STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MAREK JENDROSKA AND 123 NEW YORK CORPORATION, Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6, and an Order Under Article 19 of the Labor Law, both dated July 1, 2014, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 14-190 RESOLUTION OF DECISION

APPEARANCES

Marek Jendroska, petitioner pro se, and for123 New York Corporation.

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

WITNESSES

Marek Jendroska, for petitioners.

Reyna Moreno and J.C. Dacier, Labor Standards Investigators, for respondent.

WHEREAS:

On August 27, 2014, petitioners Marek Jendroska and 123 New York Corporation filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued against them by respondent Commissioner of Labor (Commissioner) on July 1, 2014. The Commissioner filed an answer on December 2, 2014.

Upon notice to the parties, a hearing was held on February 19, 2015 in New York, New York before J. Christopher Meagher, Member of the Board and 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 (wage order) directs petitioners to comply with Article 6 of the Labor Law and pay the Commissioner wages due and owing to claimant employee Arturo Aviles in the amount of $1,650.00 for the time period from November 8, 2012 to November 20, 2012, interest continuing thereon at the rate of 16% to the date of the order in the amount of $425.29, liquidated damages in the amount of $412.50, and a civil penalty in the amount of $1,650.00. The total amount due is $4,137.79.

The second order (penalty order) directs petitioners to pay the Commissioner a civil penalty under Article 19 of the Labor Law in the amount of $350.00 for failure to keep and/or furnish true and accurate payroll records for each employee during the period from November 8, 2012 to November 20, 2012.

The petition alleges that the orders should be revoked in their entirety because claimant was paid for the work he performed for one of petitioners' sub-contractors in 2012 and was supposed to withdraw his complaint since the issue was resolved.

SUMMARY OF EVIDENCE

The Wage Claim

On December 5, 2012, claimant Arturo Aviles filed a claim with the Department of Labor (DOL) alleging that he was employed by petitioner 123 New York Corporation as a laborer at the rate of $25.00 per hour and was owed $1,650.00 in unpaid wages during the period from November 8, 2012 to November 20, 2012. Claimant stated that the persons in charge of the business were the owner "Manny" and his supervisor Washington Valverde.

Aviles claimed that he performed demolition and asbestos removal for a total of eight days at a building located at 250 West 54th Street in Manhattan, from 9:00 p.m. to 5:00 a.m. or 6:00 a.m. each day. He was owed $400.00 for 16 hours worked over two days during the week ending November 10, 2012, $650.00 for 26 hours worked over three days during the week ending November 17, 2012, and $600.00 for 24 hours worked over three days during the week ending November 24, 2012. Aviles claimed that he was paid in cash, did not receive a meal break, and was discharged on November 20, 2012 after he requested his wages from Valverde.

DOL's Investigation

Labor Standards Investigator Reyna Moreno testified that she has been employed by DOL as an investigator for three years, is bilingual in Spanish and English, and is certified by DOL as proficient to perform translation services for limited English proficient individuals during its investigations. The claimant in this case was Spanish-speaking and she assisted him in filling out his claim form when he filed it with DOL on December 5, 2012. Moreno testified that she interviewed claimant in his native tongue, translated the questions on the claim form into Spanish, and entered his answers into English on the form. She then went over the information on the form with him for accuracy and he signed it in her presence.

Senior Labor Standards Investigator J.C. Dacier testified that he issued petitioner 123 New York Corporation a collection letter on January 14, 2013 advising it that Aviles had claimed

unpaid wages at the rate of $25.00 per hour during the period from November 8, 2012 to November 20, 2012, for a total amount due of $1,650.00. The notice requested that petitioner remit payment of the wages by January 24, 2013. If petitioner disagreed with the claim, DOL requested that it submit a statement explaining why the amount was not due and include any payroll records, policies, contracts, or other documentation to substantiate its position. As petitioner did not respond, a second notice was issued on February 4, 2013.

By letter dated February 8, 2013, petitioner Merek Jendroska replied that he was President of the company and in order to pay the claimant he would need a copy of his W-4 tax form, asbestos license, and medical and fitness test for the company's records. Petitioner added that he had tried to contact the claimant through his supervisor but was unable to find him.

On December 13, 2013, Dacier informed petitioner that his reasons for withholding wages were contrary to Labor Law § 191 (1) (a), which prohibit employers from withholding wages against the submission of W-4's or other forms of official paperwork. Dacier reiterated the details of the claim and advised him that if he had paid the wages due then he should submit copies of cancelled payroll checks, time sheets, and payroll for the weeks in question. Should he fail to provide such evidence or remit payment by January 8, 2014, the matter would be referred to Orders to Comply that would entail additional interest and liquidated damages.

