STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
JAROSLAW S. SKORUPSKI AND BEST CHOICE RENOVATION INC.,	:	
Petitioners,	:	DOCKET NO. PR 16-019
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 20, 2015,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Renata Humiennik, Owner, College Point, for petitioners.

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

WITNESSES

Renata Humiennik, Jaroslaw S. Skorupski, Carlos Miguel Lopez Soto, and Cuppertino Perez for petitioners.

Senior Labor Standards Investigator Joseph Ryan for respondent.

WHEREAS:

Petitioners Jaroslaw S. Skorupski and Best Choice Renovation Inc. filed a petition in this matter on January 25, 2016 pursuant to Labor Law § 101, seeking review of two orders issued against them by respondent Commissioner of Labor on November 20, 2015. Respondent filed her answer to the petition on February 23, 2016.

Upon notice to the parties a hearing was held in this matter on June 9, 2016 in New York, New York before J. Christopher Meagher, Board Member, 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.

The order to comply with Article 6 (unpaid wages order) under review directs compliance with Article 6 and payment to respondent for unpaid wages to two claimants, Adam Podwysocki and Boguslaw Podwysocki, in the amount of $3,576.00 for the time period from January 11, 2015 to January 24, 2015, and January 3, 2015 to January 24, 2015, respectively, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $470.27, liquidated damages in the amount of $3,576.00, and assesses a civil penalty in the amount of $2,682.00, for a total amount due of $10,304.27. At the hearing, respondent moved to amend the orders to comply to change the schedule of wages so that the period for unpaid wages for Adam Podwysocki is December 13, 2014 to January 24, 2015 and the period for unpaid wages for Boguslaw Podwysocki is January 10, 2015 to January 24, 2015. The hearing officer reserved decision on that motion and, as discussed below, the Board denies the motion with respect to Adam Podwysocki and grants the motion with respect to Bogulsaw Podwysocki.

The order under Article 19 (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 true and accurate payroll records for each employee from on or about January 3, 2015 through January 24, 2015.

Petitioners allege that the orders are invalid and unreasonable because Boguslaw Podwysocki was an independent contractor and Adam Podwysocki was unknown to petitioners and not hired by them, therefore petitioners are not employers under the Labor Law.

SUMMARY OF EVIDENCE

Wage Claim

On March 2, 2015, claimants filed claims against petitioners alleging that they were owed unpaid wages. Adam Podwysocki alleged that he was owed a total of $2,244.00 in unpaid wages from the week ending December 13, 2014 to January 24, 2015 and that he received no wages for any of the 102 hours of work he performed for petitioners during that period. Boguslaw Podwysocki alleged that he was owed a total of $1,332.00 in unpaid wages from the week ending January 10, 2015 to January 24, 2015. Both claimants alleged that they were construction workers with a $22.00 hourly rate of pay. Neither claimant testified at the hearing.

Petitioners' Evidence

Testimony of Renata Humiennik

Petitioners operate a company that does interior renovations for empty apartments in Manhattan. Petitioners are hired by management companies of apartment buildings to perform the apartment renovations including painting, plastering, tile work, cabinetry or other repairs or renovations that are needed. Renata Humiennik is the president and owner of Best Choice Renovation Inc. and testified that petitioners have six to eight employees performing the renovations while she and the company's manager, petitioner Jaroslaw Skorupski, supervise the employees at the job sites. Humiennik testified that petitioners pay their employees a daily rate rather than an hourly rate but they always work eight hours per day from 8:00 a.m. to 4:30 p.m. and receive 30 minutes for a lunch break. She explained that employees are paid every Friday but

the paychecks do not include a statement of the time that they worked because they treat them like subcontractors and issue them 1099 tax forms at the end of each year.

Humiennik testified that petitioners agreed to hire Boguslaw Podwysocki for one project, to tile a kitchen floor. Petitioners agreed to pay him $400.00 for that job, as reflected in the print out of a text message sent from Skorupski to Boguslaw Podwysocki. Shortly after hiring Boguslaw Podwysocki to do this job, Humiennik and Skorupski became very sick and were unable to visit the apartment where Boguslaw Podwysocki was working. He called to ask for more work and petitioners agreed that he could do more work including putting up some doors and tiling the bathroom. Petitioners paid him a total of $1,000.00. Either at the time or soon after paying him the $1,000.00, Humiennik and Skorupski went to the job site and saw the work that Boguslaw Podwysocki did and they called him to say that the work was incomplete and not well done so he had to come back to finish it. He did not return to perform more work. Humiennik testified that Boguslaw Podwysocki was never hired as an hourly employee and no hourly wage was agreed upon. She testified that petitioners paid him more money than he earned since he did not complete the work he was supposed to do. She further testified that petitioners never hired Adam Podwysocki and, in fact, did not know who he was.

