STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	
MICHAEL BENNER AND ROC RAIDERS PROFESSIONAL FOOTBALL TEAM, LLC,	
Petitioners,	
	DOCKET NO. PR 16-005
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated November 17, 2015,	RESOLUTION OF DECISION
- against -	
THE COMMISSIONER OF LABOR,	
Respondent.	

APPEARANCES

Michael Benner, petitioner pro se, and for *Roc Raiders Professional Football Team, LLC (T/A Rochester Raiders).*

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Steven J. Pepe* of counsel), for respondent.

WITNESSES

Michael Benner and Melody Millar, for petitioners;

Labor Standards Investigator Shaun Abrilz, Anthony Bartley, and Edward Moody, for respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals on January 8, 2016, for review of two orders issued by respondent Commissioner of Labor against petitioners Michael Benner and Roc Raiders Professional Football Team, LLC (T/A Rochester Raiders). Respondent Commissioner of Labor answered the petition on February 16, 2016. Upon notice to the parties a hearing was held on June 1 and September 28, 2016, in Rochester, New York, before J. Christopher Meagher, Member of the Board, and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present

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

The order to comply with Article 6 (wage order) directs petitioners to comply with Article 6 of the Labor Law and seeks payment to respondent for wages due and owing to five named claimants[1] in the amount of $9,165.00 for the time period from February 1, 2014 through April 11, 2014, with interest continuing thereon at the rate of 16% calculated to the date of the wage order, in the amount of $1,509.71, 100% liquidated damages in the amount of $9,165.00, and assesses a 200% civil penalty in the amount of $18,330.00, for a total amount due of $38,169.71.

The order under Article 19 of the Labor Law (penalty order) imposes a $1,000.00 civil penalty against petitioners 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 February 1, 2014 through April 11, 2014.

Petitioners argue the orders are unreasonable because they did not employ Anthony Bartley, Edward Moody, Henry Davis, and Michael Rothschild,[2] and Adam Friedman was paid by petitioners in full.

SUMMARY OF EVIDENCE

Claims

Anthony Bartley filed a claim for unpaid wages with respondent, dated April 28, 2014, against Rochester Raiders Pro Arena Football, alleging that he worked as "VP of Football Ops/Director Player" for the team, was hired by petitioner Michael Benner on November 1, 2013, had an agreed rate of pay of $15,000.00 per season (March 1 to August 31), and as of the date of the claim was still working for the team, which at that time was under new ownership. Bartley's claim alleges that petitioners failed to pay him $1,875.00 per game for the weeks ending March 27, 2014, April 5, 2014, and April 11, 2014, for a total amount claimed of $5,625,00. An "agreement for services" attached to Bartley's claim titled "Rochester Raiders Rochester, NY 2014 ('project')," states that it is entered and effective November 11, 2013, and was signed by Bartley on November 11, 2013, and allegedly signed by Benner on January 24, 2014. The agreement provides that "owner shall pay employee a $15,000.00 base salary for the 2014 season in equal increments with payments bi-weekly starting the opening day of training camp and with the final payment no more than two weeks following the final game of the 2014 season."

Edward Moody filed a claim, dated April 29, 2014, against petitioner Michael Benner and Roc Raiders LLC, alleging that he worked as "staff" for the team, was hired by Benner in February 2014, had varying pay rates, and was still working for the team as of the date of his claim. Moody's claim alleges he worked 204 hours in February and March 2014, and was promised $10.00 per hour, for a total claim of $2,040.00. An agreement for services attached to Moody's claim, entitled "Rochester Raiders Rochester, NY 2014 ('Project'), was signed by

[1] Respondent's counsel advised the Board at hearing that the parties settled the claim of Michael Rothschild prior to hearing.
[2] *Id.*

Moody on February 21, 2014, and was allegedly signed by Benner on the same date. The agreement provides that "owner shall pay employee $10.00 per hour in base salary for the 2014 season in equal increments with payments weekly, starting on the opening day of training camp and with the final payment no more than two weeks following the final game of the 2014 season."

Henry Davis filed a claim, dated May 5, 2014, alleging he worked for Benner and the Rochester Raiders as equipment manager at an agreed rate of $225.00 per game, that he was hired by Benner in February 2014, and his last day of work was April 11, 2014, when the league "suspended the owner." Davis' claim alleges he was not paid for work performed from March 22, 2014 to April 11, 2014, for a total claim of $675.00.

