

designated hearing officer. The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The order to comply with Article 6 (wage order) directs payment to the Commissioner for unpaid wages due and owing to claimant Shannon Lee in the total amount of \$230.00 for the time period from November 4, 2011 to November 6, 2011, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$86.61. The order also finds due and owing liquidated damages in the amount of 25% of the wages due totaling \$57.50 and a civil penalty of \$230.00, for a total of \$604.11.

The order under Article 19 (penalty order) assesses a \$500.00 civil penalty against petitioner for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from on or about November 4, 2011 through November 6, 2011.

Petitioners allege that claimant was paid for all hours worked and that they kept all required payroll records.

SUMMARY OF EVIDENCE

Testimony of Dimitrios Potamianos Sr., Petitioner

Petitioner Dimitrios Potamianos Sr. testified that he has been running his business, DS Studio LLC, and working closely with employees since 2010. In 2011, the claimant, Shannon Lee, failed to report to work for three consecutive days for which she had been scheduled. A then-manager received an email from claimant stating that claimant resigned from her position. Potamianos testified that from the email, “we can . . . understand that [claimant] wasn’t working for a while with us.”

Potamianos testified that claimant had been paid in full for work she performed. While he did not have in his possession a canceled check showing proof of payment, Potamianos entered into evidence an “earnings record” for claimant, which includes entries for the pay periods ending on October 14, 2011 through and including November 10, 2011. Potamianos further testified that claimant was paid her wages by direct deposit as indicated by “DD” after each net dollar amount on the earnings record. The earnings record was prepared by a payroll company.

Potamianos testified that he provided to DOL by Federal Express and facsimile “the schedule, and the hours, everything – and the email.” In particular, Potamianos provided to DOL a document that shows the hours worked by each employee and includes the respective employees’ signatures. The document includes the work schedule for “every individual week of the month,” including claimant’s hours from November 4 to November 6, 2011. Petitioner could not recall claimant’s scheduled hours for the particular week at issue but remembered that claimant failed to report to work. Because claimant did not report to work and then resigned, the document does not include claimant’s signature for the week in question.

Testimony of Jeremy Kuttruff, Senior Labor Standards Investigator

Labor Standards Investigator Jeremy Kuttruff testified that claimant completed a claim form stating that she was owed \$230.00 for the period of November 4, 2011 through November 6, 2011. The claim form provided the basis for DOL's investigation. DOL notified petitioners by letter of the claim against them.

DOL received from petitioner an e-mail dated November 7, 2011, in which claimant provided notice of her resignation. November 7, 2011, however, was the day after the claim period ended and thus petitioners' evidence did not address the particular hours for which petitioners owe wages to claimant for work performed. Other than the email and a handwritten letter from Potamianos, petitioners provided no further documentation to DOL during its investigation of the claim. Based on the claim form and petitioners' failure to produce evidence disproving it, the Commissioner issued the orders demanding payment.

Kuttruff testified that the earnings record Potamianos introduced into evidence was insufficient to prove to him, as the investigator, that claimant received payment for the wages due to her for the period in question. While the claim is for \$230.00, the earnings record shows a check dated November 10, 2011, in the amount of \$240.00, and the net amount of \$199.84 was remitted by direct deposit, as indicated by "DD." Directly below the entry of payment, however, it appears that a payment for the same amount was reversed. Kuttruff testified that payments made by way of direct deposit can be reversed.

Due to how the earnings record was reproduced, the remaining details included in the record, if any, are obscured. Based on his review of the document, Kuttruff testified that he believes the claim to be valid.

Kuttruff testified that during the course of the investigation, he did not receive any additional documents from Potamianos other than the email from claimant dated November 7, 2011, in which she resigned from her position, and a handwritten letter.

SCOPE OF REVIEW AND BURDEN OF PROOF

An aggrieved party may petition the Board to review the validity and reasonableness of an order issued by the Commissioner (Labor Law § 101 [1]). A petition must state in what respects the order under review is claimed to be invalid or unreasonable and any objections not raised in the petition "shall be deemed waived" (Labor Law § 101 [2]).

Labor Law § 103 (1) provides that an order of the Commissioner is presumed valid. Should the Board find the order or any part thereof invalid or unreasonable, the Board shall revoke, amend, or modify the order (Labor Law § 101 [3]).

Petitioners bear the burden of proving every allegation in a proceeding (12 NYCRR 65.30; State Administrative Procedure Act § 306 [1]; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). Therefore, a petitioner must prove that the challenged order is invalid or unreasonable by a preponderance of evidence (Labor Law § 101 [1]; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 11, 2011]).