Testimony of Jaroslaw Skorupski

Skorupski, the manager of Best Choice Renovation Inc. and a named petitioner, testified that after placing an ad for construction workers on a Polish website, he received many calls from Boguslaw Podwysocki. Eventually, when Skorupski felt he needed more workers, he answered a call from Boguslaw Podwysocki and agreed to hire him for one job tiling a kitchen floor. Skorupski agreed to pay him $400.00 for the job. Skorupski testified that Boguslaw Podwysocki asked if he could bring people and Skorupski told him he did not care how many people did the job because he would only give him $400.00 for it. Boguslaw Podwysocki agreed to do the job the next day. Skorupski then got sick several days later and was unable to visit the apartment where Boguslaw Podwysocki was working. Three or four weeks later, Skorupski visited the job site and saw that the assigned work was incomplete and not well done. He gave Boguslaw Podwysocki a $1,000.00 check and told him to return to finish the kitchen floor tiling job that he was hired to do. Skorupski said that Boguslaw Podwysocki responded that he had a doctor's appointment and never came back. Skorupski testified that he paid Boguslaw Podwysocki $1,000.00 instead of the agreed upon $400.00 because he did more work than the first project he was hired to do. He testified that he never agreed to pay him an hourly rate of $22.00 and that Boguslaw Podwysocki never worked eight hours a day like the other workers. Skorupski testified that he saw a second person working with Boguslaw Podwysocki on two occasions.

Testimony of Carlos Miguel Lopez Soto

Carlos Miguel Lopez Soto testified that he has worked for petitioners for about four years and that he does all the renovation work an apartment may need. Soto works five days a week, seven hours a day beginning at 8:00 a.m. and takes an hour lunch break. He receives $180.00 per day for his work and previously made $120.00 per day when he was first hired. Skorupski supervised Soto by telling him what hours to work, how much money he would be paid, and by regularly checking on his work at the job site. Soto testified that he worked with both claimants at the job site and that Adam Podwysocki was at the job site when Boguslaw Podwysocki was there. Soto also testified that Boguslaw Podwysocki started to work around December 15 or 16, 2014 for

approximately one and a half months. Soto also testified that Boguslaw Podwysocki was supposed to start work at 8:00 a.m. but often arrived late and that he reluctantly reported this to Skorupski. Soto further testified that claimants mostly used petitioners' tools except for their own machine used to pick up tiles.

Testimony of Cuppertino Perez

Cuppertino Perez has worked for Best Choice Renovation Inc. for more than two years helping with plastering and painting or other work. Perez testified that he works five days a week, eight hours a day, beginning at 8:00 a.m. and ending at 4:00 p.m. He takes a one hour lunch break. He is paid $140.00 per day. Skorupski tells Perez what hours to work and how much he would get paid. Skorupski also supervises Perez's work. Perez testified that claimants worked at the same job site that he worked at and while he could not recall the dates, they worked there for somewhere between one and two months.

Respondent's Investigation

Senior Labor Standards Investigator Joseph Ryan testified that the Department of Labor received claimants' unpaid wages claim forms and relied on those as a basis for respondent's determination. He testified that he had two phone conversations with Renata Humiennik and respondent received one letter from her regarding the claim for unpaid wages. During the first phone call on March 17, 2015, Humiennik said she did not owe any wages to Boguslaw Podwysocki and that she did not know Adam Podwysocki. Ryan told Humiennik to send documentation such as payroll records to prove her assertion. On September 24, 2015, respondent received a faxed letter from Humiennik in which she alleged that she paid Boguslaw Podwysocki all the money that he was owed and that she did not hire Adam Podwysocki so did not owe him any money. She included copies of letters that she received from each claimant stating that she owed them money and she included a copy of the cancelled $1,000.00 check that was given to Boguslaw Podwysocki. Ryan spoke to Humiennik again on September 24, 2015 and told her she still had not submitted sufficient proof regarding the wage claims made by claimants. Ryan did not have any further communications with Humiennik nor did respondent receive further correspondence from her or petitioners. Thus, Ryan recommended issuance of orders to comply.