Adam Friedman filed a claim, dated August 19, 2014, against Benner and Bob Gunther alleging he was not paid for work performed from March 22, 2014 to July 31, 2014, for a total claim of $1,050.00. Friedman's claim does not specify his position or who hired him, but states an agreed rate of pay of $150.00 per game and a last day worked of July 31, 2014.

Petitioners' evidence

Testimony of Michael Benner

Petitioner Michael Benner testified that from January 2014 to April 7, 2014, he owned and operated the Rochester Raiders, a professional indoor football team based in Rochester, New York. The Raiders were a member of the American Indoor Football League (AIFL), and as such, were governed by the league's rules, which, according to Benner, limited its teams' payrolls and approved employee and player contracts. Benner testified that in general, the players practiced twice a week and were not paid for practice, only for games. Benner testified the team only played two games "under [his] watch" before he relinquished control on April 7, 2014, and surrendered the team to the AIFL to be taken over by a new owner, Approved Sports Management, and that he was no longer responsible for wages owed after that date. The Raiders played an away game in Cleveland on March 22, 2014, and were supposed to play a home game against Baltimore in Rochester on April 5, 2014, but the game was played in York, Pennsylvania due to difficulties securing a facility in Rochester for the game. The Cleveland and Baltimore games were the only two games played by the Raiders during Benner's ownership of the team.

Benner testified that petitioners paid Adam Friedman, a player, in full, for the two games he played for the Raiders while Benner was owner, as demonstrated by a payroll check made out to Friedman from Roc Raiders Football on April 4, 2014, in the amount of $45.50, representing a payment of $50.00 for playing in one game, less taxes. Benner testified players could make up to $150.00 per game, and explained that their base salary was $50.00 per game and that in addition players earned performance bonuses as determined by the coaches.

Benner testified that he never hired Anthony Bartley, nor did he draft or sign the contract attached to the claim form Bartley filed with respondent. According to Benner, Bartley sent him the contract but he did not agree to it because after consulting the league about the proposed contract, league officials advised, "no, too much money." Benner also testified that he informed Bartley if he wanted to work for the Raiders, he needed to relocate to Rochester. Benner testified that although he did interview Bartley in Rochester, he never hired him, did not sign Bartley's

proposed contract, and Bartley did not relocate to Rochester. Benner further testified that Jarrold Rogol performed the duties Bartley alleged he performed, and after Rogol left, Benner assumed those duties.

Benner testified Edward Moody worked as the director of football operations prior to Benner's involvement with the team. Moody, according to Benner, wanted to continue working for the team and presented Benner with a contract, which Benner did not agree to and never signed. Benner testified that the signature on the contract attached to the claim Moody filed with respondent is not his signature. Benner explained that the "money [Moody] wanted was preposterous." Benner testified that to his knowledge, Moody was not present at team practices during the time he owned the team. Benner, however, was only present at one practice during the time he owned the team, and "[t]he coaches were in charge . . . completely in charge of the practice facility and whoever came in."

Benner testified he only met Henry Davis one time, at a team practice, and told him it was not possible for the team to pay him due to budget restrictions. Benner explained that he told Davis he has no objection to him "hanging around" the team, but that he would not be part of the staff. Benner further testified that even players did not make as much as the $225.00 a game Davis alleged he was promised.

Testimony of Melody Millar

Melody Millar testified that she joined the team in November 2013, initially to assist with marketing, and eventually became Benner's assistant. Millar testified that the AIFL had to approve all contracts, and did not approve the proposed contracts for Bartley and Moody. The league did not approve Bartley's proposed contract because the salary was too high for a market of Rochester's size. The league rejected Moody's proposed contract because, according to Millar, there was no need for his position. Millar further testified that Bartley was only present in Rochester for one week. Additionally, Millar testified that all player payrolls were submitted and to the best of her knowledge the players were all paid in full.