FINDINGS OF FACT 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).

The Wage Order is Affirmed

The wage order issued by respondent directs petitioners to pay \$230.00 in unpaid wages to claimant for time worked pursuant to Labor Law § 191. The Labor Law requires employers to maintain accurate payroll records that include, among other things, employees' daily and weekly hours worked, wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law § 195; 12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment and maintain the records for no less than six years (*id.*).

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such 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 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 2010]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employee's evidence (*Anderson v Mt. Clemens Pottery*, 328 US 680, 687-88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's credible evidence (*Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 20, 2014]).

Having failed to produce legally sufficient payroll records as required by Labor Law § 195 and 12 NYCRR 142-2.6, DOL's calculation of wages must be credited unless petitioners meet their burden to negate the reasonableness of the Commissioner's determination or prove the "precise" extent of uncompensated work, if any (*Anderson v. Mt. Clements Pottery Co.*, 328 US 680, 687 [1949]). The burden is not an impossible one, however, in this case, petitioners' evidence was too general, conclusory, and unreliable to satisfy petitioners' burden.

Petitioners allege that claimant is owed no wages and offered petitioner Potamianos' testimony, an "earnings statement" and an email from claimant notifying petitioners of her resignation to support their contention that petitioners correctly paid claimant for all time worked. We note that at the conclusion of the March 27, 2015 hearing, the record was held open by mutual agreement of the parties to allow additional time to exchange supplementary documentary evidence in an effort to resolve the matter. No such resolution was reached; neither was additional documentary evidence entered into the record.

On the record before us, we conclude that petitioners' assertions regarding the amount claimant was paid for time worked could not be substantiated by the earnings record Potamianos introduced into evidence. While we credit Potamiano's testimony that a payroll company prepared the claimant's earnings record, we cannot credit the earnings record for the truth of the matter asserted because the record is not complete. In *Matter of Weiboldt* (PR 14-014 at 5 [Sept. 16, 2015]), petitioners introduced "receipt books" to prove that claimant was owed no wages. Like in *Matter of Weiboldt*, where we found that petitioners' contention that they properly paid claimant was not borne out by the evidence, the earnings record before us reveals preparation, at an unverifiable time, of a record of amounts petitioners allegedly paid to claimant, however, on its face, the record is inaccurate and incomplete (*see id.*). For example, claimant's base rate is inconsistent across the five pay periods represented on the earnings record.¹ The entry for the week of October 14, 2011, states that claimant's base rate was \$3.13, yet her base rate for the following pay period was \$0.00, and \$12.50 for the following week. For the November 4 and November 10, 2011 pay periods, claimant's base rate is shown at \$10.00 per hour. Moreover, the entry for October 21, 2011, also states claimant worked zero hours for the week, yet she earned a gross amount of \$225.00 and was paid by direct deposit a net amount of \$188.54. Because of these objective, facial inaccuracies, we cannot credit the earnings record.

Even if we were to assume the earnings record is accurate, it is of little probative value for petitioners because it fails to show whether claimant reported to work on November 4 through November 6, 2011, and if so, whether she was in fact paid for the hours worked. The wage claim is for \$230.00. Following the November 10, 2011 entry, the earnings record shows "(199.84)." This amount reflects the same net amount paid by direct deposit to claimant on November 10, 2011 after deductions were made to claimant's gross earnings of \$240.00. No other payment is similarly bracketed. Investigator Kuttruff credibly testified to the technical feasibility of reversing payments made by direct deposit and suggested that the November 10, 2011 payment may have been reversed. To the extent that the earnings record may itself rebut Kuttruff's allegation, the photocopied document is partially obscured, and petitioner failed to offer any plausible alternative reason for the parenthetical notation. Neither did Potamianos provide a complete copy of the earnings record nor a receipt of payment to claimant notwithstanding the record being held open expressly to allow him to do so. In short, the earnings record raises more questions than it answers. We also note that the document does not contain information required by law, including the number of hours worked daily (*see* Labor Law § 661; 12 NYCRR 142-2.6). We therefore find that petitioners failed to maintain accurate payroll records as required by law and petitioners did not meet their threshold burden of showing that claimant was paid for time worked.

In the absence of adequate payroll records, the Commissioner was entitled to rely on claimant's statements as the "best available evidence" and draw an approximation of hours worked and wages owed, even where imprecise (*Mt. Clements Pottery Co.*, 328 US at 687-88 ["The 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"]). Petitioners produced no time records. Under *Mt. Clements Pottery Co.*, we therefore find that the discrepancy between the \$240.00 gross amount noted in the earnings

¹ The earnings record includes "check date" entries for October 14, October 21, October 28, November 4 and November 10, 2011.

record and the \$230.00 underpayment alleged by the claimant is negligible under the circumstances and credit the Commissioner's calculation (*see id.*).

