STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: DONALD MERRIAM AND DAVID PAUL AND LIGHT HOUSE LAKE CONSTRUCTION, LLC, Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and an Order Under Article 19 of the Labor Law, both dated May 31, 2016, - against - THE COMMISSIONER OF LABOR, Respondent.	:	DOCKET NO. PR 16-085 RESOLUTION OF DECISION

APPEARANCES

Underberg & Kessler, LLP, Rochester (*Jennifer A. Shoemaker* of counsel), for petitioners.

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

WITNESSES

Donald R. Merriam, David Paul, Taryn A. Hilliker, and Jesse Toates, for petitioners.

Senior Labor Standards Investigator Lori Quackenbush, Shawn Butler, and Marc Mitrano, for respondent.

WHEREAS:

On July 11, 2016, petitioners Donald Merriam, David Paul, and Light House Lake Construction, LLC, filed a petition with the Industrial Board of Appeals seeking review of two orders issued by respondent Commissioner of Labor on May 31, 2016. Respondent answered on August 17, 2016.

Upon notice to the parties, a hearing was held on October 11, 2016, November 28, 2016, and December 21, 2016, in Rochester, New York, before J. Christopher Meagher, Board Member and designated hearing officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and submit post-hearing briefs.

The order to comply with Article 6 of the Labor Law (wage order) directs payment of wages due and owing to claimant Shawn Butler in the amount of $4,211.00 for an unspecified time period. The order assesses interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $1,116.78, 100% liquidated damages in the amount of $4,211.00, and a 100% civil penalty in the amount of $4,211.00. The total amount due is $13,749.78.

The order under Article 19 of the Labor Law (penalty order) assesses a civil penalty in the amount of $1,000.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from March 17, 2012 through October 5, 2014.

At hearing, the hearing officer granted leave for petitioners to amend the petition. We affirm granting petitioners' motion. Petitioners contend in their amended petition that the orders are unreasonable or invalid because: (1) petitioners Donald Merriam and David Paul are not owners of Light House Lake Construction, LLC, and therefore not individually liable for wages due and owing; and (2) respondent's wage calculations are unreasonable because petitioners paid claimant consistent with the Labor Law's wage requirements. Petitioners also challenge respondent's assessment of liquidated damages and civil penalties. As set forth below, we find that petitioners Merriam and Paul are statutory employers and individually liable under the Labor Law. We further find that respondent's wage calculations are reasonable and affirm the wage order, including the imposition of interest, liquidated damages, and civil penalties. However, the penalty order is revoked.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of Petitioner David Paul

Petitioner David Paul testified that Light House Lake Construction is a trucking company that hauls materials such as fill dirt, stone, salt, blacktop, and sand for third parties. When a third party wants to contract with the company for a job, it contacts a broker who in turn contacts Light House Lake. The broker then makes the arrangements for hauling to each customer's job site through Paul, Donald Merriam, or Taryn Hilliker, to whom Paul is married. Together Paul and Merriam create a schedule matching each hauling request with a driver and a company truck. Light House Lake drivers call in each evening at 8:00 p.m. to receive their assignments for the following day. In addition to dispatching and repairing trucks, Paul and Merriam are responsible for hiring and firing drivers, determining their pay rates, providing start dates for new hires, and managing the company's operations. While he has no ownership interest in Light House Lake, Paul testified that he supervises "most" of the company's operations. He has been a supervisor at the company since its founding.

During a typical day, a driver arrives at the "yard" at 7:00 a.m. and stops by the company office to pick up a company cellular telephone. The office is located approximately 100 feet from where the trucks are parked. The driver proceeds to the truck to check the oil level, start the vehicle, turn on the vehicle's lights, check the brakes, and conduct a walk-around visual inspection. The driver then fills out a vehicle condition report, where he notes any irregularities with the truck.

Paul testified that not all drivers follow the steps for the pre-trip inspection, but when a driver does, Paul has never seen it take more than two to three minutes. Upon completing the vehicle condition report, the driver sets out for the first job site. Light House Lake retains vehicle condition reports for 30 days. Paul further testified that some drivers arrive at the yard early to pick up their trucks and then go out for breakfast before their first job.

