STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: GREGORIO ESTEVEZ (T/A GREGORY'S HOME IMPROVEMENT, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated August 30, 2013, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 13-163 RESOLUTION OF DECISION

APPEARANCES

Gregorio Estevez, petitioner *pro se*.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Gregorio Estevez, *pro se* petitioner.

Dawn Hughes, Labor Standards Investigator, for respondent.

WHEREAS:

On October 15, 2013, petitioner Gregorio Estevez filed a petition with the Industrial Board of Appeals (Board) seeking to annul an order to comply with Article 6 of the Labor Law (wage order) and an order under Article 19 of the Labor Law (penalty order) both issued by the Commissioner of Labor (commissioner, respondent or DOL) on August 30, 2013.

The wage order demands payment by petitioner of $903.00 in unpaid wages due and owing claimant Jose Eduardo Portillo (claimant) for the period April 9 to April 14, 2012, together with interest at the rate of 16% to the date of payment calculated as $166.03 as of the date of the order, liquidated damages in the amount of 25% of the wages due and owing or

$188.25, and a civil penalty of $376.50, for a total amount due as of the date of the order of $1,633.78. The penalty order demands payment by the petitioner of $250.00 for failing to keep and/or furnish true and accurate payroll records for each employee for the period from on or about April 9 through April 14, 2012.

The petition claims that the orders are unreasonable and invalid because claimant was not his employee, was hired to do a job for $300.00, and was paid in full. The petition also states that petitioner lost money because he had to correct the work claimant performed, and lost a customer, future jobs and his reputation through claimant's fault. The DOL filed an Answer on November 22, 2013.

Upon notice to the parties, a hearing was held on March 20, 2014 in New York, New York before Jean Grumet, Esq., Member of the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

SUMMARY OF EVIDENCE

Testimony of Petitioner Gregorio Estevez

Estevez testified that his only employees are his sons, nephew and sometimes his father; he has no payroll or payroll records. On cross-examination, he stated that he pays cash for work performed by his sons who live with him, his 19-year-old nephew, and sometimes his 80-year-old father, and does not consider them employees. He keeps no records of these payments.

Estevez hired Portillo, who said he was a carpenter, on a date Estevez does not recall "to give me help because I have another job." Estevez met Portillo at Home Depot in Hempstead, New York; they agreed that Portillo would do one job for Estevez, for $300.00, at an Associated supermarket a few blocks away. Portillo brought his own hammer, circular saw and sawzall (a type of saw used in construction and demolition) in a backpack. The job Estevez and in turn Portillo were hired for was removing some panels because petitioners were "doing a ceiling" and installing a new awning. It was supposed to be a one day job, but claimant was unable to finish in one day. That first day (the same day Estevez met Portillo), Portillo worked together with Estevez and Estevez's son and nephew and "was doing all right;" Estevez paid him $150.00 in cash. On cross-examination, Estevez stated that when he brought Portillo from Home Depot to look at the job, Portillo said he would do it for $300.00, and asked to be paid in advance. "I say 'at the end of the day, I give you half. ' So I gave him half at the end of the day."

Early the second day, Estevez, his son and his nephew helped Portillo to set up by putting up tape and preparing the work site. At one point Estevez testified this took "a couple hours," at another point, "[l]ike half an hour." When they were done setting up, they left Portillo to continue working by himself, but because he began drinking and disturbing customers, the Associated telephoned Estevez to come back; when he arrived, Portillo became "aggressive," demanded money, and refused to work. Estevez also found that Portillo had not done "no work, just messed up the whole thing," cutting too far into a warped joist and weakening it. "As soon as I saw him doing that, I say, that's wrong; but he was drunk already.... aggressive and then I said, 'give me your name so I can write you a check.' 'No. I want cash.'.... He left and I left

and I never saw that guy again." Estevez stated that the inspector refused to accept Portillo's work, forcing Estevez to replace the joist, which cost a lot of money. He testified: "I hired him to do the job and he messed it up. He embarrassed me in front of all these people and I end up paying a lot of money to remove all those joists because he messed it up. Then [the Associated's manager] fires me; he was a good customer but then after that, my reputation went to the floor. How's he gonna give me a job after all the embarrassing moments."

Estevez introduced in evidence a February 9, 2014 letter from Randy Batista, president of Pada Foods Corp. Associated, which Estevez testified Batista wrote as "a favor because I asked" even though Batista no longer hires Estevez for work. The letter, addressed "To Whom It May Concern," states that in May 2012 Batista hired Estevez "to do some renovation" and Estevez's son, nephew

> "and another person that I do not know, started work. On the second day of work at this location I received a phone call from one of my employees telling me to call the contractor because his worker was misbehaving. The scenario was not professional and I called Mr. Estevez to take care of the situation. He showed up and this person became violent, appearing to be drunk. And all of the work he did was badly done and I couldn't accept it. I was not happy with this incident and I requested that Mr. Estevez removed this person from the premises.
>
> "I, or my store personnel, do not know who this person is and we do not have any relation with this individual."