Petitioners failed to overcome the Commissioner's approximation with credible and reliable evidence establishing the precise hours claimant worked and that she was paid for those hours. To rebut the Commissioner's calculations, Potamianos introduced an email between claimant and a former manager employed by petitioners. The email, allegedly written by claimant, reads in relevant part:

"Unfortunately Im [*sic*] going to have to let my position with your company go. The past couple of days I have had some personal issues going on, one being that I need to move to a new apartment ASAP which is going to require more finances so im [*sic*] going to start waitressing. I appologize [*sic*] for the sudden resignation."

The email is timestamped "November 7, 2011 8:29:23 PM EST." It is undisputed that claimant resigned from her position at DS Studio, effective November 7, 2011, which is the day after the claim period. On its face, however, the email is silent about what days she did or did not work during the claim period, which is November 4 through November 6, 2011. We therefore find that the email is of no probative value for petitioners in their effort to negate the reasonableness of the Commissioner's determination or prove the precise extent of uncompensated work.

Based on the record evidence, we conclude that petitioners have not met their burden of proving that the claimant's disputed wages were paid and therefore affirm the wage order.

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 (1) sets the "maximum rate of interest" at "sixteen per centum per annum."

Petitioners failed to submit evidence at hearing challenging the interest assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2).

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 100% of the total amount of wages found to be due.

Petitioners failed to submit evidence at hearing challenging the liquidated damages assessed in the minimum wage order and the issue is thereby waived pursuant to Labor Law § 101 (2).

The Civil Penalty in the Wage Order is Affirmed

Labor Law § 218 authorizes the Commissioner to assess civil penalties based upon the wages found owing upon giving "due consideration" to the factors listed in the statute. Petitioners did not submit evidence challenging the civil penalties assessed in the wage order beyond the conclusory allegations of the petition and the issue is thereby waived pursuant to Labor Law § 101 (2). The civil penalty assessed in the wage order is affirmed.

The Penalty Order is Affirmed

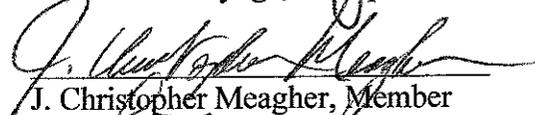
Labor Law § 661 and 12 NYCRR 142-2.6 require that every employer establish, maintain and preserve for not less than six years, contemporaneous, true, and accurate weekly payroll records and make such records available upon request of the Commissioner at the place of employment. While petitioners allege that they provided DOL with legally sufficient payroll records during the investigatory phase of the proceeding, petitioners failed to produce at the hearing such records or evidence that such records were provided to DOL. We therefore affirm the civil penalty.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

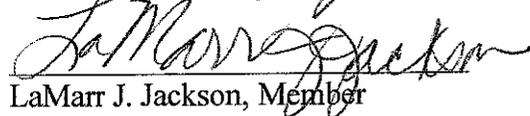
- 1. The wage order is affirmed; and
- 2. The penalty order is affirmed; and
- 3. The petition is otherwise denied.



 Vilda Vera Mayuga, Chairperson



 J. Christopher Meagher, Member



 LaMarr J. Jackson, Member

 Michael A. Arcuri, Member

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

The Civil Penalty in the Wage Order is Affirmed

Labor Law § 218 authorizes the Commissioner to assess civil penalties based upon the wages found owing upon giving "due consideration" to the factors listed in the statute. Petitioners did not submit evidence challenging the civil penalties assessed in the wage order beyond the conclusory allegations of the petition and the issue is thereby waived pursuant to Labor Law § 101 (2). The civil penalty assessed in the wage order is affirmed.

The Penalty Order is Affirmed

Labor Law § 661 and 12 NYCRR 142-2.6 require that every employer establish, maintain and preserve for not less than six years, contemporaneous, true, and accurate weekly payroll records and make such records available upon request of the Commissioner at the place of employment. While petitioners allege that they provided DOL with legally sufficient payroll records during the investigatory phase of the proceeding, petitioners failed to produce at the hearing such records or evidence that such records were provided to DOL. We therefore affirm the civil penalty.

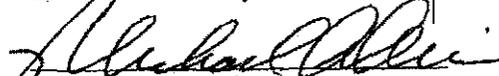
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and
2. The penalty order is affirmed; and
3. The petition is otherwise denied.

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.