STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
ROSARIO A. MASULLO AND R & G MASULLO INC. (T/A R AND G MASULLO),	:	
Petitioners,	:	DOCKET NO. PR 14-297
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, an Order to Comply with Article 6, and an Order Under Article 19 of the Labor Law, all dated September 23, 2014,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Anthony Masullo, for petitioners.

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

WITNESSES

Anthony Masullo, Marselino Bueno, and Labor Standards Investigator Jose L. Mendez, for petitioners.

Claimant Ismael Rivera and Senior Labor Standards Investigator Pierre Magloire, for respondent.

WHEREAS:

On November 21, 2014, petitioners Rosario A. Masullo and R & G Masullo Inc. (T/A R and G Masullo) filed a petition with the Industrial Board of Appeals (Board) seeking review of three orders issued by respondent Commissioner of Labor (Commissioner or DOL) on September 23, 2014. The Commissioner answered on February 2, 2015.

Upon notice to the parties, a hearing was held on May 13, 2015 in New York, New York before Vilda Vera Mayuga, Chairperson of the Board and designated hearing officer in this

proceeding. 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 19 of the Labor Law (minimum wage order) directs payment of minimum wages due and owing to claimant Ismael Rivera in the amount of $13,594.62 for the period from March 17, 2007 to September 8, 2011, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $6,620.77, 25% liquidated damages in the amount of $3,398.66, and a 100% civil penalty in the amount of $13,594.62. The total amount due is $37,208.67.

The order to comply with Article 6 of the Labor Law (wage order) directs payment of unpaid wages due and owing to claimant Ismael Rivera in the amount of $950.00 for the period from March 17, 2007 to September 8, 2011, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $462.66, 25% liquidated damages in the amount of $237.50, and a 100% civil penalty in the amount of $950.00. The total amount due is $2,600.16.

The order under Article 19 of the Labor Law (penalty order) assesses a civil penalty in the amount of $500.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish the Commissioner true and accurate payroll records for each employee for the period from March 1, 2007 to September 30, 2011. The penalty order assessed a second penalty in the amount of $500.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.7 for failing to provide each employee a complete wage statement with every payment of wages for the period from March 17, 2007 to September 8, 2011. The total amount due is $1,000.00.

The petition alleges that the orders are invalid and unreasonable because petitioners paid claimant for all hours worked. Petitioners also challenge the Commissioner's imposition of civil penalties because respondent never requested records of them during the investigation and petitioners were only contacted after the orders under review were issued.

SUMMARY OF EVIDENCE

The Wage and Minimum Wage Claims

On September 13, 2011, Ismael Rivera filed a minimum wage complaint stating that he worked for R & G Masullo Gardening (R & G) as a gardener on a seasonal basis—from March 17th to November 30th of each year— from 2007 until September 2011 when he was discharged from his position. During the claim period, Rivera worked Monday through Saturday, except holidays, from 7:00 a.m. until 5:00 p.m. with a 30-minute meal period, which was at times cut short by his employer. In 2007, Rivera earned $85.00 per day, and each consecutive year R & G increased his daily rate by $5.00, until 2009 when his rate plateaued at $95.00 per day. Rivera was not paid for overtime hours worked. Rivera also filed a claim for unpaid wages in the amount of $1,035.00 for the weeks ending September 3 and September 10, 2011, during which he worked 57 hours over 6 days and 38 hours over 4 days, respectively, at a rate of $95.00 per day.

Testimony

Anthony Masullo

Anthony Masullo testified that he is the son of Rosario Masullo, the founder of R & G, and has been involved with the landscaping business for approximately 12 to 15 years. Masullo first met claimant in 2006 when claimant began working for petitioners midway through the 2006 season. Claimant did not work for petitioners during the 2007 season, during which time Masullo saw him working for a different landscaping company in the area, but claimant returned to work for petitioners for the 2008 through 2011 seasons. Masullo further testified that claimant started work for the 2008 season on May 12th rather than March 17th as alleged by claimant, and his last week of work in 2008 was November 15th rather than November 20th. Similarly, for 2009, Masullo explained that claimant worked from June 8th through October 24th. In 2011, claimant was "let go" due to lack of work.

Because petitioners did not use a time clock, Masullo was responsible for entering each employee's hours worked into a timesheet. Masullo introduced into evidence claimant's weekly timesheets for the pay periods ending May 24, 2008 through and including September 3, 2011, which show that claimant had a daily one-hour lunch from "12–1." The timesheets also show that claimant worked Monday through Friday, except holidays and during inclement weather, from "8:00" to "5:00." It also shows that claimant worked Saturday from "8:00" to "5:00" with lunch from "12–1" any week there had been a rainy day or a holiday, although Masullo had no recollection of R & G's employees working Saturdays since the area in which petitioners' did business was predominantly a Jewish neighborhood.