Respondent's evidence

Testimony of Anthony Bartley

Anthony Bartley testified he was vice-president of football operations and director of player personnel for the Rochester Raiders from January 2014 until April 2014, when Benner lost control of the team, but had accepted the job in November 2013, taking over the position previously held by Jarrod Rogol. He described his work as director of player personnel as recruiting players and working alongside the coaches as an intermediary between them and ownership. As vice-president of football operations, Bartley explained that he:

> "pretty much handled the day to day when it come down to the players, anything that would have to do with stadium set up and what have you. Taking care of the – help taking care of, you know, if we were hosting a team. Anything that was football related, that was my duties."

Bartley testified that he was referred to the Raiders by a former AIFL owner and hired by Benner. Bartley, when explaining the contract he allegedly entered with petitioners, testified that:

> "there was a contract that was signed by Benner. What Mr. Benner did was he forwarded me the copy of the contract that he had signed with Mr. Rogol who I – who I took over the position for. And he – and we agreed on the amount that was agreed to have been paid with Mr. Rogol, which was 15,000 [dollars] for the season, which he would also be responsible for taking care of my air – my travel, when needed, and my housing."

Bartley believes the contract was signed in January 2014, when he was present in Rochester, and testified that "we signed the contract on the date that the contract states. [Benner] signed it. We were in his hotel room."

Bartley testified that he was only in Rochester for two weeks in January 2014, which is when he entered the contract with Benner, and that part of his agreement with Benner was that due to a personal matter he needed to go to Los Angeles, and then Benner would pay for him to travel back to Rochester, but Benner could not afford the ticket, so Bartley did not return to Rochester. Bartley testified that although he was not present in Rochester, he worked every day and had access to the players, who complained that they had not been paid.

Bartley testified that he was supposed to be paid per game "just like the players," who earned $150.00 per game, but was never paid. He further testified that he was supposed to be paid $15,000.00 for the season. Bartley requested money from Benner, and Benner said he would try to pay him.

Bartley testified that he met Moody when he arrived in Rochester, and that Moody was his assistant. Bartley further testified that Adam Friedman was a player for the Raiders, and he does not know Henry Davis.

Testimony of Edward Moody

Edward Moody testified that from February to March 2014 he worked with the Rochester Raiders as director of football operations, handling the front office and overseeing the day-to-day operations of the team. Moody testified his hours varied, but he probably worked six hours a day, five to six days a week, and that his pay rate was between $10.00 to $15.00 per hour. Moody testified he had a contract with the Raiders, but was not paid under it, so he filed a claim with respondent after asking Benner several times for payment and not being paid despite Benner's promises to pay him. Moody also testified that he worked for the Raiders prior to Benner becoming owner and stayed with the team after Benner left.

Moody testified that Benner did not sign the contract attached to his claim form in his presence, and explained that "I know [Benner] had it at one point and he didn't give it back and then he decided to do it later, I guess" and that he "gave it to [Benner] and he took care of it and I – I got it back."

Moody testified that Antony Bartley was his colleague. Bartley, according to Moody, was flown in by Benner from Las Vegas, started to work for the tema, during preseason, and did a lot of work for the team. Moody further explained that Bartley was supposed to return to Rochester, "but as time went on, those things didn't go into play."

Moody testified that Henry Davis was part of the equipment management crew and hydration team and was present during nearly all practices and games. Moody testified that Adam Freidman was a player and that he played in the first two games of the season.

Testimony of Labor Standards Investigator Shaun Abrilz

Labor Standards Investigator Shaun Abrilz testified he was assigned by his supervisor to investigate claims for unpaid wages filed against petitioners. Abrilz indicated he had contact with Bartley and Moody, but never spoke with the other claimants. Bartley claimed that petitioners owed him $15,000.00 and provided a written contract to support his claim. Respondent, however, determined petitioners only owed Bartley $5,000.00 because he only worked for one-third of the season before he returned to Las Vegas. Moody also provided respondent with a written contract to support his claim that he worked as director of team operations.

Abrilz testified that Benner provided respondent with payroll records when requested, but Bartley was not included in the records. Abrilz explained that respondent substantiated the claims filed against petitioners because some of the claimants did not show up on the payroll records. Abrilz testified that he does not know the basis for the civil penalties and liquidated damages assessed against petitioners, because those recommendations were done by his supervisors after he had completed his investigation.