Ryan testified that respondent assessed a 75% civil penalty based on the size of the firm, the good faith of the employer, the gravity of the monetary, non-wage and recordkeeping violations.

Ryan, who never interviewed the claimants, testified that respondent determined the claimants were not independent contractors because petitioners did not provide proof of a written agreement between the claimants and petitioners; a copy of claimants' Workers' Compensation Insurance documents; an invoice for the services provided by claimants that was billed to petitioners; or any other proof showing that claimants had their own business. Ryan also said that based on the other employee witnesses' testimony at the hearing, he believed that claimants were workers in the same way the other employee witnesses were workers.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Petitioners' burden of proof in this matter was 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; Board Rules [12 NYCRR] § 65.30; *Matter of Angello v. Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dep't 2003]; *Matter of RAM Hotels, Inc.*, PR 08-078 at p 24 [Oct. 11, 2011]). A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (*Id.* § 101 [2]). The Labor Law provides that an order of the Commissioner shall be presumed valid (*Id.* § 103 [1]). The hearing before the Board is *de novo* (Board Rules of Procedure and Practice [12 NYCRR] § 66.1 [c]). Petitioners argue that they were incorrectly identified as the employer of Boguslaw and Adam Podwysocki because they subcontracted work to Boguslaw Podwysocki as an "independent contractor" and they did not hire Adam Podwysocki nor did they know who he is. We find, as discussed below, that Boguslaw Podwysocki was not an independent contractor but an employee of petitioners and that Adam Podwysocki was also an employee of petitioners.

Claimant Boguslaw Podwysocki Was an Employee of Petitioners

Petitioners claim that Boguslaw Podwysocki was an independent contractor, not an employee. Under the Construction Industry Fair Play Act, it is presumed that a person in the construction industry is an employee. (Labor Law § 861-c [1], [2]; *see also Barrier Window Systems v. Commissioner of Labor*, 149 AD3d 1373, 1374 [3d Dep't 2017]; *Traver v. Lowe's Home Ctrs. LLC*, 2016 US Dist LEXIS 26533, *5 [EDNY]; *Matter of John Ellis a/k/a John C. Ellis Sr.*, PR 15-245 (May 3, 2017). In *Barrier Window Systems*, the Court explained that the Fair Play Act was passed to address the common fraud of construction industry workers being misclassified as independent contractors when they were in fact employees. The construction contractor must demonstrate through specific statutory criteria that the person is an independent contractor or a separate business entity to rebut the presumption that the person is an employee (*Id.*). This presumption of employment in the construction industry applies to Labor Law Articles 6 and 19, the articles relevant to this proceeding (Senate Introducer's Mem in Support, Bill Jacket, L 2010, ch 418, § 1).

The Fair Play Act sets forth three criteria, sometimes referred to as the ABC test, and each criteria must be satisfied for someone to be properly classified as an independent contractor: "(a) the individual must be free from control and direction in performing the job, both under his contract and in fact; (b) the service must be performed outside the usual course of business for which the service is performed; and (c) the individual is customarily engaged in an independently established trade, occupation, profession or business that is similar to the service at issue." (Labor Law § 861-c [1]; *see also Barrier Window Systems*, 149 AD3d at 1374-75; *Traver v. Lowe's Home*, 2016 US Dist LEXIS 26533, *5; *Matter of John Ellis,* PR 15-245 at 6-8.) The Fair Play Act further sets forth twelve criteria, each of which are required to be met, to determine whether a person is a separate business entity. (Labor Law § 861-c [2]; *see also Barrier Window Systems*, 149 AD3d at 1375; *Traver v. Lowe's*, 2016 US Dist LEXIS 26533, *6; *Matter of John Ellis,* PR 15-245 at 8-

10.) We find that petitioners, a contractor in the construction industry,[1] failed to prove that claimant Boguslaw Podwysocki met each of the criteria in the independent contractor test or each of the criteria in the separate business entity test, to rebut the presumption that he is an employee. (Labor Law § 861-c [1] [2]).