Masullo introduced into evidence paystubs petitioners issued to its employees during the claim period. The paystubs were prepared by Rosario Masullo and accompanied every paycheck issued by petitioners. Rosario Masullo paid employees solely by check. Masullo testified that he first became aware of claimant's pay rate in 2008.

Masullo testified that the first time petitioners were made aware of the claim against them was when they received the orders dated September 23, 2014. He confirmed that R & G's business address is 72 Bay 32nd Street in Brooklyn, New York which is the address listed in the orders.

Marselino (Martin) Bueno

Marselino (Martin) Bueno testified that he is a foreman for petitioners and has worked for R & G for 25 years. He works full time for petitioners each year during the landscaping season generally from April to November.

Bueno recalled working with claimant in 2010 and 2011. In 2011, from April to November, along with two other employees, Bueno worked with claimant "cleaning." Claimant worked from 8:00 a.m. and would finish work at 5:00 p.m. R & G employees worked five days per week, with a one hour lunch, though they would sometimes not work because of rain. Consequently, there were certain weeks in which the employees did not work a full 40-hour work week. They never worked longer hours to finish a job or worked on Saturdays due to the

neighborhood being "95%" Jewish. Bueno further testified that petitioners did not use a time clock to keep track of employees' hours.

Claimant Ismael Rivera

Ismael Rivera testified that he started working for petitioners in 2007. Rosario Masullo hired Rivera and agreed to pay him $80.00 per day for working Monday through Saturday. Rivera worked from 7:00 a.m. to 5:00 p.m. and would arrive back at the R & G garage by 5:30 p.m., from where he would begin his commute home. Each year that Rivera worked for petitioners, they increased his pay by $5.00 per day, until 2010, after which his pay remained at $95.00 per day. Rosario Masullo paid him each Saturday. Rivera did not work for any other landscaping companies during the claim period.

Because all employees had the same schedule, nobody recorded when employees arrived at the garage, nor was there a time clock. Five employees, who worked on one home at a time—"[o]ne would work with the dirty. One would do the weeds. One would do the blower. Two guys were cutting grass"—would typically landscape 65 homes in a single workday, with each property taking approximately 10 minutes to landscape. Some of petitioners' clients, which were all residential, were 10 in a row. At most, R & G employees were provided with 20 minutes to eat lunch. The employees worked this way six days per week until the end of the landscaping season.

September 8, 2011 was Rivera's last day working for petitioners. The last paycheck Rivera received was for the week ending August 27, 2011.

Labor Standards Investigator Jose L. Mendez

Jose L. Mendez testified that he is a labor standards investigator who was assigned to investigate the instant claim. In calculating the amount due in the minimum wage order, Mendez relied upon the claim form which states that claimant worked 57 hours per week, meaning that claimant should have been paid for 40 hours at regular time, and 17 hours[1] at the overtime rate. When claimant first started working for petitioners, he earned $85.00 per day, which totaled $510.00 per week. From these numbers, he was able to derive an hourly rate of $8.95 ($510.00 divided by 57 hours worked). With the base rate, Mendez calculated that claimant should have been paid $586.05 per week, including the proper overtime payment, with an underpayment of $76.05 per week. Mendez adjusted the underpayment calculation to reflect changes in claimant's base rate over time, and his calculations reflect when claimant stated he did not work.

Mendez testified that the June 2, 2014 letter he sent petitioners at an address in Queens Village, New York, notifying them of the claim against them and seeking employment record was returned undeliverable. Mendez further testified that he sent a follow-up letter dated June 20, 2014 to the Queens Village address with a copy to R & G's Brooklyn address notifying petitioners' of DOL's determination. The letter that was entered into evidence shows a Brooklyn address different than that of petitioners'.

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[1] We note that the hearing transcript notes that Mendez stated claimant worked fifteen hours instead of seventeen hours overtime. We understand this to be an error in the transcript, which is borne out by the balance of Mendez's testimony.

Senior Labor Standards Investigator Pierre Magloire

Pierre Magloire testified that he is a senior labor standards investigator and recommended that the Commissioner assess 100% civil penalty to the wage and minimum wage orders against petitioners. In reaching his determination, he considered the employer's "cooperation" with DOL during the pending investigation, the underpayment at issue, the size of the business, petitioners' violation of record keeping requirements, and petitioners' prior violations, if any.