Estevez also introduced in evidence a May 10, 2012 Building Permit from the Village of Hempstead, to install a new awning at a location corresponding to the Associated's address, together with Estevez's April 3, 2012 Building Permit Application referring to a "New Awning" and to replacing "existing flat roof overhanging entrance w/ new metal standing seam roof sys."

Estevez testified that he received from the DOL a May 9, 2012 letter from The Workplace Project addressed to "Mr Molina" of "Gregory's Home Improvement," stating that Portillo was not paid for 64.5 work hours during the six days from Monday April 9 through Saturday April 14, 2012. The letter states that Portillo worked 7.5 hours April 9, 12 hours April 10, 13.5 hours April 11, 13 hours April 12, 13 hours April 13 and 5.5 hours April 14. On receiving the letter Estevez decided that "to end this" by sending the DOL the $150.00 check he previously offered Portillo. Estevez had not given Portillo a check before because Portillo did not want to be paid by check and Estevez did not know his name until he received notice of the claim. "He didn't know my name and I didn't know his name. It was something very fast; I just hired him to do the job and this is what he did."

Testimony of Labor Standards Investigator Dawn Hughes

LSI Hughes introduced in evidence the DOL's investigative file, which includes Portillo's June 12, 2012 sworn claim stating that "Gregory's Home Improvement" failed to pay him for 63.5 work hours during the six days from Monday April 9, 2012 through Saturday April 14, 2012. The claim alleged that Portillo worked 7 hours Monday, 11.5 hours Tuesday, 12.5 hours Wednesday, 12.5 Thursday, 12.5 hours Friday and 7.5 hours Saturday; that the employer's

"responsible person[]" was "Gregory;" that Claimant's agreed-upon pay rate was "$12/hr;" that the normal payday was Saturday for a one-week period; and that claimant was dismissed for asking for his pay. Hughes believes The Workplace Project, whose May 9 letter to the employer was attached to the claim, helped Portillo complete his claim.

On June 27, 2012 the DOL wrote to "Gregorys Home Improvement" stating that Portillo claimed to be owed $903.00 for hours worked from April 9 to April 14, 2012 at $12.00 per hour. This figure was based on Portillo's being owed $480.00 for 40 hours worked at a $12.00 per hour regular rate, and $423.00 for 23.5 hours worked at an overtime rate of time and a half of the regular rate.[1] The letter requested that the employer either remit payment or "provide a full statement giving your reasons," including "any payroll records, policies, contracts, etc. to substantiate your position." Estevez responded on July 2, 2012 that he was a licensed carpenter

> "with no employees just me, my son and some times my father helps me.... On May/2012, this man approached me at The Home Depot... looking for job. I told him to come with me to see a small job and name me a price. It was a simple job that any one with some knowledge would be able to do. He estimated the job for $300.00...and one day of work. I gave him the job and 50% of the price up front; he did not finish in one day as he estimated. I took him the next day to finish the job. At about 2:00 PM I received a phone call from the store's owner telling me to go to the store immediately, I went there and what I found was a disaster, he was drunk, he was disturbing the customers and none of the work was finished, on top of that he tried to damage private property and one of the managers had to kick him out. Everything he did was so bad that I had to remove it.... I tried to pay him but he refused to give me his full name so that I could write a check, because I did not have cash. He did not want to accept the payment by check. He did not work for me all those hours he is claiming. He disappear[ed] I did not have any contact or information of his location."

Estevez enclosed a postal money order for $150.00 payable to the Commissioner but provided no documents.

On July 11, 2012, the DOL wrote to Portillo summarizing Estevez's response and requesting that he either authorize acceptance of the $150.00 payment or, if not, "explain what you were working on and what tasks you performed to complete the job over the 62.5 [sic] hours/6 days you state you worked." A July 23, 2012 response from The Workplace Project stated: "the enclosed letter was based upon statements made by Mr. Portillo in response to your July 11th correspondence, which was read to him in Spanish. This response letter was then read to him in Spanish and signed by him." An enclosed July 18, 2012 letter, signed by both Portillo and a Workplace Project representative, states that Portillo first met Gregory at Home Depot:

> "on the 9th of May at 12:00 PM; Gregory took Mr. Portillo to the site and told him upon conclusion of the day that he only paid his workers on

[1] Pursuant to the implementing regulations at 12 NYCRR § 142-2.2, an employee is entitled to one and one-half times the employee's regular rate for hours worked over 40 in a week, subject to exemptions stated in the federal Fair Labor Standards Act, which do not apply here.

Saturdays. Gregory said he would give Mr. Portillo work for the week and then pay him on Saturday. However, he never paid Mr. Portillo for the work.