Upon returning to the yard at the end of the day, drivers are required to fuel the truck, which Paul estimated takes five minutes to complete. He has never witnessed two to three trucks in line to refuel. Drivers are also required to fill out another vehicle condition report and complete all necessary paperwork for the day. Paul estimated that a post-trip inspection takes approximately 15 minutes to complete, but explained that he had never seen a driver do a post-trip inspection: "We all sign for a post-trip, but nobody ever does it."

Drivers are responsible for keeping their own time records, a paper Paul called a "driver's table," that is turned in at the close of each business day. The table provides a space for the driver's name, the date, the truck number, whether the truck required fuel that day, and the truck "tickets" for the jobs completed. At the end of the day, the driver totals the number of hours worked. Under a section entitled "travel," the driver indicates the time he got to the yard until he got to the job, and from the time he signed out of the job until he got back to the yard. The truck "tickets" are a separate form filled out by the driver for each job and are used by the company to prove to the broker that the job was completed.

Paul is not involved in keeping payroll records but testified that it was Light House Lake's policy to pay drivers for travel time. Light House Lake retains the truck "tickets" and the driver's tables for a year, after which they are discarded. At the end of every week, Hilliker would use the driver's tables to create a weekly time sheet for each employee.

Paul testified that he hired claimant Shawn Butler two separate times, the first stint to do work around the yard, and the second to work as a driver. Butler was terminated after the second stint.

Testimony of Petitioner Donald R. Merriam

Donald R. Merriam testified that he is a "boss" at Light House Lake who "[t]ell[s] the people what to do. Make[s] the schedule." Merriam hires, fires, and trains employees, schedules delivery trucks, and assigns drivers their respective work schedules. Merriam testified that he is not aware what time drivers report to work in the morning because he does not arrive at the same time as they do. He is not involved with payroll, but testified that Light House Lake pays drivers for time spent conducting pre- and post-trip inspections.

Testimony of Jesse Toates

Jesse Toates testified that as of the time of the hearing he had been employed at Light House Lake for approximately a year and a half, first as a driver and the last year as a mechanic. Toates formerly worked with Butler, when he was a driver.

Toates' responsibilities as a driver involved delivering material, fueling the truck, and ensuring that it was in good working condition. Once he got to the yard in the morning he filled

out a slip of paper that indicated his time of arrival. Toates testified that it was his understanding that drivers were paid for the time spent checking their vehicles. He was never instructed not to record all his time worked.

Toates explained that the distance from the yard to the first assignment of the day dictated when he would need to arrive at the yard each morning. Plants where drivers had to pick up materials opened at 7:00 a.m. and this was when customers wanted the driver to be there to load up. After the truck was loaded, the driver went to the customer's job site to make the first delivery. To get to the plant by 7:00 a.m., Toates customarily got to the yard by 6:00 a.m. to get the truck ready and then left for the plant to fill up.

Testimony of Taryn A. Hilliker

Taryn A. Hilliker testified that she is the sole owner of Light House Lake Construction, LLC, which was formed in 2012. Hilliker spends most of her time in the office, where she answers questions, trains personnel to do the daily work, does the company's taxes, and oversees the company's general operations. Paul and Merriam train drivers on company policies and procedures. Merriam also possesses the authority to hire and fire employees. Hilliker generally arrives at work around 10:00 a.m., but also lives on the premises, and is usually in the office when drivers return to the yard at the end of the day.

In addition to her other duties, Hilliker is responsible for Light House Lake's payroll. Hilliker testified that the company had no contemporaneous payroll records for Butler for the periods he was employed. She recalled that he worked for Light House Lake on two separate occasions, first in 2012 and again in 2014. The company did not maintain contemporaneous time records for his employment because the "white slips" drivers submitted each day were destroyed right after each payroll was completed. The company now maintains them.