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 orders on review are claimed to be invalid or unreasonable and any objections not raised in the petition shall be deemed waived (*id.* § 101 [2]).

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

The party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act § 306 [1]; 12 NYCRR 65.30; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). 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). Based on the record before us, we find that petitioners have failed to show by a preponderance of the evidence that the Commissioner's wage calculations are invalid or unreasonable. We also find respondent failed to duly consider the petitioners' good faith and record keeping obligations and accordingly revoke the civil penalties in the wage and minimum wage orders and revoke the penalty order in its entirety.

Petitioners Failed to Meet Their Burden to Establish They Paid Claimant's Wages Due

The minimum wage and supplemental wage orders direct payment of wages due and owing to claimant in the amount of $13,594.62 and $950.00, respectively, for the period from March 17, 2007 to September 8, 2011. We find that petitioners failed to meet their burden to establish an accurate accounting of the amount of work performed by claimant and the precise wages he was paid for that work or that the inferences supporting the calculation of wages made by the Commissioner were otherwise unreasonable.

The Labor Law requires employers to maintain contemporaneous, true, and 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 § 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 the records for no less than six years (Labor Law § 661; 12 NYCRR 142-2.6).

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 (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.

Petitioners introduced into evidence two sets of records—timesheets and paystubs kept by petitioners—both of which we are unable to credit. Petitioners' time records, which were maintained by Masullo in lieu of using an employee time clock, are facially inaccurate. While they show the daily hours worked by claimant on a weekly basis and his pay rate, the hours are stated in exact even numbers from day-to-day, across every week from May 24, 2008 through and including September 3, 2011. Masullo's rounding methodology demonstrate that petitioners' records are not reliable evidence sufficient to support an accurate estimate of the periods of claimant's employment, the hours he worked, or the precise wages he was paid (*see Matter of Longia* (PR 11-276 at 10 [Sept. 16, 2010] [discrediting petitioners' handwritten payroll journals in part because "[w]hen weekly and then daily hours are listed, they are stated in exact even numbers to the minute."]). On the other hand, the paystubs petitioners offered into evidence were created by Rosario Masullo, who did not appear at hearing, nor could Anthony Masullo testify to personal knowledge of R & G's payroll process. In fact, Masullo only first became aware of claimant's pay rate in 2008, whereas the claim period runs from 2007 to 2011. As such, petitioners have failed to establish the reliability of petitioners' paystubs. We cannot credit unsubstantiated evidence as an accurate estimate of the periods of claimant's employment, the hours he worked, or the precise wages he was paid. We, therefore, find that petitioners failed to maintain records required by the Labor Law.

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 [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 the absence of required records, DOL relied on the claim form to determine the underpayment, which we find reasonable in all respects. Mendez relied on the claim form which states that claimant worked 57 hours per week, for which he received $510.00 per week. Using the derived hourly rate of $8.95 per hour, Mendez determined that claimant should have been paid $586.05 per week, which results in an underpayment of $76.05. Mendez also testified that he adjusted the underpayment to reflect claimant's base rate as it changed over the claim period and reflected when claimant stated he did not work.

The Commissioner's calculations are supported by claimant's testimony, which we find was specific, detailed, and candid. Claimant explained that he began working for R & G in 2007 for $80.00 per day, Monday through Saturday, from 7:00 a.m. to 5:00 p.m., although it would sometimes take half an hour to return to the garage, that Rosario Masullo increased claimant's

daily rate by $5.00 for three consecutive years, and that Rosario Masullo paid him each week on Saturday. Claimant testified that petitioners did not use a time clock nor did anyone document each employee's hours worked, because all employees worked the same schedule. Claimant further set out the specific division of labor that allowed R & G employees to landscape approximately 65 homes in a single workday. We, therefore, find that the Commissioner was entitled to and did reasonably rely on the claim form as the best available evidence in calculating the underpayment due and owing to claimant.

In a proceeding challenging the Commissioner's determination of unpaid wages based on the best available evidence, 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]).

Petitioners' testimonial evidence fails to show the precise amount of work performed or to show that the Commissioner's inferences drawn from the claim form were irrational. Masullo testified that he worked with claimant in 2006, that claimant worked for another landscaping company in 2007, and that claimant returned to work for R & G for the 2008 through 2011 seasons until claimant was laid off for lack of work. Masullo also disputed in his testimony the specific dates on which claimant began and ended working with R & G each season. Bueno testified that for the 2011 season, claimant worked from 8:00 a.m. to 5:00 p.m., with a one hour lunch, Monday through Friday, except when there was rain. We have repeatedly held that general and unsubstantiated testimony of this sort is insufficient to meet petitioners' burden of proof (*see, e.g.*, *Matter of Young Hee Oh*, PR 11-017 at 12 [May 22, 2014] [employer cannot shift its burden to the Commissioner with arguments, conjecture, or incomplete, general, and conclusory testimony]).