"Mr. Portillo states that on the first and second days of work, May 9th and 10th, he put in sheet rock, while three other workers put in compound and one performed carpentry work. On the 3rd day, May 11th, 2012 he went to Associated in Hempstead to perform work. Mr. Portillo did some electrical work, but the store manager wasn't pleased with him doing it so he requested Gregory [t]o remove it.[2] He continued doing carpentry; the manager saw him working there, and he continued to work at that site until Saturday, May 13th. On Saturday specifically, because it's busy day at the store Mr. Portillo states he began at 6:30 AM and worked until 2:00 PM.

"Additionally, Mr. Portillo states that on Saturday, the manager asked that he finish the job quickly, but Mr. Portillo did not have the proper tools to do so; when he called Gregory to bring tools, Gregory insulted him, and so Mr. Portillo went home to pick-up his own tools since he lives within walking distance. Gregory later pulled up and asked Mr. Portillo to get in his van with two other men, but Mr. Portillo was afraid, and so he said no; Gregory took off without paying him anything....

"....Gregory never paid Mr. Portillo at all, and did not offer to pay him any balance by check as he has claimed. Furthermore, Mr. Portillo was not drunk on site and was not sent home on the second day of work, May 10th, as Gregory alleges."

On June 12, 2013 the DOL wrote to Estevez advising him of Portillo's response and requesting that Estevez remit a check for $753.00 ($903 less the $150 previously tendered) or, if he disagreed, send copies of "the signed work agreement," timecards, payroll journals and "proof Mr. Portillo received payment." When Estevez did not respond, the DOL issued the orders here under review.

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to Board Rule 65.39 [12 NYCRR § 65.39].

Standard of Review and Burden of Proof

The Petitioner has the burden to show by a preponderance of the evidence that the orders are invalid or unreasonable. State Administrative Procedure Act § 306[1]; Labor Law § 101, 103; 12 NYCRR § 65.30.

[2] Estevez testified that there was "[n]o electrical at all.... We were replacing paneling and an awning."

Portillo was Estevez's Employee and Was Not An Indeprendent Contractor

The ultimate inquiry into whether an individual is an independent contractor is whether such person depends on someone else's business or is in business for himself. *Maria Lasso and Jaime M. Correa, Sr. and Exceed Contracting Corp.,* PR 10-182 [April 29, 2013]; *Van Patten Enterprises*, PR 08-090 [July 22, 2009]; *Alon Hen*, PR 08-094 [May 20, 2009]; *Abdul A. Saadat*, PR 08-098 [October 21, 2009]. Accordingly, in this case, we must look to determine whether Jose Portillo was "wearing the hat of an independent enterprise." *See e.g. Boston Bicycle Couriers, Inc. v Division of Employment & Training*, 778 NE2d 964 [Mass. App. Ct. 2002]. In order to make this determination, we must consider several factors, including (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business, to see if Rodriguez, was, as a matter of "economic reality", an independent contractor. *Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2d Cir 1988]. No one factor is dispositive, rather the test is based on the totality of the circumstances and the ultimate concern is whether, as a matter of economic reality, Portillo depended upon the petitioners for the opportunity to render service or is in business for himself. *Id.* at 1059.

We find that the petitioners did not meet their burden to prove that Jose Portillo was an independent contractor. Estevez presented no evidence that Portillo was anything but an ordinary day laborer and employee. Portillo worked under Estevez' supervision the first day and part of the second; Estevez, not Portillo, decided how the work was to be performed; Estevez, not Portillo, possessed required licenses and permits; there is no evidence that Portillo made any significant investment in the business or stood to profit from it; Portillo's compensation was solely for his own labor and he had no opportunity for profit and loss beyond the cost of his labor. Estevez did not claim to have a written contract with Portillo, or even to have inquired into his competence: he testified that he and Portillo did not even know each other's names. There is no evidence that Portillo owned and operated his own carpentry business, maintained workers compensation or other insurance, held any licenses, or owned or rented equipment. There is likewise no evidence in the record that the work required of Portillo required any particular skill or initiative such as one would expect of an independent business, particularly where the records shows that Portillo was merely following the directions given to him by Estevez. It is significant that the work performed by Portillo was the same type of work ordinarily performed by the petitioners, and was therefore an integral part of their business. Estevez testified that while he asks subcontractors for a license, insurance and "stuff like that... when it's a big job.... This guy, I just use him for [a] $300.00 job" and admitted, "[h]e's a day laborer but he's not my employee."[3]

The Wage Order Is Affirmed

An employer's failure to keep adequate records does not bar wage complaints. Labor Law § 196-a provides that where employee complaints demonstrate a violation of the Labor Law, DOL must credit a complaint's assertions and relevant employee statements and calculate wages due based on the information the employee provided. The employer then bears the burden

[3] We note that in 2010, the Legislature, recognizing the problem of misclassification of employees as independent contractors in the construction industry as a serious problem, enacted the New York Construction Agency Fair Play Act (*see* Labor Law § 861-a).

of proving that the disputed wages were paid. *Angello v Nat'l Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]. "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," *Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989], "even though the results may be approximate," *Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378 [1st Dept 1996]. *See also Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2013]; *Anderson v Mt Clemens Pottery Co.*, 328 US 680, 687-688 [1949], superseded on other grounds by statute.

