STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
DOV GREENBAUM AND MOLD PRO RESTORATION SPECIALIST LLC (T/A MOLD PRO),	:	
Petitioners,	:	DOCKET NO. PR 15-372
To Review Under Section 101 of the Labor Law: An Order to Comply With Article 19 of the Labor Law, and An Order Under Article 19 of the Labor Law, both dated September 21, 2015;	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent,	:	

APPEARANCES

Dov Greenbaum, petitioner pro se, and for Mold Pro Restoration Specialist LLC.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (John-Raphael Pichardo of counsel), for respondent.

WITNESSES

Dov Greenbaum, for petitioners.

Javier Velasquez and Labor Standards Investigator Edwin Rodenhaus, for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on November 17, 2015, and seeks review of two orders issued against petitioners Dov Greenbaum and Mold Pro Restoration Specialist LLC (T/A Mold Pro) on September 21, 2015. Respondent Commissioner of Labor filed an answer to the petition on January 6, 2016.

Upon notice to the parties a hearing was held in this matter on May 13, 2016, in New York, New York, before Devin A. Rice, Counsel to the Board, and designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to

examine and cross-examine witnesses, and make statements relevant to the issues raised in the proceeding.

The order to comply with Article 19 (minimum wage order) under review directs compliance with Article 19 of the Labor Law and payment to the Commissioner for unpaid minimum wages due and owing to Javier Velasquez for the time period from March 27, 2012 to March 5, 2015, in the amount of $18,648.00, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $1,634.89, 100% liquidated damages in the amount of $18,648.00, and assesses a 100% civil penalty in the amount of $18,648.00, for a total amount due of $57,578.89.

The order under Article 19 of the Labor Law (penalty order) assesses a $1,000.00 civil penalty 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 from on or about March 27, 2012 through March 5, 2015.

SUMMARY OF EVIDENCE

Javier Velasquez filed a claim with DOL on March 27, 2015, alleging he worked for petitioners from January 15, 2011 to March 5, 2015 at various sites performing construction work. Velasquez's claim states that from March 27, 2012 to March 5, 2015, he worked for petitioners Sunday 8:00 a.m. to 6:00 p.m., Monday and Tuesday 8:00 a.m. to 9:00 p.m., Wednesday from 7:00 a.m. to 10:00 p.m., Thursday from 7:00 a.m. to 11:00 p.m., and Friday from 7:00 a.m. to 3:00 p.m. The claim also states that there was no meal break. Velasquez reported that his salary was $600.00 a week "set salary." Velasquez did not work on Jewish holidays.

Petitioner Dov Greenbaum testified that when he first went into business "doing mold work," he was living and working in New Jersey. Greenbaum moved to New York on September 13, 2012, and testified that he did not work or do business in New York prior to moving to New York, because as a "one truck operation," he did not drive two-and-one-half hours each day from his residence in New Jersey to work in New York. Greenbaum described his business once he moved to New York as doing mold removal and cleaning pipes and water damage. Prior to Hurricane Sandy,[1] Greenbaum performed all jobs by himself. Because of the demand for water damage cleanup and mold abatement after Sandy, Greenbaum's business expanded and he began to hire employees, who all started as day laborers. Greenbaum explained that his first employee was "Eric," and when he needed additional employees, he asked Eric to bring additional workers. Eric brought "Carlos," who became Greenbaum's main employee after Eric was in a bicycle accident and could no longer work. Greenbaum asked Carlos to bring employees when needed, and it was "a chain" until Javier Velasquez started working for Greenbaum on July 20, 2013.

Greenbaum testified that he paid Velasquez the same as his other employees -- $110.00 per day from 9:00 a.m. to 5:00 p.m. Greenbaum did not calculate overtime based on a 40 hour week, testifying that "I calculated if there was work after 5 p.m., then whatever hours we worked after that, I would give time and a half for that time period." Greenbaum explained that he determined the time-and-one-half rate by dividing $110.00 by eight hours, and multiplying the quotient by

[1] Notice is taken that Hurricane Sandy hit New York City and surrounding areas on October 29, 2012.

time and a half, and the he usually "rounded it up." Greenbaum further testified that he eventually raised Velasquez's daily rate to $120.00.