During Butler's employment, Hilliker used the driver's "white slips" -- where he recorded the hours he worked and what he expected to be paid -- to generate a time sheet used to calculate payroll hours, which Hilliker then entered into a computer program called Intuit. The "white slip" included the date, driver's name, and total hours worked; the truck, broker, customer, and hours worked on the broker's truck "ticket" for each customer; and any fuel and oil used during the day. Drivers were paid for the time they arrived at the yard in the morning until the time they left the yard at night. This time would include starting their vehicle, picking up their company telephone, performing the pre-trip inspection, and departing for the first job site. The Intuit system contained within it the pay rate for each driver, from which it calculated tax and other withholdings. From Intuit, she generated reports and pay stubs that were used to write employee paychecks. Each employee then received an envelope with a pay stub and cash for weekly time worked.

Hilliker identified two packets of payroll documents for 2012 and 2014 that included spreadsheets generated from Intuit of weekly payments made to Butler for the period from May 26, 2012 through August 25, 2012 and August 29, 2014 through October 11, 2014. According to Hilliker, these were the periods Butler was employed. Also included are copies of time sheets generated from the "white slips" submitted by Butler. These sheets show time in for every day worked at 7:00 a.m., except for two days in 2012 showing time in at 6:30 a.m. Time outs were rounded to the hour, quarter, or half-hour. Hilliker testified that a spreadsheet for 2014 showed

Butler's last day of work was October 1, 2014 and that he was issued a paycheck on October 11, 2014 for $239.18 for the hours he worked during his last week.

Finally, Hilliker testified that the company did not receive correspondence from the Department of Labor (DOL) that was sent to its street address on Gulf Road in Holley, New York because the postal service does not deliver to such address. After receiving correspondence to the post office box the company used, it responded to the present investigation. The company was confused about the nature of the investigation because it had cooperated with DOL in an earlier audit for the 2012 and 2014 years and believed it had resolved any disputes with the claimant.

Respondent's Evidence

Testimony of Senior Labor Standards Investigator Lori Quackenbush

Lori Quackenbush testified that she is a Senior Labor Standards Investigator for DOL and is responsible for managing investigations in the Rochester district. Quackenbush explained that she reviewed the claim at issue but did not conduct the initial investigation.

The investigative file revealed that on March 17, 2015, Butler submitted a claim with respondent for unpaid wages due for two separate periods of employment with Light House Lake. Butler claimed he was employed as a driver at the rate of $14.00 per hour and was owed unpaid wages for 35 hours per week and 210 hours per year in the years 2012 and 2014, plus unpaid wages for his last 13 hours worked during the payroll week from September 28, 2014 to October 5, 2014.

On May 12, 2015, investigator Shaun Abrilz mailed a collection letter to petitioners advising them that Butler had filed a claim and requesting "time cards, sign in sheets, computer logs, payroll journals or any other material" relating to the hours worked and wages paid claimant for the period from March 17, 2012 to October 5, 2014. The letter was returned as undeliverable.

On June 10, 2015, Abrilz sent petitioners a second collection letter advising them that Butler claimed he worked as a driver from March 17, 2012 through October 4, 2014 at the rate of $14.00 per hour and was owed $5,348.00 in unpaid wages. Abrilz further advised that petitioners had failed to provide any credible evidence that claimant was not owed the wages and DOL would therefore proceed to collect wages owed of $5,348.00 based on Butler's statements, along with liquidated damages of 25%. The June 10 letter, unlike the May 12 letter, did not make a specific request for petitioners to provide payroll records. This letter was received by petitioners as indicated by their letter of June 17, 2015, replying to respondent and enclosing a copy of claimant's last paycheck in the amount of $239.18 and asserting that claimant was employed at the rate of $12.50 per hour from May 26, 2012 to August 25, 2012 and $14.00 per hour from August 9, 2014 to October 11, 2014. Petitioners did not submit payroll records establishing the hours worked and wages paid to claimant for the period of the claim.

On August 3, 2015, respondent updated its records to include the post office box noted on petitioners' letterhead of P.O. Box 361, Holly, NY 14470 and sent Merriam a letter advising that: "Without any time records or payroll records to prove Mr. Butler was paid correctly for all his time we must continue to pursue the wages owed to him." Respondent enclosed a recapitulation of wages due in the amount of $5,348.00, plus liquidated damages of 25%, and requested that petitioners remit payment by August 17, 2014 or Orders to Comply would issue, entailing

additional interest and penalties. Petitioners did not remit payment or further respond and the final orders were issued on May 31, 2016.