Petitioner did not remit payment or submit further information showing proof of payment. In the absence of adequate payroll records establishing that the wages were paid, the Commissioner issued the orders under review on July 1, 2014. In support of the 100% civil penalty assessed in the wage order, Dacier completed an investigative report titled "Background Information-Imposition of Civil Penalty" that provides information relating to the size of petitioners' firm, their good faith, gravity of the violation, and records provided or not provided. Dacier testified that all of the information utilized to support the 100 % penalty was contained in the form. A box on the form stating that petitioner was "not generally cooperative" meant that he failed to submit proof that the wages had been paid. No other testimony was submitted explaining how respondent arrived at the 100% civil penalty.

Dacier also completed a report titled "Labor Law Articles 6, 19 and 19-A Violation Recap" that cited petitioners for violating the recordkeeping requirements of Labor Law § 661 by failing to submit payroll records for the period November 8, 2012 to November 20, 2012. No testimony was submitted explaining the form or how the final $350.00 civil penalty was calculated.

By letter dated July 14, 2014, petitioner responded to the orders, explaining that he was concerned he was still expected to pay the wages, interest, late fees, etc. because he believed the issue had been resolved. Petitioner stated that claimant had worked for one of his sub-contractors in 2012 and after the dispute came up he had a meeting with him and the issue had been resolved back then. Petitioner said he thought the claimant had cleared things up with DOL because he never received any other complaint from him.

Petitioners' Evidence

Petitioner Merek Jendroska testified that he is the owner and operator of 123 New York Corporation, a construction business in Queens, New York that performs asbestos removal at

various building sites in the New York City area. He sometimes hires sub-contractors to help him when he is busy and cannot handle all his jobs. Petitioner testified that his sub-contractors hire and pay their own crews but "of course, I am still responsible for everything because I am general contractor for [the] job." In 2012, he hired a sub-contractor named Washington Valverde to work for him on a job at a commercial building at 250 West 54th Street in Manhattan where claimant Arturo Aviles was employed to remove asbestos.

Petitioner testified that based on his "information" he understood that Aviles was receiving his money every week for the job on West 54th Street. He learned that claimant and his sub-contractor had an argument over some issue during claimant's last week on the job but Valverde had "finally" paid him. After petitioner learned of the dispute with DOL, he located claimant and arranged a meeting to discuss the issue. Claimant spoke with him at the meeting in Spanish and very broken English but brought a friend along who spoke English well and helped translate their conversation.

Petitioner testified that he asked claimant if his sub-contractor still owed him money and claimant replied that "everything" was all right between them and he was paid "everything." Petitioner asked him how much money he received in his last paycheck and claimant said he received $575.00. To verify the payment, petitioner asked him to sign a form called "Final Paycheck Acknowledgement" that contractors have their workers sign when they receive their paycheck. Before claimant signed the document petitioner asked him whether he understood what he was signing and claimant replied that he did. He then filled out everything on the form "from top to bottom" and signed his name with the date March 24, 2013 in the signature space. Petitioner asked him to contact DOL to tell them everything was resolved and told him "I will use you sometime in the future in my job." According to petitioner, claimant promised to do so and petitioner thought the dispute was resolved.

A copy of the acknowledgement form was submitted into evidence. A review of the document shows that the handwriting at the top stating the employee's name, the company name of "123 New York Corporation," and the net amount of the paycheck is dissimilar to that stating the claimant's name, signature, and date in the signature space. The document is in English and has form language at the top stating "the undersigned recipient, having received my final paycheck from" and form language above the signature line stating "To the best of my knowledge, there is no additional money owed to me by the employer at the present time." Petitioner was asked if he knew whether claimant could read English and said he did not know. The form also contains spaces for the pay period of the check, gross wages, deductions, and the signature and date of the person issuing it, all of which are blank. Petitioner was asked why Valverde did not sign the form and replied that he was at another location at the time.

Responding to questions from the Hearing Officer, petitioner testified that he paid Valverde by check and Valverde paid the claimant by check drawn on his own checking account. Petitioner said he had no copies of any of the cancelled checks that were issued the claimant, however, because Valverde had made those payments. Petitioner acknowledged that he was not sure how long claimant worked on the West 54th Street job, estimating that it was two or three days and three or four hours per day because it was winter and was cold at the time, and that he had no time records showing the hours he worked. He asked Valverde to find a logbook he kept of the times his crew signed in and out on the job but he was unable to locate it. According to

petitioner, claimant was working for Valverde on at least one other job around the time frame of the claim and was assigned to another but failed to report for it.