Greenbaum testified that Velasquez did not work six days every week during the entire claim period, nor did he work as late as he alleged. Greenbaum explained that Velasquez worked for somebody else in Brooklyn, so was not always able to work on jobs for Greenbaum. Greenbaum further testified that 90% to 95% of the jobs were in residential homes and it was very rare for a job to require work until 9:00, 10:00, or 11:00 p.m., as alleged by Velasquez.

Greenbaum testified that he did not work on Jewish holidays, but admitted that Velasquez may have gone without Greenbaum to a job on a Jewish holiday in a non-religious household. Greenbaum supplied the Board with a calendar of Jewish holidays that he did not work on, and also appointment books showing all the jobs he worked starting in 2013. Greenbaum testified that the appointment books show "which days I had worked, who the customer was, [and] what kind of job it was." Greenbaum further testified that "every single job is in the calendar" and that "absence of anything written . . . means there was nothing going on that day, no job, no inspection, nothing."

Greenbaum also provided the Board with checks written to Velasquez, including the fronts and backs of the checks. He testified that he paid by check and "never paid anybody by cash." One of the checks in evidence is dated November 21, 2012, prior to the date Greenbaum testified he hired Velasquez. When asked to explain this discrepancy, Greenbaum stated that July 2013 was the first time Velasquez "started to work for me every week whenever I had jobs . . . . He must have worked for me this one week, but that was it." Greenbaum further stated that "maybe it's a different Javier . . . it could be he worked for me that one week, maybe a couple of days or whatever, I don't know, I just don't remember, but I guess there is a possibility that was a different Javier Velasquez . . . . I just don't know."

Greenbaum testified that he kept track of his employees on a yellow note pad that he no longer has, and that he had no other time sheets. Greenbaum testified that he was on site with the employees for 99% of the jobs, but that there were one to three occasions when he was out of town and not present at the job sites.

Greenbaum also testified that he did not receive any correspondence from DOL prior to receiving the orders.

Claimant Javier Velasquez testified that he worked for Greenbaum doing demolition, cleaning, spraying, painting, and plastering. Velasquez testified he worked for Greenbaum from the end of 2012 until 2015, and that he filed a claim with DOL against petitioners "[d]ue to the extensive hours that I was working and for the reason that he said to me that I could no longer work over there with him." He later clarified that he started working for Greenbaum on March 12, 2012, and his last day was February 5, 2015. According to Velasquez, Greenbaum paid him $110.00 per day in cash, and he worked six days a week, Sunday to Friday. He later clarified that Greenbaum paid him $120.00 a day for the work they did "later on." Velasquez testified that "[i]n relation to the hours, I cannot be exact, but there were times that we had to start at 7:00 in the morning, at 8:00 in the morning and at 9:00 in the morning." Velasquez further testified that no breaks were provided and he "would work straight." Velasquez also testified that Greenbaum was usually present on the jobs, but "once in a while" was absent.

Velasquez testified that he did not work for anybody else during the time he worked for Greenbaum. He further testified that in the beginning Greenbaum paid cash, "but at the end he will pay us by check."

Velasquez testified that he did not work every Sunday. He further testified that the hours he claimed he worked was an average and that in actuality the hours varied. The schedule written on the claim form, according to Velasquez, was an estimate of an average week. Velasquez also testified that he worked six days every week for three years, that he was paid $660.00 each week, and that he was not paid overtime, but clarified that he did not always work six days a week, because Greenbaum did not work on Jewish holidays, and that he only worked two Sundays a month. Velasquez denied that he was paid extra for working later than 5:00 p.m. and that he was paid $110.00 a day no matter how many hours he worked. Velasquez, however, also testified that "the normal rate was 110, he will pay us 120 when we would work one hour more or two hours more, but not every single day." Velasquez denied that he worked for four months at a restaurant, explaining that he only worked one day at the restaurant and then went back to work for Greenbaum.