Quackenbush testified that had petitioners provided credible payroll records to respondent's investigator, any wage calculations would have been done using those records. She also explained that on June 10, 2015, the investigator spoke with claimant over the telephone. During the call claimant informed him that petitioners laid off their employees for the period between the Thanksgiving and Easter holidays and respondent recalculated the wages due in the final orders accordingly. In determining to assess civil penalties, respondent considered the type of violation at issue, the size of the business, whether the business was new, whether petitioners were cooperative, any history of Labor Law violations, and whether petitioners acted in good faith. With respect to good faith, Quackenbush explained that petitioners failed to provide requested records and were generally unresponsive. Because the total amount due and owing was over $1,000.00, any violation of the Labor Law was serious and more than a mere calculation error. Because petitioners were not recidivists, respondent did not seek the 200% allowable under the Labor Law.

Regarding the $1,000.00 penalty assessed in the penalty order, Quackenbush identified a report titled "Labor Law Articles 6, 19 and 19-A Violation Recap" that stated the penalty was recommended because the "[e]mployer failed to provide time and payroll records demanded for the period 3/17/12 -10/5/14."

Testimony of Claimant Shawn Butler

Shawn Butler testified that he drove a 13-wheel tractor dump truck for petitioners during two periods of employment from 2011 through 2012, and after a year's break when he worked for another employer, again from 2013 through 2014. Drivers were taken off payroll for a portion of the year from Thanksgiving to Easter when the "ground freezes" and he didn't count that time in either year on his claim form. In filing his claim with DOL, he claimed unpaid wages for the 35 weeks between the two holidays in 2012 and 2014, where he worked an average of six days and 50 to 60 hours per week. After he hit a deer with his truck, Paul refused to pay him for his last 13 hours of work.

Butler testified that each evening at 8:00 p.m. he would call Light House Lake to receive the next day's assignments: "[N]ine times out of 10 I'd have to be somewhere at 7:00 [a.m.] in the morning." Paul required drivers to report to every job 15 minutes early. Those jobs could be picking up and running material from a landfill or plant to a customer's job site or running it from the job site to a dump site. This meant he had to report to the yard at least an hour earlier than the first assignment, and often one to two hours earlier for jobs that were not nearby, to allow enough time to do the pre-trip inspection and drive to the job. Butler explained that he tried to give himself 45 minutes to complete a pre-trip inspection to allow the engine to warm, and, because the trucks run on an air braking system requiring additional time to fill with air. A pre-trip inspection also involved checking the truck's oil and visually inspecting the vehicle for any damage, signs of leakage, or parts coming loose. Although Butler was generally the only person to drive his truck, Paul was "adamant" that Butler conduct a full pre-trip inspection every morning.

At the end of the work day, Butler would return the truck to the yard, refuel, conduct a post-trip inspection, and submit all his paperwork for the day. The paperwork included a daily

vehicle report, a time slip on which he tallied the hours he was to be paid, and the truck "tickets" for each job. The "tickets" showed the times he signed in at each job assignment and signed out after it was completed. The vehicle report listed the time when he picked up and dropped off the truck. He was never paid for the actual hours he worked each day, however, as Paul required him to put on the time slip only the hours from the truck "ticket" that the company was paid for. Petitioners also did not pay him travel time between jobs or time to and from the yard. When Butler and other employees complained to Paul about not being fully paid, Paul would explain "that he doesn't pay you travel time because technically he's just giving you a ride to work." Paul would also summarily "dock" employees' time if he was unhappy with an employee's performance. Butler was paid weekly on Saturdays at noon. When picking up his pay, petitioners asked him to sign a check and then paid him his wages in cash.

Butler testified that the claim he filed with DOL was based on the actual hours he worked each week that were shown in the daily motor vehicle report he submitted each day: "Being an hourly employee for a trucking company he's supposed to pay you key to key and he doesn't. He pays you what they call ticket time."

