

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

-----X  
In the Matter of the Petition of: :  
 :  
SHALINI MOHABIR EDWARDS AND SURESH :  
CONSTRUCTION CORP., :  
 :  
Petitioners, : DOCKET NO. PR 14-020  
 :  
To Review Under Section 101 of the Labor Law: : RESOLUTION OF DECISION  
An Order to Comply with Article 6, and Order to :  
Comply with Article 19, and an Order Under Article 19 :  
of the Labor Law, all dated December 6, 2013, :  
 :  
- against - :  
 :  
THE COMMISSIONER OF LABOR, :  
 :  
Respondent. :  
-----X

**APPEARANCES**

Shalini Edwards, petitioner pro se, and for Suresh Construction Corp.

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

**WITNESSES**

Shalini Edwards, for petitioners.

Emily Nieves, Labor Standards Investigator, and Pierre Magloire, Senior Labor Standards  
Investigator, for respondent.

**WHEREAS:**

The petition in this matter was filed with the Industrial Board of Appeals (Board) on  
January 27, 2014, and seeks review of three orders issued by respondent Commissioner of Labor  
(Commissioner or respondent) on December 6, 2013. The Commissioner filed an answer to the  
petition on March 13, 2014.

Upon notice to the parties, a hearing was held on September 11, 2014 in New York, New  
York, before Vilda Vera Mayuga, Chair 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.

The first order (minimum wage order) directs that petitioners pay minimum wages owed claimants Jose Aaron Lopez Cruz and Miguel Padilla in the amount of \$7,290.00 for the period of March 1, 2006 through September 29, 2007, together with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$8,134.12, liquidated damages in the amount of \$1,822.88, and a civil penalty of \$7,290.00, for a total amount due of \$24,537.00.

The second order (wage order) directs that petitioners pay wages owed claimants Jose Aaron Lopez Cruz and Miguel Padilla in the amount of \$880.00 for the period of March 1, 2006 through September 29, 2007, together with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$895.09, and a civil penalty of \$880.00, for a total amount due \$2,655.09.

The third order (penalty order) directs that petitioners pay a civil penalty of \$800.00 for one count of failing to keep and/or furnish true and accurate payroll records for the period of January 14, 2006 through January 13, 2012 in violation of Labor Law § 661 and 12 NYCRR 142-2.6, and \$800.00 for one count of failing to give each employee a complete wage statement with every payment of wages for the period of March 1, 2006 through September 30, 2007 in violation of Labor Law § 661 and 12 NYCRR 142-2.7, for a total amount due of \$1,600.00.

The petition asserts that claimants were paid all wages owed. For the following reasons, we find petitioners met their burden of proof and respondent's findings were not reasonable as to the minimum wage and wage orders. We affirm the penalty order.

## SUMMARY OF EVIDENCE

### *The Wage and Minimum Wage Claims*

An organization filed a letter claim with the Department of Labor on behalf of Jose Aaron Lopez Cruz and Miguel Padilla Quezada (claimants) stating that claimants were employed by Suresh Construction Corp as construction workers from March 2006 through November 2006, working six days a week at a rate of \$105.00 cash per day, and then March 2007 through September 2007 for a daily rate of \$110.00 cash, and that they were not paid overtime during the periods of their employment and are also owed several days' wages.

### *Petitioners' evidence*

Petitioner Edwards testified that she owns and operates Suresh Construction Corporation, a construction business located in South Ozone Park, New York. Edwards testified that she hired claimants to do sheet rocking, painting, and cleaning at projects for which her company was contracted. She did not have records of hours worked because claimants were paid by the day and their pay rate was \$100.00 per day for eight hours of work as verbally agreed to with them. Edwards paid claimants with company checks that reflected the day each claimant worked. At hearing, Edwards presented four checks: two dated March 25, 2006 each for \$500.00 to each claimant and two dated April 1, 2006 each for \$600.00 to each claimant. Edwards explained that the date of the check represents the day after claimants finished work in the project she hired them to work on and each check represents the daily pay rate of \$100.00. Edwards testified that although she has kept Suresh Construction Company active, the company has not done any work for years.

Edwards testified that she kept a record of anyone who worked for petitioners in a notebook, paid them at the end of the week by check, and each employee signed the book to acknowledge receipt of payment.

### *DOL's evidence*

Labor Standards Investigator Emily Nieves testified that she handled the investigation of the claims against petitioners, reviewed the claim forms, and visited petitioners at the address provided in the claim forms. She testified that she did not speak to claimants and that respondent only received the first page of their claim forms which does not include specifics of the days and hours worked or the wages claimed to be owed.

Nieves also testified that she issued petitioners a collection notice advising petitioners that claimants had filed a minimum wage claim and a wage claim against them, providing the details of the claim, and instructing that if they agreed, they should remit payment within ten days or, if they disagreed, they should respond in writing stating the basis of their dispute and include "any payroll record, policy contract, etc." to substantiate their position. Nieves testified that respondent also sent petitioners a recapitulation letter "explaining [its] findings," a computation sheet showing the dates, hours and amounts of underpayment, and a violation notice. Nieves testified that no correspondence sent to petitioners was returned by the US Postal Service.

Senior Labor Standards Investigator Pierre Magloire testified that he reviewed the investigation undertaken by, and documents prepared by, Nieves and testified that petitioners did not contact respondent at any time during the investigation.

## GOVERNING LAW

### Standard of Review and Burden of Proof

When a petition is filed, the Board reviews whether an order issued by the Commissioner of Labor is "valid and reasonable" (Labor Law § 101 [1]). Any objections not raised in the petition shall be deemed waived (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed "valid" (*Id.* § 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 (*Id.* § 101 [3]).