Under these standards, Estevez plainly did not negate the reasonableness of the wage order. The claimant submitted to DOL a sworn claim stating that he worked 63.5 hours for Estevez over the six-day period from April 9 to April 14, 2012, for an agreed-upon wage rate of $12.00 per hour. In a subsequent submission, Portillo repeated that assertion,[4] and stated that after putting in sheet rock apparently at a different location for two days, he went to the Associated mentioned by Estevez on the third day, continuing to work there through Saturday. In the absence of required records, Estevez bore the burden to disprove these statements.

We do not credit Estevez' testimony that Portillo worked only a day and a half at the Associated and did no other work for Petitioner nor do we credit Estevez's version of events, in which he promised $300.00 to an unskilled day laborer whom he had just met to complete a single job expected to take only one day. Estevez's own testimony indicating that Batista had been a good customer on whom Estevez relied for frequent jobs, and that he hired Portillo "to give me help because I have another job," tends to corroborate that Estevez had many jobs for the Associated as well as for other customers, and likely relied on day laborers like Portillo, not only on Estevez's own sons and nephew. No documents support Estevez's claim that Portillo worked for him (or even for him at the Associated) for only a day and a half.

Batista's letter states that an unnamed worker was misbehaving and violent, appeared to be drunk and did unacceptable work, on an unspecified day in May 2012, but does not state that this employee was Portillo, that this was the only project for which Batista hired Estevez, or even that the unidentified employee worked just a day and a half. Both Batista's letter and Estevez's own July 2, 2012 letter to Respondent refer to work in May 2012, and the building permit submitted by Estevez was issued May 10, 2012; Portillo's claim relates to work from April 9 through April 14, 2012 , and the first Workplace Project letter complaining of non-payment to Portillo is dated May 9, 2012. In the absence of required payroll records which would show for sure exactly when and how long Portillo worked, it was reasonable and valid to accept his sworn claim as a reasonable basis for computation of underpayments.

Similarly, we do not credit Estevez' testimony that he paid Portillo $150.00 cash after his first work day. Had Estevez kept records as required or even asked Portillo for a receipt for the alleged payment, there would be no need for Estevez to ask the Board to rely on his unsupported testimony, which is further undermined by inconsistencies. For example, Estevez testified that he and Portillo agreed on a $300.00 price for what was expected to be a one-day job, but also

[4] While the subsequent letter refers to dates in May rather than April, this was apparently a typographical error by The Workplace Project, especially since the weekdays given in the letter correspond to dates in April, not May 2012.

that when Portillo asked for advance payment, Estevez said "'at the end of the day, I give you half.' So I gave him half at the end of the day." Estevez' testimony also contradticts his earlier July 2, 2012 letter to DOL stating that he "gave [Portillo] the job and paid him 50% of the price up front."

Finally, Estevez's contention that he lost money as a result of Portillo's unsatisfactory work and conduct is irrelevant to Portillo's entitlement to pay for work performed. Labor Law § 193 prohibits deductions from earned wages for reasons not specifically set forth as exceptions to the statute. As stated in *Matter of William Mark Dictor and Hanlon Auto Transport, Inc.* PR 09-003 [June 18, 2009], "[d]eductions from an employee's wages to pay for damage caused by the employee is unlawful under Labor Law § 193." *see: Matter of La France v Tri-State Leasing Serv., Inc.*, 173 AD2d 989, 991 [3d Dept 1991] (deductions from wages for damage to tractor trailer unlawful); 12 NYCRR 142-2.10 [a] [1] (deductions for spoilage or breakage prohibited). If Portillo's work or conduct was unsatisfactory, Estevez's recourse was to fire him.

The Penalty Order Is Affirmed

It is undisputed that petitioners maintained no payroll records. The Board finds that the computations the Commissioner made in imposing the civil penalty are valid and reasonable in all respects

Liquidated Damages Are Affirmed

The wage order includes liquidated dames in the amount of 25% of the wages owed. Labor Law § 198 [1][a] provides that unless an employer proves a good faith basis for believing it's underpayment of wages was in compliance with the law, liquidated damages of up to 100% shall be assessed. We find that the petitioner did not meet his burden to show a good faith basis to believe the wage underpayment was in compliance with the law, and we find the 25% penalty assessed to be valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The orders are affirmed; and

2. 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.