Velasquez testified that in 2012 he met Greenbaum each day for work in Far Rockaway at 8:30 or 9:00 a.m. at "a point in which people gather in order to look for [a] job." Velasquez explained that at that time Greenbaum told him he was living in New Jersey, but was in the process of moving to New York.

Labor Standards Investigator Edwin Rodenhaus testified that at the time of hearing he had been employed by DOL as an investigator for 12 years and conducted between 800 to 1,000 investigations. Rodenhaus testified that he investigated the claim of Javier Velasquez and was personally familiar with Velasquez's claim form. Rodenhaus explained that after he received the claim, he sent a letter to petitioners requesting payroll records for Velasquez, but petitioners never responded. Rodenhaus further explained that he "completed an audit because the employer didn't supply the records based on what were submitted with the claim form." Rodenhaus testified that he determined the underpayment due to Velasquez based on the hours Velasquez claimed when he met with an investigator in New York City. Rodenhaus "verified the total hours into the salary to come up with an hourly rate and then multiplied the hours over to 40 for the underpayment each week." Rodenhaus further testified that the investigator in New York City removed Jewish holidays from the spreadsheet and calculated no underpayment for days that were indicated as Jewish holidays.

After completing the audit, Rodenhaus sent a letter to petitioners explaining the amounts found due and requesting records or payment. Petitioners did not respond and the orders were issued. The orders included a civil penalty in the amount of 100 % of the wages found due and owing because "the employer never responded and never provided records to dispute what [was] computed." Rodenhaus explained that in determining the civil penalty he considered the size of the firm, the good faith of the employer, and the gravity of the violation." Liquidated damages were assessed at 100 % of the wages due and owing because of "the same reasoning as [the civil penalty], not paying overtime, not providing records, full payroll cards, the good faith of the employer and the non-reporting violation."

Rodenhaus testified he never spoke to Velasquez and never tried to verify his claim prior to issuance of the orders because "the investigator in New York City did the intake on it, so I just

based it on what she took as his hours of work." Rodenhaus further testified that "[o]nce we don't get a response from the employer, we are required to compute based on what the claimant has submitted." Rodenhaus testified that he never attempted to speak to petitioners because there was no response to the letters he sent petitioners, which he assumed they had received.

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

Burden of proof

Petitioners' burden of proof in this matter is to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30; *see also Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [2011]). We find petitioners met their burden of proof to show the minimum wage order must be modified, but failed to show the penalty order is unreasonable.

Petitioners failed to maintain required records

Article 19 of the Labor Law requires employers to maintain for no less than six years payroll records that show for each employee, among other things, the wage rate, number of hours worked daily and weekly, including the time of arrival and departure of each employee working a spread of hours exceeding ten, the amount of gross wages, and the net wages paid (12 NYCRR 142-2.6 [a]; *see also* Labor Law § 661). Article 19 also requires every employer to provide each employee a statement with each payment of wages showing the hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages (12 NYCRR 142-2.7). Payroll records must be produced to DOL for inspection when requested (Labor Law §§ 660, 661). It is undisputed that petitioners failed to keep the records required by Article 19, and did not provide wage statements to employees with each payment of wages.

The minimum wage order is modified

Article 19 of the Labor Law, entitled the "Minimum Wage Act," sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]), and its implementing regulations require payment of time and one-half a non-residential employee's regular hourly rate for each hour worked over 40 in a week (12 NYCRR 142-2.2).

The minimum wage order finds petitioners owe Velasquez $18,648.00 in unpaid overtime for the period from March 27, 2012 through March 5, 2015. In the absence of required 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 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

calculation to the employer" (*see also Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1st Dept 2013], *cert denied* 21 NY3d 858 [2013]). Petitioners have the burden of showing that the minimum 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 (*Ram Hotels, supra*). Where no wage and hour records are 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).

Greenbaum denied that Velasquez worked the amount of hours claimed and presented evidence in the form of a calendar for the time period from February 2, 2013 through March 7, 2015 to show the number of days he had jobs scheduled. Greenbaum testified credibly that every job petitioners worked was noted in the calendar, and also produced numerous text messages from himself to Velasquez showing that petitioners did not work six days or even five days every week as determined by respondent. Having reviewed Greenbaum's calendar, we find that Velasquez could have only worked overtime in 41 out of the 109 weeks between February 2, 2013 and March 7, 2015.

