STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MARK WIEBOLDT AKA MARK WIEBOUDT AND LAUNDRY PALACE COL CORP. AND LAUNDRY PALACE C.I., INC. AND LAUNDRY PALACE CLT CORP. AND LAUNDRY PALACE DALE LLC AND LAUNDRY PALACE HEMP, INC. AND LAUNDRY PALACE HUNT INC. AND LAUNDRY PALACE ISLAND, INC. AND LAUNDRY PALACE LOW INC AND LAUNDRY PALACE RIVER LLC AND LAUNDRY PALACE ROSE INC. AND LAUNDRY PALACE U INC. AND LAUNDRY PALACE W.H., INC. (T/A LAUNDRY PALACE), Petitioners, To review under Section 101 of the New York Labor Law: An Order to Comply with Article 6, and an Order under Article 19 of the Labor Law, both dated December 3, 2013, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 14-014 RESOLUTION OF DECISION

APPEARANCES

Louis J. Gaccione, Jr., Esq. for petitioners.

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

WITNESSES

Mark Wieboldt and Carmen Sanchez, for petitioners.

Joseph Ryan, Senior Labor Standards Investigator, for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on January 21, 2014, and seeks review of two orders issued against petitioners Mark Wieboldt AKA Mark Wieboudt and Laundry Palace Col Corp. and Laundry Palace C.I., Inc. and Laundry Palace CLT Corp. and Laundry Palace Dale LLC and Laundry Palace Hemp. Inc. and Laundry Palace Hunt Inc. and Laundry Palace Island, Inc. and Laundry Palace Low Inc. and Laundry Palace LLC and Laundry Palace River LLC and Laundry Palace Rose Inc. and Laundry Palace U Inc. and Laundry Palace W.H. Inc. (T/A Laundry Palace) by the Commissioner of Labor (Commissioner or respondent) on December 3, 2013. On March 12, 2014, the Commissioner filed an answer. Upon notice to the parties, a hearing was held in Hicksville, New York on August 6, 2014 before Jeffrey M. Bernbach, then Executive Director 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, make statements to the issues and file legal briefs.

The order to comply with Article 6 (wage order) finds that petitioners were employers as defined in New York Labor Law § 190 (3), having employed Jose Hector Torres (claimant) as a cleaner from November 25, 2008 to January 19, 2011 and failed to pay him wages earned or payable during that period. The order seeks payment of $6,490.82 in unpaid wages, $2,984.71 in interest, $1,622.71 in liquidated damages, and $6,490.82 in civil penalties, for a total due of $17,589.06.

The order under Article 19 (penalty order) assesses a $1,000.00 civil penalty against petitioners for violation of Labor Law § 661 for failing to keep and/or furnish true and accurate payroll records for each employee.

The petitioners allege that the orders are invalid because claimant was fully compensated for the period covered by the orders, that they kept true and accurate payroll records for the periods in question, and never received requests for payroll records from respondent.

SUMMARY OF EVIDENCE

Wage Claim

On June 19, 2012, Jose Hector Torres filed a claim for unpaid wages in the amount of $6,325.49 for work as a cleaner from November 25, 2008 to January 19, 2011, at a rate of $65.00 a day. He also claimed that his agreed upon rate of pay was $7.25 an hour, and that he worked between 9 and 10.7 hours a day, 5 days a week for 17 weeks between January 9, 2009 and December 31, 2009, 6 days a week for 22 weeks between January 4, 2010 and August 31, 2010, and 7 days a week for 17 weeks between September 1, 2010 and December 31, 2010.

Testimony of Petitioner Mark Wieboldt

Wieboldt testified that he is the owner of Laundry Palace Col, Inc., a Hempstead, New York, 6,000 square foot "self-service laundry" that operates "24/7." He testified that there was one employee per shift who was charged with "maintenance, keep[ing] it clean, tak[ing] care of

any problems that might arise, equipment malfunction," along with "wash, dry and fold drop-off" and that he himself was at the laundromat "three times a week" for two and a half to three hours each time, although "very rarely" at night.

Wieboldt testified that claimant worked at the laundromat three or four nights a week for approximately two years until Carmen Sanchez, manager of the laundromat, fired him, and that during that period, claimant made $65.00 per eight hour shift. He also testified that he could not remember the number of employees he had at the laundromat during 2009 and 2010, but did recall that all employees were in the receipt books and that there was one employee per shift.