Testimony of Marc Mitrano

Marc Mitrano testified that he has been employed by Light House Lake Construction since approximately March or April 2016. He also worked for the company for two-to-three years between 2009 and 2012 but was unsure of the exact dates. Mitrano worked with Butler and drives a tri-axle dump truck, the same type of vehicle that Butler drove. Mitrano's workday varied, but usually he starts at the first job site at 7:00 a.m. and works until he is signed out. He works weekly between five and six days; during the summer months he works six days weekly. If he has a 7:00 a.m. assignment, Mitrano picks up his truck "at least" an hour before to afford him time to conduct a pre-trip inspection, warm up the truck, and drive to the first job site.

Mitrano is paid hourly. When paid, Mitrano signs a check and Paul then pays him with cash. Drivers track their time by filling out "little white slips of paper" at the end of each day. The white slip does not account for all the hours he works daily. Mitrano explained that he records when he starts and ends each day on his vehicle condition report but is paid for only the time from when he arrives at and signs out from each job site. In other words, he is paid based on the truck "ticket." Mitrano gives himself approximately 15 to 20 minutes to prepare his truck before he leaves the yard for the first job. During the pre-trip inspection he opens the hood of the truck, checks the oil, unplugs the block heater, and performs a visual walk around inspection of the vehicle to make sure the lights are in working condition and everything looks safe and operational. Mitrano estimates that the inspection takes approximately ten minutes to complete. A post-trip inspection, which is similar to the pre-trip inspection except for the oil check, takes approximately 10 to 15 minutes to complete. With refueling, it can take up to 30 minutes before he can leave the yard at the end of the day.

Mitrano testified that he is laid off for two to three months during the winter months when construction is slow.

SCOPE OF REVIEW AND BURDEN OF PROOF

A hearing before the Board is de novo (Board Rules of Procedure and Practice [Board Rules] [12 NYCRR] § 66.1 [c]). The Labor Law provides that an order of the Commissioner is presumed valid (Labor Law § 103 [1]) and the party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act § 306 [1]; Board Rules [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 [Oct. 11, 2011]). Should the Board find the order or any part thereof invalid or unreasonable, it must revoke, amend, or modify it (Labor Law § 101 [3]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Employer Status

"Employer" as used in Article 6 of the Labor Law means "any person, corporation, limited liability 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" includes "permitted or sufferred to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act, like the New York Labor Law 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 the Fair Labor Standards Act" *(Chu Chung v The New Silver Palace Rest., Inc.,* 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v. RSR Security Services Ltd.*, (172 F3d 132, 139 [2d Cir 1999]), the Second Circuit Court of Appeals 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 include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or 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 the economic reality based on a "totality of circumstances" (*Id.*).

Applying the *Herman* factors to the instant case, we find that petitioners were statutory employers under the Labor Law. Paul testified that he and Merriam are responsible for hiring and

firing drivers, determining their pay rates, providing start dates for new hires, and managing the company's operations generally. While he has no ownership interest in the company, Paul acknowledged that he supervises "most" of its operations and had been a supervisor since its' founding. Merriam testified that he is a "boss" at Light House Lake who hires, fires, trains employees, assigns drivers their respective work schedules, and directs them in their duties. The balance of factors for both petitioners thereby establishes that they had the requisite authority as a "matter of economic reality" over claimant's employment and were employers individually liable for the unpaid wages owed to claimant.

Wage Order

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]). As discussed above, an employer includes a person or entity who "employs" any individual, and "employed" includes an individual who is "permitted and suffered to work." Article 6 further defines "[w]ages" as the earnings of an employee for labor and services rendered (Labor Law § 190 [1]) and requires employers to pay wages to employees for all hours worked at the agreed payrate within various periods of time following the week when they are earned. "Manual Workers," defined as a mechanic, workingman, or laborer (Labor Law § 190 [4]), must be paid their wages weekly and not later than seven days after the end of the week in which they are earned (Labor Law § 191 [1] [a]).

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]).