Under the ABC test, claimant was an independent contractor if (a) he was free from petitioners' direction and control in performing tiling and door installation services for petitioners; (b) the tiling and door installation work done by claimant was outside the usual course of petitioners' interior renovations business; and (c) claimant was customarily engaged in an independently established occupation similar to the tiling and door installation work he performed for petitioners (Labor Law § 861-c [1]; *Barrier Window Systems*, 149 AD3d at 1374-75; *Matter of John Ellis,* PR 15-245 at 7-8). As set forth in more detail below, petitioners could not prove that Boguslaw Podwysocki met any of the necessary criteria of the ABC test. While it is sufficient to establish that petitioners did not meet their burden to prove claimant was an independent contractor by only showing claimant did not meet one of the three required criteria, here the record demonstrates that petitioners could not prove any of the criteria. (*See Traver v. Lowe's Home*, 2016 US Dist LEXIS 26533, *9).

Claimant was not free from petitioners' direction and control (Labor Law § 861-c [1] [a]). Humiennik and Skorupski both testified that they supervise all job sites on a daily or every other day basis. Both Humiennik and Skorupski testified that their usual practice was to hire employees to do some initial work and then evaluate that work to determine if they would keep them employed. Soto, an employee and witness of petitioners, also testified that he was initially hired by Skorupski who then evaluated his work before deciding to continue to employ him. Consistent with petitioners' practice, Boguslaw Podwysocki was initially offered a job to tile a kitchen floor for $400.00 so that petitioners could evaluate his work to determine if they would offer him additional work. After he finished the first job, Skorupski gave him additional assignments to tile a bathroom and install doors. More than a month after initially hiring Boguslaw Podwysocki to tile a kitchen floor, Humiennik and Skorupski appeared at the site where claimants were working and saw the work performed by claimants for the first time. Petitioners paid $1,000.00 to Boguslaw Podwysocki and, despite being dissatisfied with his work, asked him to finish the assignment. Humiennik, Skorupski, Soto and Perez, another employee witness of petitioners, all testified that the usual work hours are from 8:00 a.m. to 4:00 or 4:30 p.m. and that claimant Boguslaw Podwysocki was expected to be present during those hours but tended to show up late and leave early. Soto testified that he reluctantly reported to Skorupski that both claimants often showed up late for work and left early. Petitioners expected to direct and control Boguslaw Podwysocki's work and it was only due to their unexpected illnesses that they did not regularly supervise it as they would have otherwise. Petitioners failed to prove the first of the three required criteria in the ABC test. (*See Barrier Window Systems*, 149 AD3d at 1376; *Matter of John Ellis,* PR 15-245 at 8).

Petitioners also failed to prove the other two required criteria in the ABC test. Claimant Boguslaw Podwysocki did not provide a service outside the usual course of petitioners' business

[1] Labor Law § 861-b defines "construction" as "constructing, reconstructing, altering, maintaining, moving, rehabilitating, renovating or demolition of any building, structure, or improvement, or relating to the excavation of or other development or improvement to land." We find painting, plastering, tiling and installing doors is encompassed within the definition of construction because it involves altering and maintaining a building or structure (*Matter of John Ellis,* PR 15-245 at p 7, n 2).

(Labor Law § 861-c [1] [b]). Petitioners do interior renovations in empty apartments, including plastering and painting, tiling, framing and door installation. Boguslaw Podwysocki did tiling and door installation, which is not outside the usual course of petitioners' interior renovation work. (*See id.*). There is also no evidence in the record that Boguslaw Podwysocki owned and operated his own interior renovations company and held insurance. No one testified about Boguslaw Podwysocki owning his own business nor was any evidence introduced showing that he entered into his own subcontractor agreements or secured his own workers' compensation insurance (*See* Labor Law § 861-c [4]; *see also* Barrier *Window Systems*, 149 AD3d at 1376-77). Petitioners failed to prove claimant Boguslaw Podwysocki met the requirements of the independent contractor test in the construction industry.