Abrilz, when shown documents signed by Benner, testified that it did not appear to be the same signature as on the contracts provided to respondent by Bartley and Moody.

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provision of Board Rules (12 NYCRR) § 65.39.

Petitioners have the burden to show by a preponderance of evidence that the orders are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101, 103; Board Rule [12 NYCRR] § 65.30; *Matter of RAM Hotels, Inc.*, PR 08-078 at p 24 [Oct. 11, 2011]). Petitioners argue the orders are unreasonable with respect to Anthony Bartley, Edward Moody, and Henry Davis because they were not employed by petitioners, and with respect to Adam Friedman because he was paid in full by petitioners.

Article 6 of the Labor Law defines an "employee" as any person employed for hire by an employer in any employment (Labor Law § 190 [2]). "Employer" as used in Article 6 of the Labor Law means "any person, corporation or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]; *see also* Labor Law § 650 [6] [similar definition of employer under Article 19 of the Labor Law]). "Employed" means

"suffered or permitted to work" (Labor Law § 2 [7]). We find that petitioners employed the claimants.

Benner testified that claimants Anthony Bartley, Edward Moody, and Henry Davis were not employed by petitioners; however, Bartley and Moody provided detailed and specific information concerning their employment for petitioners. Bartley described being hired by Benner, his job duties with the Raiders, and gave detailed and credible testimony concerning specific assignments he worked on such as negotiating with hotels for rooms for the players. Moody provided detailed and credible testimony about the work he performed for petitioners, his hours of work, and his promised rate of pay. Bartley and Moody corroborated each other's testimony that they worked for petitioners, and Moody credibly testified that Henry Davis worked for petitioners as part of the equipment management and hydration team and was always present at practices and games.

While we find Benner's testimony that he told Moody and Davis that he could not pay them and did not consider them employees is credible, the record shows that, nonetheless, Moody and Davis performed work for petitioners, were present at practices and games, and were "suffered or permitted to work." Benner, although he testified he was not present at practices, and therefore may not have been aware that Moody and Davis were working for the team is still liable as an employer (along with petitioner Roc Raiders Professional Football Team LLC) for unpaid wages because petitioners benefitted from their work (*Matter of Enigma Management Corp.*, PR 11-001 [September 16, 2015]). Under the Labor Law, Benner did not need to be present on a daily basis directly supervising employees to be held liable as an employer for unpaid wages (*Matter of Yick Wing Chan et al.*, PR 08-174 at p4 [October 17, 2012] *aff'd by Chan v Industrial Bd of Appeals*, 120 AD3d 1120 [1st Dept 2014]). We also find petitioners employed Bartley. Bartley testified credibly that petitioners hired him to replace Jarrold Rogol, that Benner paid for him to fly to Rochester during the Raiders' preseason, and that he continued to work for petitioners despite Benner not being able to pay for him to return to Rochester after flying home to attend to a personal matter. Petitioners did not provide sufficient evidence to rebut Bartley's credible testimony. Further, while the contracts attached to the claims filed by Bartley and Moody do not appear to have the same signature as other documents signed by Benner, we do not find this dispositive of whether Bartley and Moody worked under the terms of the contracts or provided services to petitioners. Bartley and Moody credibly testified about the formation of the contracts, that they understood the terms of the contracts governed their employment with petitioners, that they worked and performed services for petitioners, and, in the case of Bartley, that Benner signed the contract in his presence. This testimony was not rebutted by petitioners.

Having found that claimants were employed by petitioners, Article 6 of the Labor Law provides that "clerical and other worker[s]" must "be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days, designated in advance by the employer" (Labor Law § 191 [1] [d]). "Wages" are defined by Article 6 as "the earnings of any employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis" (Labor Law § 190 [1]). Respondent determined based on claims and statements provided by Anthony Bartley, Edward Moody, Henry Davis, and Adam Friedman, that petitioners violated Article 6 of the Labor Law by failing to pay claimants their earned wages.

To assure that employees are properly paid their wages for the actual hours worked, the Labor Law requires employers to maintain payroll records that include, among other things, its 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 and 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 (*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 (*Id.*). The Labor Law also requires employers to provide employees written notice at the time of hiring of their rates of pay, and the basis thereof, along with other relevant information and to obtain a written acknowledgement of receipt of the notice from the employee (Labor Law § 195 [1]). 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 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 legally required records, 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 requirement is applicable 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]).