Finally, petitioner asserted that the orders are unreasonable because he has been in the construction business for 25 years, has a good reputation in the industry, and after becoming aware of the dispute from DOL made numerous efforts to locate the claimant to make sure he had been paid.

FINDINGS

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).

Petitioners' Burden of Proof

Petitioners' burden of proof in this case was to establish by a preponderance of evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101 [1]; 12 NYCRR 65.30; *Matter of Ram Hotels, Inc.* PR 08-078 at 24 [October 11, 2011]).

An Employer's Obligation to Maintain Adequate Payroll Records

The Labor Law requires employers to maintain accurate payroll records that include, among other things, their 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 § 661; 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 them for no less than six years (*Id.*).

Employers are further required to furnish each employee a statement with every payment of wages listing the hours worked, rates paid, gross and net wages, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 142-2.7). The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

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 and 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]).

In *Anderson v Mt. Clements Pottery Co.*, 328 US 680, 687-688 [1946], 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."

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 employees' evidence *(Mt. Clemens Pottery Co.*, 328 US at 688; *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 statements (*Doo Nam Yang v ACBL Corp.*, 427 FSupp2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee,* PR 10-293 at 16 [April 10, 2014]).

The Board has summarized the applicable federal and state principles governing the employer's burden of proof in cases before the Board, holding that petitioners have the burden of showing that the Commissioner's wage order is invalid or unreasonable by a preponderance of evidence of the specific hours that the claimant worked and that he was paid for those hours, or other evidence that shows the Commissioner's findings to be unreasonable (*Matter of Ram Hotels, Inc., supra* at 24 [October 11, 2011]).

Petitioners Failed to Meet Their Burden of Proof to Establish That Claimant Was Paid His Wages Due

Petitioners did not challenge the Commissioner's determination that they were the claimant's "employer[s]" under the Labor Law and petitioner Jendroska in fact conceded he was responsible for all facets of the job as the general contractor. As such, an employment relationship existed between petitioners and the claimant and they were responsible for payment of his wages (Labor Law § 191 [3]; *see Ovadia v Industrial Board of Appeals*, 19 NY3d 138, 145 [2012] [business relationship between general contractor and sub-contractor at construction site may in appropriate situations support finding that general contractor is employer of sub-contractor's workforce]; *Matter of Exceed Contracting Corp. v Industrial Board of Appeals,* 126 AD3d 575, 576 [2015] [general contractor exercised sufficient supervision and control over sub-contractor's workforce to be deemed an employer]).

Petitioner testified that he was not sure how long claimant worked on the West 54th Street job, had no time records showing the hours he worked, and had no cancelled checks showing that he was paid for those hours. Petitioner cannot avoid his burden to provide required payroll records because the cancelled checks were in the possession of his sub-contractor. He could have obtained copies from Valverde, or obtained them by subpoena, if they indeed existed. The Board has repeatedly found that an employer is not absolved of its responsibility to maintain and produce records, even where a third party has taken possession of a company's payroll records, (*Matter of David Schlockman and/or Mitchell Zimmerman and/or D.A.M. Clothing, Inc.*, PR 07-047 [June 25, 2008] [employer put into foreclosure by its financing factor may subpoena

records]). As the Appellate Dvision stated in *Angello v National Finance Corp.*, 1 AD3d 850, 854 (3d Dept 2003), where the employer does not provide the records required under the Labor Law, "regardless of the reason therefor," the presumption favoring the Commissioner's determination based on the employees' statements applies.

In lieu of adequate payroll records, petitioner testified that he met with claimant after he learned of the dispute with DOL and was told that "everything" was all right with Valverde and he had been paid "everything." The Board has repeatedly held that general and conclusory testimony asserting that an employee has been fully paid is insufficient to meet an employer's burden of proof (*see e.g. Matter of Young Hee Oh*, PR 11-017 at 12 [May 22, 2014] [citing prior Board decisions]). We give little weight to this alleged statement because it is double hearsay repeated through an unidentified third person that translated the conversation from Spanish to English and did not testify at hearing. Moreover, petitioner indicated that claimant worked for Valverde on at least one other job around the time frame of the claim. Without corroboration of the precise hours that claimant worked at the West 54th Street job, and without corroboration of the precise wages he was paid for those hours, the statement is simply too vague and nonspecific to be reliable evidence showing proof of payment.