Petitioners also failed to prove that Boguslaw Podwysocki was a separate business entity. The separate business entity test sets forth twelve criteria, all of which must be met, to determine whether a person is a separate business entity and, thus, not subject to the presumption that he or she is an employee of the contractor. (Labor Law § 861-c [2]; *see also Barrier Window Systems*, 149 AD3d at 1375; *Traver v. Lowe's*, 2016 US Dist LEXIS 26533, *6; *Matter of John Ellis,* PR 15-245 at 8-9.) Under Labor Law § 861-c (2) the following criteria must all be met to prove someone is a separate business entity:

> "(a) the business entity is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of contractor for whom the service is provided to specify the desired result;
>
> "(b) the business entity is not subject to cancellation or destruction upon severance of the relationship with the contractor;
>
> "(c) the business entity has a substantial investment of capital in the business entity beyond ordinary tools and equipment and a personal vehicle;
>
> "(d) the business entity owns the capital goods and gains the profits and bears the losses of the business entity;
>
> "(e) the business entity makes its services available to the general public or the business community on a continuing basis;
>
> "(f) the business entity includes services rendered on a Federal Income Tax Schedule as an independent business or profession;
>
> "(g) the business entity performs services for the contractor under the business entity's name;
>
> "(h) when the services being provided require a license or permit, the business entity obtains and pays for the license or permit in the business entity's name;
>
> "(i) the business entity furnishes the tools and equipment necessary to provide the service;
>
> "(j) if necessary, the business entity hires its own employees without contractor approval, pays the employees without reimbursement

> from the contractor and reports employees' income to the Internal Revenue Service;
>
> "(k) the contractor does not represent the business entity as an employee of the contractor to its customers; and
>
> "(l) the business entity has the right to perform similar services for others on whatever basis and whenever it chooses."

Claimant Boguslaw Podwysocki was not free from the direction or control of petitioners as to how the work was performed, subject only to the right of the manager of the apartment where he was working to tell him what the result of the work should be. (Labor Law § 861-c [2] [a]). While petitioners may not have been physically present on a day to day basis to supervise claimant's work, Humiennik and Skorupski consistently testified that they would have been had they not been sick, that they communicated with the manager of the apartment about the work that claimant performed, and that they expected the work to be performed during their designated work hours. They also determined what additional work Boguslaw Podwysocki could do after he informed them that he completed the initial kitchen tiling job that he was hired to do. As is the case with the independent contractor test, by failing to prove only one criteria in the separate business entity test, petitioners cannot prove that Boguslaw Podwysocki was a separate business entity rather than an employee. (Labor Law § 861-c [2]; *see also Barrier Window Systems*, 149 AD3d at 1375; *Traver v. Lowe's*, 2016 US Dist LEXIS 26533, *6). But petitioners also did not prove other criteria of the separate business entity test.

Petitioners produced no documentary evidence nor offered any testimony showing that Boguslaw Podwysocki had a substantial investment in a separate business entity or that his business entity provided the tools and equipment necessary to the work (Labor Law § 861-c [2] [c] and [i]). In fact, the record indicates that claimants were dependent on petitioners for the work they did and for the necessary tools and equipment to perform the work. Petitioners' witnesses testified about claimants' use of petitioners' tools and even alleged they had to tell Boguslaw Podwysocki to bring back a machine he took from the worksite. Petitioners further failed to offer any evidence that Boguslaw Podwysocki performed the work for petitioners under his own business's name nor that he performed similar work for others (Labor Law § 861-c [2] [g] and [l]). There was no evidence in the record about any other work that Boguslaw Podwysocki performed other than the work he performed for petitioners.

We need not consider whether Boguslaw Podwysocki satisfied any of the other 12 factors, since petitioners having failed to prove Boguslaw Podwysocki satisfied Labor Law § 861-c (2) (a), (c), (g), (i), and (l), failed to prove Boguslaw Podwysocki met all 12 statutory requirements for a separate business entity under the Fair Play Act.

Because petitioners failed to prove that claimant Boguslaw Podwysocki was an independent contractor or separate business entity under the Fair Play Act, they did not rebut the presumption that he was an employee, and respondent's determination that petitioners were Boguslaw Podwysocki's employer is reasonable.

Petitioners Employed Adam Podwysocki

As we determined that claimant Boguslaw Podwysocki was an employee of petitioners and not an independent contractor, we also find that claimant Adam Podwysocki, who petitioners alleged was a worker hired by Boguslaw Podwysocki, was an employee of petitioners.