Moreover, we also discredit petitioners' testimonial evidence due to an inconsistency in the record presented by them at hearing. Masullo and Bueno both testified that R & G did not conduct business Saturdays because the area in which they worked is predominately Jewish and R & G was therefore precluded from working on Saturdays. Yet the paystubs created by and offered into evidence by petitioners, show claimant worked on a Saturday the week ending on September 26, 2008. Because petitioners' own evidence shows that claimant worked on at least one Saturday, we reject petitioners' unqualified claim that claimant solely worked Monday through Friday. Accordingly, we find that petitioners have not met their burden to produce evidence of the precise work performed and wages paid or evidence sufficient to negate the reasonable inferences drawn from the Commissioner's evidence (*see Anderson v Mt. Clemens Pottery*, 328 US 680, 687–88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821; *Doo Nam Yang*, 427 F Supp 2d at 332 ; *Matter of Kong Ming Lee*, PR 10-293 at 16; *see also* Labor Law § 196-a [a]).

Because petitioners failed to prove that the Commissioner's calculation was invalid or unreasonable, we affirm the wages due and owing to claimant.

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

Liquidated Damages

Labor Law §§ 198 (1–a) and 663 (2) provide 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 Penalties in the Wage and Minimum Wage Order Are Revoked

Labor Law § 218 (1) provides that when determining the amount of civil penalty to assess against an employer who has violated a provision of Articles 6 or 19 of the Labor Law, the Commissioner shall 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.*).

Petitioners argue that the civil penalties are unreasonable because they never received any letters from DOL notifying petitioners of the claim against them or seeking records pursuant to DOL's investigation. Mendez confirmed that DOL's June 2, 2014 letter to petitioners was returned marked undeliverable. While Mendez testified that DOL's June 20, 2014 letter was mailed to both the Brooklyn and Queens Village address DOL had on file for R & G, respondent failed to rebut Masullo's claim that petitioners' never received the letter. Nothing in the record shows that respondent used petitioners' correct mailing address at any time prior to issuing the orders under the review. In explaining the basis for the civil penalties, Magloire testified in a general fashion that he considered the employer's "cooperation" as a basis for the civil penalties. Petitioners' argue, and respondent failed to contest, that DOL did not contact petitioners until *after* the Commissioner's orders issued. Under the circumstances of this case, we find the Commissioner failed to duly consider the petitioner's good faith and compliance with record keeping obligations (*see Matter of Ahmed*, PR 12-081 at 11 [April 13, 2016]). We revoke the civil penalties in the wage and minimum wage orders accordingly.

The Penalty Order is Revoked

Count 1 of the penalty order assesses a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish accurate payroll records for each employee from March 1, 2007 through September 30, 2011. Count 2 of the penalty order assesses a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages during the period from March 17, 2007 through September 8, 2011. As discussed above, DOL made no request of petitioners that they produce any relevant payroll records before it reached its determination that petitioners were responsible for wages owed. Under the circumstances of this case, we find the Commissioner failed to duly consider the factor concerning petitioner's good faith and revoke the penalty order in its entirety (*see Matter of Ahmed*, PR 12-081 at 11–12).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed but modified to reduce the total amount due by revoking the civil penalty; and

2. The minimum wage order is affirmed but modified to reduce the total amount due by revoking the civil penalty; and

3. The penalty order is revoked; and

4. The petition is otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members of the Industrial Board of Appeals in New York, New York, on September 14, 2016.

The Penalty Order is Revoked

Count 1 of the penalty order assesses a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish accurate payroll records for each employee from March 1, 2007 through September 30, 2011. Count 2 of the penalty order assesses a $500.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages during the period from March 17, 2007 through September 8, 2011. As discussed above, DOL made no request of petitioners that they produce any relevant payroll records before it reached its determination that petitioners were responsible for wages owed. Under the circumstances of this case, we find the Commissioner failed to duly consider the factor concerning petitioner's good faith and revoke the penalty order in its entirety (*see Matter of Ahmed*, PR 12-081 at 11–12).

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1. The wage order is affirmed but modified to reduce the total amount due by revoking the civil penalty; and

2. The minimum wage order is affirmed but modified to reduce the total amount due by revoking the civil penalty; and

3. The penalty order is revoked; and

4. The petition is otherwise denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Syracuse, New York, on
September 14, 2016.