Petitioners acknowledged that they failed to maintain contemporaneous time records of the claimant's hours, as they destroyed the "white slips" that listed his purported daily hours and the vehicle reports that showed the time he picked up and dropped off the truck each day. The time sheets drawn from the "white slips" to generate his weekly pay are inaccurate, as all but two entries list his "time in" each day at 7:00 a.m. Butler, meanwhile, credibly testified that he reported to the yard by at least 6:00 a.m. each day so he could perform a full pre-trip inspection and drive to the job site by 7:00 a.m. Mitrano and petitioners' witness Toates corroborated Butler's testimony, indicating that they would report to work by 6:00 a.m. if their first scheduled assignment was 7:00 a.m. We reject Paul's general testimony to the contrary, asserting that drivers typically reported to the yard at 7:00 a.m. and not before (*Matter of Mohammed Aldeen, et al,* PR 07-093 at pp. 13-14 [May 20, 2009] [general testimony of employee hours inconsistent with other evidence proffered by employer insufficient to meet burden of proof], *aff'd. sub nom, Matter of Aldeen v Industrial Board of Appeals*, 82 AD3d 1220 [2d Dept. 2011]).

As the computer spreadsheets identified by Hilliker were drawn from incomplete and inaccurate records, we find that they are simply unreliable to establish the precise daily and weekly hours worked by claimant or the periods of his employment. Petitioners did not submit wage notices required by Labor Law § 195 establishing his agreed rate of pay for both years that he was employed. Nor did they submit accurate time records showing the hours he worked during his last week of employment, for which he claimed 13 hours of unpaid wages.

In the absence of adequate payroll records, the Commissioner was entitled to rely on the "best available evidence" drawn from claimant's statements to calculate the wages owed, even where approximate (*Mid-Hudson Pam Corp.*, 156 AD2d at 821). We credit claimant's testimony in support of his written claim, as it was specific, credible, and corroborated by other testimony in the record. Claimant testified that he worked an average of 35 weeks between the Easter and Thanksgiving holidays in 2012 and 2014, 50 to 60 hours over six days each week. He was customarily assigned to be at his first job by 7:00 a.m. Because Paul required him to be at the site 15 minutes before the assigned time, and to perform a full pre-trip inspection of the truck, he would report to the yard by 6:00 a.m. each day, or earlier depending on the distance to the job. At the end of the day he returned to the yard to perform a post-trip inspection. Although he listed the times he picked up the truck in the morning and dropped it off at night on the daily vehicle reports, he was never paid for his actual hours worked. Paul required him to list on the white slips only the "ticket" time between signing in and out at each hauling job, which the company would be paid for. He was not paid for time he travelled from the yard to work sites and back. Butler's testimony that he was paid only for "ticket time" was corroborated by Mitrano, who testified that he was paid just for the time between arriving at and signing out of each job site, e.g. "ticket" time. We reject the general testimony of petitioners' witnesses that claimant was paid for the time from when he arrived at the yard in the morning to when he left at night, including travel time, as it was unsupported by any daily time records or other credible evidence and credibly contradicted by claimant and Mitrano.

We find that petitioners failed to pay claimant his full wages for the hours he was "permitted and suffered to work" during the period of his claim, including the time from when he picked up the truck each morning to when he dropped it off at night, travel time between jobs, and

time to and from petitioner's yard.[1] In the absence of adequate payroll records submitted by petitioners, the Commissioner was entitled to rely on the written claim filed by claimant in this case as the "best available evidence" and draw an approximation of his hours worked and wages owed drawn from such statements, even where imprecise (*Mt. Clements Pottery Co.*, 328 U.S. at 687-88 ["The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the (recordkeeping) requirements of . . . the Act"]; *Reich v Southern New England Telecommunications Corp.*, 121 F.3d 58, 70 n.3 [2d Cir. 1997] [finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records"]). Petitioners failed to overcome that approximation with credible or reliable evidence at hearing establishing the precise hours claimant worked, and that he was paid for those hours, or with other evidence showing the Commissioner's findings to be unreasonable. The determination of wages owed in the wage order is affirmed.

Interest

Labor Law § 219 (1) provides that when respondent 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 order and the issue is thereby waived pursuant to Labor Law § 101 (2).