"Employer" as used in Labor Law Articles 6 and 19 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 § 651 [6]). "Employer" is also defined in Article 1 § 2 (6) of the Labor Law to include an "agent" which includes a "manager, . . ., supervisor or any other person employed acting in such capacity" (Labor Law § 2 [8-a]). "Employed" means "permitted or suffered to work" (Labor Law § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (FLSA) defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same test for analyzing employer status under FLSA (*Matter of Yick Wang Chan v. N.Y. State Indus. Bd. of Appeals*, 120 AD3d 1120 [1st Dept 2014]; *Bonito v. Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]; *Matter of Maria Lasso and Jaime M. Correa Sr. and Exceed Contracting Corp.*, PR 10-182 [Apr. 29, 2013], *aff'd sub nom. Matter of Exceed Contracting Corp. v. Indus. Bd. of Appeals*, 126 AD3d 575 [1st Dept 2015]; *Chung v. New Silver Palace Rest., Inc.*, 272 FSupp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v. RSR Sec. Servs. Ltd.*, (172 F3d 132, 139 [2d Cir 1999] *citing Carter v. Dutchess Comm. College*, 735 F2d 8, 12 [2d Cir. 1984 and *Goldberg v. Whitaker House Coop.*, 366 US 28, 33 [1961]), the Second Circuit explained the "economic reality test" used for determining employer status:

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors included whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules of conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*Id.*).

Applying this test to the record in the present case, we find that it was reasonable and valid to deem petitioners a statutory employer who in economic reality was responsible for Adam Podwysocki's wages. The record shows that the hiring and firing of workers was controlled by petitioners; that petitioners supervised and controlled work schedules, what work was to be done, places of work and other conditions of employment; that rates and method of pay were determined by petitioners; and that petitioners maintained employment records, as limited as they may have been. (*See e.g. Matter of Luchia McSweeney*, PR 11-298 [March 11, 2015]).

Petitioners assert that claimant Adam Podwysocki was hired by Boguslaw Podwysocki and, thus, they had no responsibility for him. Yet, once we determined that Boguslaw Podwysocki was not an independent contractor but, in fact, an employee, the question with respect to Adam Podwysocki's classification turned on whether petitioners suffered or permitted him to work. We find that they did. "An employer who has knowledge that an employee is working and who does not desire that work to be done has a duty to prevent its performance" (*Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 288 [2d Cir 2008]). "A presumption arises that an employer who is armed with knowledge has the power to prevent work it does not wish to be performed. Where that presumption holds, an employer who knows of an employee's work may be held to suffer or permit that work" (*Id.* at 290). Skorupski testified to seeing Adam Podwysocki working on at least two occasions. Petitioners' employee witnesses testified about Adam Podwysocki working. Petitioners were aware of Adam Podwysocki's work on their behalf and they benefitted from his work. They knew that Adam Podwysocki was performing work for them and took no steps to stop that work. As such, petitioners suffered or permitted Adam Podwysocki to work and are therefore liable for the unpaid wages. (*See Matter of Enigma Management Corp.*, PR 11-001 [Sept. 16, 2015]; *Matter of Kenneth Ahrem*, PR 10-302 [March 20, 2013]; and *Matter of Floral Park Community Church*, PR 07-014 [April 25, 2008]).

Petitioners' Failure to Maintain Payroll Records

Article 6 of the Labor Law requires that an employer pay wages to its employees (Labor Law § 191). Labor Law § 190 (1) defines "wages" as the "earnings of an employee for labor or services rendered." Articles 6 and 19 of the Labor Law also require employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law §§ 195 [4] and 661). The records must show for each employee, among other things, the number of hours worked daily and weekly, the amount of gross wages, deductions from gross wages, and allowances, if any (*Id.*). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law §§ 661 and 662 [2]). In the absence of required payroll 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 if results may be merely approximate (*Ramirez v. Commissioner of Labor*, 110 AD3d 901, 901-02 [2d Dep't 2013]; *Matter of Mid-Hudson Pam Corp.* v. *Hartnett*, 156 AD2d 818, 820-21 [3d Dep't 1989]; *see also* Labor Law § 196-a [where no records kept the burden is on employer to prove wages properly paid]).

Petitioners neglected to offer the legally required records of the days claimants worked and the wages they paid them either at the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner correctly determined that petitioners failed to maintain legally required payroll records.

