuals observed by DOL at his residence on April 20, 2012 were his employees and instead claimed they gathered at his house every morning to be transported to work by a friend named Orlando. The friend parked his truck in petitioner's driveway because he closed his shop and lived in an apartment. Mondragon testified, however, that on the morning of DOL's visit there were no other vehicles parked in the driveway and the workers who gathered there were waiting to be loaded in petitioner's van. The friend never appeared at petitioner's residence to meet his employees during DOL's visit and petitioner did not call him as a witness to corroborate that he was their real employer.

In a meeting with DOL to resolve the dispute, petitioner said he did not operate a construction business but rather assisted contacts in obtaining workers to perform handyman services. Petitioner arranged the jobs, collected the payments, and paid the workers from the money collected. On cross-examination, however, petitioner denied that he had ever recommended or assisted people in obtaining the services of a handyman and said he could not recall whether he told the investigators he did so or paid workers from the money collected. Petitioner's evasiveness and shifting explanations concerning his business practices undermine the credibility of his testimony concerning claimant's employment.

We find the record evidence establishes that claimant was "hired" by petitioner and "permitted and suffered to work" as a laborer during the period of his claims. An employment relationship thereby existed between petitioner and claimant and he is responsible for any wages owed under the Labor Law.

The Findings That Petitioner Owes Claimant Back Wages Are Affirmed

The Labor 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, 12 NYCRR § 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative.

In the absence of accurate records required by the Labor Law, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 820-21 [3d Dept. 1989]; *Ramirez v Commissioner of Labor,* 110 AD3d 901 [2d Dept. 2013]).

Petitioner did not submit evidence challenging the Commissioner's calculation of wages owed in the wage orders. The issue is thereby waived pursuant to Labor Law § 101 [2]. We affirm the Commissioner's determinations finding that petitioner owes claimant back wages as valid and reasonable in all respects.

Liquidated Damages

Labor Law § 198 [1-a] provides that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment "and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law." Such damages shall not exceed one hundred per cent of the total amount of wages found to be due.

Petitioner did not challenge the Commissioner's determination to assess liquidated damages in the wage orders. The issue is thereby waived pursuant to Labor Law § 101 [2]. We affirm the determination as valid and reasonable in all respects.

Interest

Labor Law § 219 [1] provides that when the Commissioner determines that wages are due, 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."

Petitioner did not challenge the interest assessed in the wage orders. The issue is thereby waived pursuant to Labor Law § 101 [2]. We find that the computations made by the Commissioner in assessing interest in the orders are valid and reasonable in all respects.

Civil Penalties

The petition did not challenge the civil penalties assessed in the wage or penalty orders. The issue is thereby waived pursuant to Labor Law § 101 [2]. We find that the considerations and computations the Commissioner was required to make in connection with the penalties assessed in the orders are valid and reasonable in all respects.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed; and

2. The wage order is affirmed; and

3. The penalty order is affirmed; and

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

Vilda Vera Mayuga, Chairperson

Absent
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 New York, New York on
December 17, 2014.