Liquidated Damages

Labor Law § 195 (1-a) provides that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law. Such damages shall not exceed 100% of the total amount of wages found to be due. Petitioners failed to submit evidence at hearing challenging the liquidated damages assessed in the wage order and the issue is thereby waived pursuant to Labor Law § 101 (2).

The Civil Penalty in the Wage Order Is Affirmed

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Article 6, she must issue an order directing payment of any wages found to be due, plus "the appropriate civil penalty." Where the violation is not willful or egregious and there is no history of prior wage violations, in setting the amount of the penalty the Commissioner is required to "give due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and . . . the failure to comply with recordkeeping or other non-wage requirements" (*Id.*).

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[1] While the Labor Law exempts certain transportation employees engaged in interstate commerce from the minimum wage requirements of Article 19 of the Labor Law (12 NYCRR 142-2.2 and 42 USC § 213 [b]), there is no evidence in the record that petitioners employees drove out of state.

Investigator Quackenbush testified that in recommending the 100 % civil penalty assessed in the wage order, respondent considered the type of violation at issue, the size of the business, whether the business was new, whether petitioners were cooperative, any history of Labor Law violations, and whether petitioners acted in good faith. With respect to good faith, Quackenbush explained that petitioners failed to provide requested records and were generally unresponsive. Because the total amount due and owing was over $1,000.00, any violation of the Labor Law was more than a mere calculation error. Because petitioners were not recidivists, respondent did not seek the 200% allowable under the Labor Law.

Petitioners argued in closing that they showed good faith by responding to the investigation after they received notice but were confused because of a prior DOL audit that they believed had resolved any dispute with the claimant. Regardless of petitioners' confusion, we find that the totality of factors weighed by respondent supports the penalty determination and that petitioners failed to establish that the amount is unreasonable.

The Penalty Order Is Revoked

Labor Law § 218 (1) provides that if the violations involve "a reason other than the employer's failure to pay wages," the amount of civil penalty shall not exceed $1,000.00 for a first violation, $1,500.00 for a second, and $2,000.00 for a third.

Based on a report in the investigative file, Investigator Quackenbush testified that the $1,000.00 penalty assessed in the penalty order was based on petitioners' failure to furnish "demanded" payroll records. The record shows, however, that DOL's initial collection letter dated May 12, 2015 demanding payroll records for the period from March 17, 2012 to October 5, 2014 was returned as undeliverable. In its subsequent correspondence with petitioners, DOL did not make a proper demand for records before imposing the final order. We therefore revoke the order, as petitioners did not fail to furnish any "demanded" payroll records required by the Labor Law (*Matter of Pavlov,* PR 10-275 at pp. 7-8 [July 25, 2013] [penalty order for failure to furnish required records revoked where collection letter did not sufficiently demand they be provided]; *Matter of Mercendetti,* PR 07-104 at pp.5-7 [July 18, 2009] [failure to provide records in support of defense to a claim is not the basis for a penalty for failure to provide records]).

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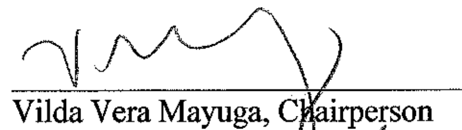
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

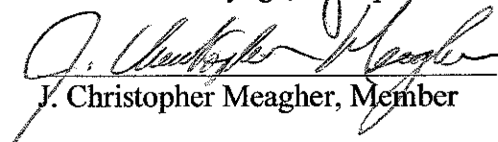
1. The wage order is affirmed; and

2. The penalty order is revoked; and

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

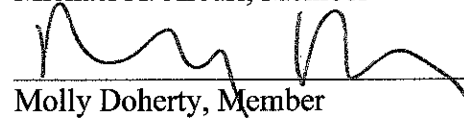


Vilda Vera Mayuga, Chairperson

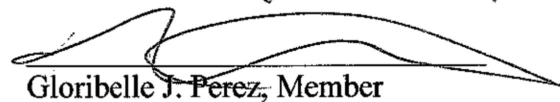


J. Christopher Meagher, Member

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 wage order is affirmed; and

2. The penalty order is revoked; and

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

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

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