Velasquez's testimony was not sufficient to overcome our finding. Velasquez variously testified that the hours he indicated he worked on his claim form were an estimate, that he worked six days a week for three years, that he only worked on Sunday twice a month, that he was paid $660.00 a week, and that he was not paid by check. Petitioners' credible evidence, however, shows that an average work week for two years of the claim period was 3 ½ days a week, and numerous checks introduced into evidence as well as text messages between Greenbaum and Velasquez show petitioners paid Velasquez by check and that his wages were not $660.00 every week but varied based on the number of days worked consistent with Greenbaum's testimony that he paid day rates. Based on our review of Greenbaum's calendars we find that from February 2, 2013 to March 7, 2015, he failed to pay Velasquez $3,069.00 in overtime based on a day rate of $110.00 a day and 12 ½[2] hour work day for each day indicated as a work day by the calendars. Because petitioners failed to provide any proof of the hours worked by Velasquez for the time period from March 27, 2012 and February 1, 2013, he failed to meet his burden of proof for that time period. We find petitioners owe Velasquez $8,305.00 in unpaid overtime and modify the minimum wage order accordingly.

Civil penalty

Labor Law § 218 (1) provides that if respondent determines an employer has violated certain provisions of Article 19, including failure to pay overtime, must assess an "appropriate civil penalty." The civil penalty assessed must be 200 % if respondent finds the violation was willful or egregious, or if the employer has previously violated the Labor Law. Otherwise, in assessing the amount of the penalty, the respondent must "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

[2] Based on claimant's allegation in his claim form that he worked 75 hours, six days a week, which is an average of 12 ½ hours per day, and which was not sufficiently rebutted by petitioners who provided no time records or clear testimony of the hours per day worked by claimant.

case of wages . . . the failure to comply with recordkeeping or other non-wage requirements" (Labor Law § 218 [1]).

Respondent assessed a 100 % civil penalty against petitioners, which Rodenhaus testified was based on petitioners' failure to respond to DOL's correspondence and not providing records to dispute respondent's determination of the amount of wages owed. Rodenhaus also testified that in determining the civil penalty he considered the size of the firm, the good faith of the employer, and the gravity of the violation. While there is no dispute petitioners failed to keep legally required records or respond to DOL, Greenbaum credibly testified that he never received any correspondence from DOL during the investigation to which he could have responded. We credit Greenbaum's testimony and revoke the civil penalty as improperly assessed because Greenbaum was unaware of the investigation and therefore could not have been found uncooperative or lacking good faith.

Liquidated damages

Labor Law § 218 (1) also requires respondent to include liquidated damages of 100 % of the wages found due with the order. Liquidated damages must be paid by the employer unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law."[3] Greenbaum credibly testified that he paid overtime on a daily instead of a weekly basis by paying an extra amount to employees when they worked more than eight hours in a day. Although this resulted in an underpayment, we credit Greenbaum's testimony and find it shows a good faith belief under the circumstances that such underpayment was in compliance with the law. The liquidated damages are revoked.

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." The Commissioner's determination of interest due was required by statute and did not exceed the statutory limit, and is therefore not unreasonable or invalid, but must be recalculated based on the modified principal amount.

The penalty order is affirmed

The penalty order assesses a $1,000.00 civil penalty 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 from on or about March 27, 2012 through March 5, 2015. There is no dispute that petitioners failed to keep and/or furnish the required records. The penalty order is affirmed.

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[3] While Labor Law § 218 (1) requires the Commissioner to include 100 % liquidated damages in her orders to comply, Labor Law § 663 (2) provides that liquidated damages shall be calculated by the Commissioner as "no more than" 100 % of the underpayments found due.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is modified to reduce the wages due and owing to $8,305.00, the civil penalty to $0.00, liquidated damages to $0.00, and to recalculate the interest on the modified principal amount; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is, granted in part and denied in part.

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.