As corroboration that claimant was fully paid, petitioner submitted a written "Acknowledgement of Final Paycheck" form signed by the claimant that is in English and has form language above the signature line stating "To the best of my knowledge, there is no additional money owed to me by the employer at the present time." Petitioner was asked if he knew whether claimant could read English and stated that he did not know. The handwriting at the top of the form listing the employee name, company name, and net amount of the paycheck is dissimilar to that showing the claimant's handwriting on the signature line, suggesting that key entries on the form may have been written by another person. The form lists only one paycheck received in the amount of $575.00. There are numerous blank spaces for the pay period represented by the check, gross wages, deductions, and the date and signature of the person issuing it. Petitioner was asked why his sub-contractor did not sign the form and stated that he was in another location at the time. We find the incompleteness of the form, absence of evidence that claimant understood what he was signing, irregularities on the face of the document, and lack of correlation to the weeks worked or wages paid demonstrates that it is not credible or reliable evidence showing proof of payment for the period of the claim.

On December 5, 2012, claimant filed a written claim with DOL stating that he was employed by petitioners and was owed $1,650.00 in unpaid wages for eight days worked during the time period from November 5, 2012 through December 20, 2012. The claim form was authenticated by an investigator who testified that she is bilingual in Spanish and English and is certified to provide translation services to limited English proficient individuals during DOL's investigations. The investigator interviewed claimant in his native tongue, translated the questions on the claim form into Spanish, and entered his answers into English on the form. She then reviewed the information on the form with him for accuracy and he signed it in her presence.

In the absence of adequate payroll records submitted by petitioners, the Commissioner was entitled to rely on the written claim filed by the claimant in this case as the "best available evidence" and draw an approximation of his hours worked and wages owed drawn from such statement, even where imprecise (*Mt. Clements Pottery Co.*, 328 U.S. 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 failed to overcome that approximation with credible or reliable evidence at hearing establishing the specific hours he worked, and that he was paid for those hours, or with other evidence showing the Commissioner's findings to be unreasonable. We affirm the Commissioner's determination of wages owed in the wage order 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."

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) ("Any objections to the . . . order not raised in such appeal shall be deemed waived").

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 wage order and the issue is thereby waived pursuant to Labor Law § 101 (2).

The Civil Penalties in the Wage and Penalty Orders Are Revoked

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Article 6, he must issue an order directing payment of any wages found to be due, "plus the appropriate civil penalty."

If a violation involves a willful or egregious failure to pay wages, or an employer who has previously been found in violation, the penalty "shall" be "in an amount equal to double the total the total amount . . . found to be due" (*Id.*). For all other types of violations, the amount of the penalty is discretionary. Where the violations involve "a reason other than the employer's failure to pay wages," such as a penalty for failure to furnish or maintain adequate payroll records in violation of Article 19, the amount shall not exceed $1,000.00 for a first violation, $2,000.00 for a second violation, and $3,000.00 for a third or subsequent violation (*Id.*). In applying his discretion for wage and non-wage violations, the statute directs the Commissioner to give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements (*Id.*)."

Petitioner testified at hearing that he has been in the construction business for 25 years, has a good reputation in the industry, and after becoming aware of the dispute with DOL made numerous efforts to locate the claimant to make sure he had been paid. In response to petitioners' evidence, investigator Dacier simply stated that all information supporting the penalty in the wage order was contained in the penalty form. No testimony was submitted providing an explanation for how the factors enumerated in the statute were considered to arrive at the 100% civil penalty. As to the penalty order, while a report was admitted into evidence from DOL's file citing petitioners for a recordkeeping violation, no testimony was submitted explaining how respondent arrived at the $350.00 penalty.

We have previously held that DOL's failure to adequately explain its application of the criteria that must be given "due consideration" under Labor Law § 218 in assessing civil penalties is unreasonable. The investigator's testimony simply establishing a foundation for submission of the penalty form does not satisfy the particularization required by the statute (*Matter of Hoffman*, PR 08-115 at 7-8 [November 17, 2009] [civil penalties assessed by Commissioner revoked where insufficient testimony offered regarding factors to be applied under statute authorizing penalties for unpaid wages, recordkeeping, and other violations]). We therefore revoke the civil penalties in the wage and penalty orders for failure of the Commissioner to adequately explain the basis for his administrative determination (*Matter of Givens*, PR 10-076 at 9 [February 16, 2013] [civil penalties revoked for failure to explain how penalties arrived at and why appropriate]).

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wages, interest, and liquidated damages in the wage order are affirmed, the civil penalty is revoked, and the order as modified is otherwise affirmed; and

2. The penalty order is revoked; and

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

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
March 2, 2016.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wages, interest, and liquidated damages in the wage order are affirmed, the civil penalty is revoked, and the order as modified is otherwise affirmed; and

2. The penalty order is revoked; and

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

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 Albany, New York on
March 2, 2016.