The Unpaid Wages Order is Modified in Part and Affirmed in Part

Based on the record before us, we find that petitioners did not meet their burden to show that they were not claimants' employers nor did they maintain legally required records. Petitioners also did not introduce any evidence challenging the wages in the order and the issue is thereby waived pursuant to Labor Law § 101 (2).

The unpaid wages order finds that petitioners failed to pay claimant Adam Podwysocki from January 11, 2015 to January 24, 2015 and failed to pay Boguslaw Podwysocki from January 3, 2015 to January 24, 2015. Respondent sought to amend the unpaid wages order so that the schedules of wages accurately reflect the claim forms. More specifically, respondent moved to amend the schedule of wages in the order to comply to reflect Adam Podwysocki's claim that he was not paid for work that he performed from December 13, 2014 to January 24, 2015 and to reflect Boguslaw Podwysocki's claim that he was not paid for work that he performed from January 10, 2015 to January 24, 2015, which are the time periods in the claim forms. We deny respondent's motion with respect to Adam Podwysocki's claim. The proposed amendment to the schedule of wages for Adam Podwysocki expands the period for which unpaid wages are claimed beyond that set forth in the order to comply. Petitioners were entitled to timely notice that Adam Podwysocki was unpaid for a greater number of work hours than the number of hours set forth in the order to comply. (*See e.g., Matter of Beqiraj*, PR 11-393 at 9 n.3 [July 22, 2014] [Board precluded from modifying wages upward as the Board is bound by the hours used by the Commissioner to calculate back wages]). As such, we find that the unpaid wages order with respect to Adam Podwysocki must be modified to reflect the January 11, 2015 to January 24, 2015 schedule of wages set forth in the order to comply, thereby reducing the amount of unpaid wages to $1,540.00. We grant respondent's request to amend the order to comply to accurately reflect the schedule of wages for Boguslaw Podwysocki as that amendment simply reduces the work hours set forth in the claim, thus petitioners were not deprived of the right to prepare to challenge that part of the order. As such we affirm the part of the wage order regarding Boguslaw Podwysocki's unpaid wages.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, then the order directing payment of those wages 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." Here, respondent correctly determined that claimants were not paid all wages owed and petitioners did not offer any evidence to challenge the imposition of interest. As discussed above, we modified the amount of wages owed to Adam Podwysocki. Interest, therefore, shall be reduced proportionally.

Liquidated Damages

Labor Law § 218 provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. Here, respondent correctly determined that claimants were not paid all wages and petitioners failed to offer any evidence challenging the imposition of liquidated damages. Because we reduced the amount of wages owed, as discussed above, the liquidated damages shall be reduced proportionally.

The Civil Penalty is Affirmed

The unpaid wages order includes a 75% civil penalty. Labor Law § 218 (1) provides that when determining an amount of civil penalty to assess against an employer who has violated a provision of Article 6 of the Labor Law, respondent 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."

Petitioners did not introduce any evidence to challenge the civil penalty. Because we reduced the amount of wages owed, as discussed above, the civil penalty shall be reduced proportionally.

The Penalty Order is Affirmed

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. In this case, respondent assessed a $500.00 penalty against petitioners for failure to keep and/or furnish true and accurate payroll records for each employee from on or about January 3, 2015 through January 24, 2015; a violation of Labor Law § 661 and 12 NYCRR 142-2.6. Petitioners failed to introduce any evidence at hearing that it kept required records. We affirm the penalty order.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The unpaid wages order is affirmed but modified as follows:
   a. unpaid wages to Adam Podwysocki shall be reduced to $1,540.00; and
   b. unpaid wages to Boguslaw Podwysocki shall remain as $1,332.00; and
   c. interest, liquidated damages, and civil penalty shall be reduced proportionally; and
2. The penalty order is affirmed; and
3. The petition for review be, and it 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 September 13, 2017.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The unpaid wages order is affirmed but modified as follows:
   a. unpaid wages to Adam Podwysocki shall be reduced to $1,540.00; and
   b. unpaid wages to Boguslaw Podwysocki shall remain as $1,332.00; and
   c. interest, liquidated damages, and civil penalty shall be reduced proportionally; and
2. The penalty order is affirmed; and
3. The petition for review be, and it hereby is, denied.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Albany, New York,
on September 13, 2017.

Molly Doherty, Member

Gloribelle J. Perez, Member