With respect to Bartley, Davis and Moody, petitioners presented no records regarding their employment. The only evidence petitioners presented was the testimony of Benner and Millar that Bartley, Davis and Moody were not petitioners' employees. As discussed above, we did not credit this testimony, and find that petitioners, in the absence of legally required records, failed to meet their burden of proof to show the precise amount of work performed by Bartley and Moody or to negate the reasonableness of respondent's determination of the hours worked and wages owed, which was based on the employees' claims and statements, and respondent's investigators' review of the evidence and adjustments to Bartley's claim to reduce the wages owed consistent with the actual time-period he worked for petitioners. We do, however, find that the wages respondent found due to Davis must be reduced. Davis claimed that his rate of pay was $225.00 per game. The record is clear that the Raiders only played two games while petitioners owned and operated the team. Therefore, the wages found due and owing to Davis must be reduced from $675.00 to $450.00.

With respect to Adam Friedman, petitioners produced a check in the amount of $45.50 as proof of payment for the March 24, 2014 game, and offered credible testimony that petitioners only controlled the team for two games – March 24, 2014 and April 4, 2014. We do not credit petitioners' testimony that Friedman's wage rate was $50.00 per game with possible earnings up to $150.00 as opposed to Friedman's claimed rate of $150.00 per game. Benner's testimony was

not consistent concerning the player's pay rates and whether any portion of their compensation was a bonus. Friedman claimed that his rate was $150.00 per game, which was consistent with Bartley's testimony that players were to be paid $150.00 per game and is also consistent with Benner's own testimony that players could earn up to $150.00. The record indicates that players signed contracts with the club consistent with policies set by the AIFL. Petitioners, however, did not produce Friedman's contract, nor did they produce a written notice given to Friedman at the time he was hired setting forth his rate of pay as required by Labor Law § 195 (1). In the absence of sufficient proof, including a required written notice of Friedman's pay rate, we find respondent's determination that Friedman's rate was $150.00 per game as stated on his claim form is reasonable. We do, however, credit Benner's testimony, as supported by the entire record, that petitioners only owned and operated the team for two games. We, therefore, find petitioners owe Friedman $300.00 ($150.00 per game for two games) less $45.00 credit for wages paid, for a total amount of $254.50 and the wage order is reduced accordingly.

Liquidated Damages

Respondent included liquidated damages of 100% of the wages found due. Labor Law § 218 (1) 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." The assessment of liquidated damages is upheld, because petitioners failed to prove a good faith basis to believe the underpayments were in compliance with the law.

Civil penalty

The wage order assesses a 200% civil penalty. Labor Law § 218 (1) requires respondent to impose a 200% civil penalty where she determines the employer has violated the Labor Law before, or that the violation is willful or egregious; however, Abrilz testified he did not know the basis for imposing a 200% civil penalty against petitioners because the determination was made by his supervisors after he completed his investigation. Because respondent failed to explain the basis for the civil penalty, it is revoked.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then 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 did not present any evidence to challenge the interest. Interest is affirmed.

Penalty Order

The penalty order assesses a $1,000.00 civil penalty against petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee from on or about February 1, 2014 through April 11, 2014. Labor Law § 218 (1) provides that where a violation is for a reason other than an employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed $1,000.00 for a first violation. Petitioners did not meet their burden of proof to

show that they maintained required payroll records during the relevant period. The $1,000.00 civil penalty imposed is affirmed because it does not exceed the amount allowed by statute for a first violation.

NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The wage order is modified to revoke the claim of Michael Rothschild, to reduce the wages owed to Adam Friedman to $254.50, to reduce the wages owed to Henry Davis to $450.00, to revoke the civil penalty, to recalculate liquidated damages and interest consistent with these modifications, and is otherwise affirmed; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is, 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
December 13, 2017.

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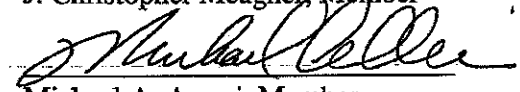
2. The penalty order is affirmed; and

3. The petition for review be, and the same hereby is, 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
December 13, 2017.