Wieboldt testified that claimant was paid in cash weekly and that his pay was calculated by Sanchez and recorded in a receipt book, which claimant signed when he was paid. He testified that Sanchez had worked for him for 19 years and set employee schedules, but he knew "what the pay was, the gross payroll for the week on an hourly basis." He also testified that, in response to his "previous history of having the same incidents [he was] having right now" during which "[he] had no proof," he implemented a system whereby when "each worker was paid, he had to sign a receipt." Wieboldt testified that signed receipts were kept in a receipt book maintained by Sanchez and stored during use and thereafter in the office at the laundromat. Wieboldt testified that Sanchez "dispensed on an as-needed basis" the weekly payroll amount at the end of each employee's work week, which varied. Wieboldt testified that he did not know how many days or hours his employees worked as it was Sanchez's responsibility to "do the receipts . . . so that [they] did not have the problem that I [was] having repeat itself." He testified that there were no other payroll records.

Wieboldt testified that the laundromat had problems receiving mail because the laundromat's office is "in the corner" and the "mailman drops the mail off on the front folding table." He also testified that he did not receive any correspondence from respondent concerning the orders at the laundromat.

Testimony of Carmen Sanchez

Sanchez testified that she had been a manager for petitioner Wieboldt's business for 22 years and was the manager of the laundromat where claimant had worked. She testified that she hired, and then fired claimant because he "didn't clean" and "was always talking out back with customers." She also testified that she was never at the laundromat when claimant worked. She testified that claimant was hired in January 2009, working for two nights a week, that in April 2010, he began working three nights a week and in October of that year, he began working four nights a week.

Sanchez testified that she used receipt books when paying laundromat employees, writing an employee's name on a receipt and having the employee sign that receipt each week before being paid in cash. On direct examination, she testified that there were never more than four employees working at the laundromat; on cross examination, she testified that in April 2010, there were employees "other than the ones that are shown in these payroll books" provided by petitioners. Sanchez testified that claimant signed for his pay every week, but that she did not record her own hours or sign the receipt book when she was paid because she was the manager. She testified that when the receipt books did not show that the four employees had worked a total of 168 hours—the number of hours in a week for a business open 7 days a week, 24 hours a

day—it meant that she herself had worked the remaining hours. She also testified that there were other weeks when she had an assistant helping her.

Sanchez testified that she calculated the time employees worked each week, communicated this to Wieboldt verbally and was given cash for payroll. She testified that she partially prepared the weekly receipts in advance, and then, when employees came in to be paid, each would sign the receipt she had prepared and be paid. Sanchez prepared and dated all the receipts the same day but handed them out to each employee when they reported to work and signed the receipt.. She testified that beyond the two receipt books entered into evidence, there were no other payroll records.

Finally, Sanchez testified that there were problems receiving mail at the laundromat because postal workers would "throw it outside on the table when they come in."

Testimony of Senior Labor Standards Investigator Joseph Ryan

Senior Labor Standards Investigator Joseph Ryan testified that he was assigned to investigate the claim although he was not the sole investigator who worked on it. He testified that on June 22, 2012, an intake investigator (now retired) reviewed the claim, and deemed it "valid" and having "a real legitimate basis" and filled in two lines on the first page of the claim form to specify, where claimant had not, that minimum wages and overtime were due and the total amount claimed. He also testified that on the second page of the claim form, the reviewing investigator had calculated "the difference per week according to what was calculated per week at minimum wage for the 40 hours and overtime per week, minus what the claimant stated that he was paid by the employer per week for the weeks that the claimant [was] claiming," specifying that respondent determined the wages due by calculating "on 40 hours a week at $7.25 an hour for $290.00 a week, plus $10.875 for overtime rate of hours over 40 per week." He testified that the minimum wage for the period claimed was $7.25 an hour.

When shown receipt books produced at hearing by petitioners as evidence of legally sufficient payroll records, Ryan testified that the books were of questionable validity as they appeared to have been created "after the fact," and that claimant's name on the receipts looked "very different from" his signature on the claim form and on his passport. On cross examination, Ryan also testified that he had no "specialized training in handwriting" and that he had not actually seen claimant sign the claim form.