A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (*Id.* § 101 [2]). Petitioners have the burden to prove by a preponderance of the evidence that the orders are not valid or reasonable (*Matter of Ram Hotels, Inc.*, PR 08-078, at 24; Board Rule 65.30 [12 NYCRR 65.30]; State Administrative Procedure Act § 306; *Matter of Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

### Recordkeeping Requirements

Articles 6 and 19 of the Labor Law require employers to maintain payroll records for employees covered by the Act and to make such records available to the Commissioner (Labor Law §§ 195 and 661). Such payroll records must include, among other things, employees' daily and weekly hours worked, wage rate and gross and net wages paid (*Id.*).

### DOL's Calculation of Wages in the Absence of Adequate Employer Records

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. Labor Law § 196-a provides that employers who keep inadequate records "shall bear the burden of proving that the complaining employee was paid wages, benefits, and wage supplements" (See *Angello v Natl. Fin. 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 [3d 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 US 680, 687-688 (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."

### **FINDINGS**

#### The Wage and Minimum Wage Orders are Revoked

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 and documentation. Here, respondent did not rebut petitioners' credible testimony and documentary evidence for us to find that the wage and minimum wage orders were valid and reasonable. Petitioner Edwards credibly testified that she hired claimants to work on some projects for which her company was contracted. Edwards was specific in her testimony as to the verbal agreement she had with claimants and other employees in terms of work hours and a daily pay rate, as well as payment by company check acknowledged by each worker and, in this instance, checks cashed by each worker days after they were dated. Petitioners presented four checks made out to, and endorsed by, claimants, all of which were negotiated in March or April of 2006, which is part of the claim period.

In contrast, respondent presented evidence showing that the Department had relied on a letter claim filed by an organization on behalf of claimants. The letter had claim forms attached signed by claimants but the forms were missing critical information that only appeared in the unsworn referral letter from the organization. Respondent's investigators testified that they visited

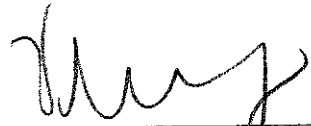
petitioners' business but were unable to find anyone, that they never spoke to claimants and that their findings were based on the statements found in the referral letter filed by the organization. We cannot agree with respondent that an unsworn referral letter is "the best available evidence" on which to rely for its findings. On the record before us, even if petitioners' evidence is minimal and lacks precision, we find that is not valid and reasonable for respondent to base its findings in statements that are not those of claimants or based on an actual investigation that reveals a violation of the labor law in unpaid wages. We revoke the wage and minimum wage orders in their entirety.

Penalty Order

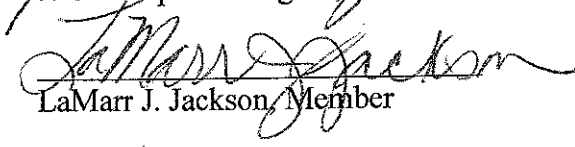
Respondent assessed petitioners a \$1,600.00 penalty for failure to keep legally sufficient payroll records and for failure to provide each employee with a wage statement. Petitioners' own testimony reflects they did not maintain such required records. No evidence was offered at hearing other than Edwards's testimony that she had a "notebook" with some documentation, which notebook she did not bring to the hearing and never shared with respondent. Respondent offered evidence that he attempted to meet with petitioners and mailed letters to petitioners to address the claim before him, but there was no response from petitioners. Accordingly, we find the penalty order is valid and reasonable and we affirm it.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The minimum wage order is revoked; and
2. The wage order is revoked; and
3. The penalty order is affirmed; and
4. The petition for review is granted in part and denied in part.

  
\_\_\_\_\_  
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  
May 25, 2016.

petitioners' business but were unable to find anyone, that they never spoke to claimants and that their findings were based on the statements found in the referral letter filed by the organization. We cannot agree with respondent that an unsworn referral letter is "the best available evidence" on which to rely for its findings. On the record before us, even if petitioners' evidence is minimal and lacks precision, we find that is not valid and reasonable for respondent to base its findings in statements that are not those of claimants or based on an actual investigation that reveals a violation of the labor law in unpaid wages. We revoke the wage and minimum wage orders in their entirety.

Penalty Order

Respondent assessed petitioners a \$1,600.00 penalty for failure to keep legally sufficient payroll records and for failure to provide each employee with a wage statement. Petitioners' own testimony reflects they did not maintain such required records. No evidence was offered at hearing other than Edwards's testimony that she had a "notebook" with some documentation, which notebook she did not bring to the hearing and never shared with respondent. Respondent offered evidence that he attempted to meet with petitioners and mailed letters to petitioners to address the claim before him, but there was no response from petitioners. Accordingly, we find the penalty order is valid and reasonable and we affirm it.

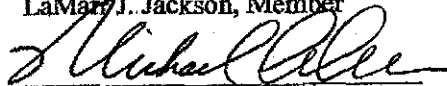
**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**

1. The minimum wage order is revoked; and
2. The wage order is revoked; and
3. The penalty order is affirmed; and
4. The petition for review is granted in part and denied in part.

\_\_\_\_\_  
Vilda Vera Mayuga, Chairperson

\_\_\_\_\_  
J. Christopher Meagher, Member

\_\_\_\_\_  
LaMar J. Jackson, Member

  
\_\_\_\_\_  
Michael A. Arcuri, Member

Dated and signed by a Member  
of the Industrial Board of Appeals  
at Utica, New York, on  
May 25, 2016.