Ryan testified that none of the three copies of the three letters respondent sent to petitioners regarding the claim and the wages owed was returned by the US Postal Service, and that after the letters went unanswered, and, in the absence of records showing that claimant had been paid all wages, the Commissioner issued the order under review on December 3, 2012.

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]). It also provides that a Commissioner's order shall be presumed "valid" (Labor Law § 103 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (Labor Law § 101 [3]). A petition that challenges the validity or reasonableness of an order issued by the Commissioner shall "state . . . in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). Board Rules provide that "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR 65.30). This burden of proof is met 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 (12 NYCRR 65.39).

The Wage Order Is Affirmed

New York law requires that an employer maintain employment records, including payroll records, that show employees' daily and weekly hours, wage rate, and gross and net wages paid, which records they must keep open to inspection by the Commissioner or a designated representative (Labor Law §§ 195 and 661; 12 NYCRR 142-2.6). In the absence of required payroll records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even if results may be merely approximate (*Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2013]; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dept 1989]).

Petitioners allege that claimant is owed no wages and offered the testimony of Wieboldt and Sanchez, as well as two receipt books to prove this. While we credit their testimony that the receipt books were petitioners' only payroll records, we give the books little weight as evidence of claimant having been paid all wages owed him. The books reveal preparation, at an unverifiable time, of a record of amounts paid in cash to certain employees; however, the books are inaccurate and/or incomplete. While we credit the testimony of Sanchez and Wieboldt that neither was present when claimant worked, and that Sanchez calculated the amount employees worked and related this to Wieboldt, who did not know his employees' work schedules, we conclude that their assertions regarding the amount claimant worked and was paid could not be substantiated by the receipt books. Sanchez testified that she paid claimant his cash wage and that he signed the receipt book weekly, but also testified that she prepared the receipts in advance and employees signed them—even if they were dated incorrectly, for example—because the employees knew that signing a receipt was a requirement for getting paid. Sanchez testified that she calculated claimant's hours without seeing him at work and that some workers did not appear in the receipt books. Both testified that claimant worked eight-hour shifts, for which he was paid $65.00, yet this is not borne out by the testimonial or documentary evidence.

The receipts themselves are of little probative value for petitioners. Some receipt numbers and dates are not in numerical sequence so that, for example, receipts of a higher number have an earlier date. Many receipts do not reflect the hours claimant is alleged to have worked each day or in total for the week, and some receipts indicate that claimant was paid more

than $65.00 per eight-hour shift. We also note that the records do not contain much of the information required by law, including the number of hours worked daily and weekly (*see* 12 NYCRR 142-2.6). We find that the petitioners failed to maintain accurate payroll records as required by law.

In the absence of accurate payroll records, petitioners bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 851 [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 at 821, "[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 petitioners have the burden of showing that the 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 (*Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011]). Where accurate records are not 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). In this case, in the absence of required records, DOL relied on claimant's claim form, which was the best available evidence, in determining the underpayment, which we find reasonable in all respects.

Liquidated Damages

Where the Commissioner determines an employee has not been paid all wages owed, Labor Law § 198 requires him to assess liquidated damages in an amount not to exceed 100% of the amount of unpaid wages unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law. Petitioners did not challenge the Commissioner's determination to assess liquidated damages of 25%. The issue is thereby waived pursuant to Labor Law § 101 (2), and we affirm the imposition of liquidated damages.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages 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." Petitioners did not challenge the interest assessed in the wage order. The issue is thereby waived, pursuant to Labor Law § 101 (2) and the imposition of interest is affirmed.

Civil Penalty

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Articles 6 or 19, he must issue an order directing payment of wages

and wage supplements found to be due, "plus the appropriate civil penalty." As petitioners did not oppose the civil penalty assessed in the wage order, the issue is thereby waived, pursuant to Labor Law § 101 (2) and we find the penalty amount valid and reasonable in all respects.

The Penalty Order is Affirmed

The penalty order was based on petitioners' failure to keep and or furnish true and accurate payroll records pursuant to Labor Law § 661. Petitioners contended that they maintained "true and accurate payroll records for the period in question." As discussed above, we find petitioners did not maintain required records. The penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and

2. The penalty order is affirmed; and

3. The petition be, and the same hereby is, otherwise denied.

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
September 16, 2015.