STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
KHEMNAUTH DEOCHARRAN AND EXPRESS TRUCKING & COURIER INC.,	:	
Petitioners,	:	DOCKET NO. PR 17-024
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 January 4, 2017,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Khemnauth Deocharran, petitioner pro se, and *Dmitriy Prosolov*, for petitioners.

Pico Ben-Amotz, General Counsel, New York State Department of Labor (*Benjamin T. Garry* of counsel), for respondent.

WITNESSES

Khemnauth Deocharran and Dmitriy Prosolov for petitioners.

Sygenstz Moreau and Senior Labor Standards Investigator Shaun Abrilz for respondent.

WHEREAS:

The petition in the above-captioned case was filed with the Industrial Board of Appeals on March 2, 2017, and seeks review of two orders issued by respondent Commissioner of Labor (Commissioner or DOL) against petitioners Khemnauth Deocharran on January 4, 2017. Respondent filed an answer on April 17, 2017. Upon notice to the parties a hearing was held on August 3, 2017, in New York New York, before Joshua D. Riegel, 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 make statements relevant to the issues.

The order to comply with Article 6 of the Labor Law (wage order) under review directs petitioners to comply with Article 6 and pay respondent for wages in the amount of $1,870.70 due and owing to Sygenstz Moreau for work performed during the period from August 15, 2015 through August 27, 2015, with interest continuing thereon at the rate of 16% calculated to the date of the wage order in the amount of $406.74, liquidated damages in the amount of $1,870.70, and assesses a civil penalty in the amount of $2,338.37, for a total amount due of $7,179.51.[1]

The order under Article 19 of the Labor Law (penalty order) imposes a $500.00 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 August 16, 2015 through August 29, 2015.

The petition alleges the orders are invalid or unreasonable because Moreau was paid in full, information submitted to respondent was not considered during its investigation of Moreau's claim, respondent held a conference without notice to petitioners, and petitioners did not fail to produce information requested by respondent. We disagree with petitioners and affirm the orders, except that the civil penalty is revoked from the wage order.

SUMMARY OF EVIDENCE

On September 22, 2015, Sygenstz Moreau filed a claim for unpaid wages with respondent alleging he had worked as a truck driver for petitioners in July and August 2015 and was not paid for the weeks ending August 22 and August 29, 2015. Moreau's claim alleges the company kept his checks for the weeks ending August 22 and August 29 and that he is owed $1,207.40 and $663.30 for those weeks, respectively.

Moreau testified he worked Monday to Friday as a truck driver for petitioners, typically working from 9:00, 10:00, or 11:00 a.m. until 12:00 a.m. Moreau, an experienced truck driver, who used to own his own truck, explained that he used petitioners' truck to make deliveries and pick-ups related to petitioners' contract with DHL. Moreau testified that his work for petitioners consisted of, for example, going to Pennsylvania to make a delivery, and then bringing a load back to New York. Petitioners paid Moreau by miles driven, and Moreau completed paperwork for each run he made and handed it in at petitioners' office. Moreau also testified that he agreed to have his paychecks made out to the company name he had previously used when he owned and operated his own truck because it was more convenient for petitioners. Moreau testified he was terminated by petitioners after being involved in a road accident in Pennsylvania that damaged petitioners' truck. Moreau testified petitioners held onto his checks and did not pay him because they "needed to find out how much it cost to repair the truck."

Petitioner Khemnauth Deocharran is the owner and president of Express Trucking & Courier, Inc. Deocharran testified that Moreau rented a truck from Express Trucking for $300.00 a week "as an independent contractor." Moreau, according to Deocharran, worked five weeks for petitioners. Moreau did not work complete weeks, but only when he was available. Deocharran testified that Moreau was involved in an accident on August 25, 2015, and that "[a]t that point

[1] We note that there is a mathematical error in this total. However, because we revoke the civil penalty, respondent will have to recalculate the total amount due.

being an owner/operator at Express Trucks, you're responsible for your actions on the road as an independent contractor . . . . At that point we did charge him back for the damages to the truck." Deocharran further testified that petitioners did not receive information sent by respondent during the investigation because it was sent to the wrong address.

Dmitriy Prosolov is petitioners' accountant and designated representative in this proceeding. He testified that Moreau approached petitioners looking for work as an independent contractor but did not have his own truck at the time so "[i]n order to start immediately without his own truck, we offered him to work on our truck." The rental fee for the truck was $300.00 a week, which Moreau failed to pay. Petitioners also loaned money to Moreau for a GPS and made deductions from Moreau's gross wages in accordance with a loan agreement. Prosolov further testified that after petitioners terminated Moreau, Moreau demanded $1,870.00, but petitioners disagreed they owed him that amount because deductions needed to be made for the truck rental.

Senior Labor Standards Investigator Shaun Abrilz testified that he was not assigned as an investigator or supervisor of respondent's investigation of petitioners, but reviewed the file to testify. He explained that respondent calculated the wages petitioners owed to Moreau based on Moreau's statements in his claim form because petitioners did not provide any legally sufficient payroll records to respondent during the investigation. Abrilz further testified that petitioners had no prior record of Labor Law violations.

When testifying about how respondent assessed civil penalties against petitioners, Abrilz explained that:

> "Each individual senior investigator has their own scale about how penalties are assessed . . . . the civil penalty here was assessed due to the fact that the employer did not attend a compliance conference, repeat violations of illegal deductions, and also the failure to keep proper records."

FINDINGS AND CONCLUSIONS OF LAW

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

Burden of Proof

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]). We find petitioners failed to meet their burden of proof and affirm the orders except that the civil penalty portion of the wage order is revoked.

Petitioners were Moreau's employer

Petitioners alleged for the first time at hearing that Moreau was an independent contractor, not an employee. Labor Law § 101 (2) provides that any objection to an order not

raised in the petition is waived. Because petitioners did not allege until the hearing that Moreau was an independent contractor, the issue was waived; however, the record supports respondent's determination that Moreau was petitioners' employee, not an independent contractor. Petitioners presented no credible evidence that Moreau, who used petitioners' truck to make deliveries and pick-ups for petitioners, was in business for himself, had any investment in the business other than his own time and labor, or worked for any other companies during the time he was employed by petitioners (*Matter of Friedman*, PR 14-050 [October 28, 2015]; *Matter of Wojtowicz*, PR 10-102 [June 12, 2013]). That petitioners may have made out checks to Moreau's company name that he used when he operated his own truck prior to working for petitioners does not impact our decision. The record shows that Moreau was paid this way for petitioners' convenience.

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]). 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]). There is ample evidence in the record that petitioners suffered or permitted Moreau to work, and controlled his working conditions and set his rate and method of pay.

Wage order

Article 6 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]). Article 6 also prohibits employers from making deductions from an employee's wages that are not allowed by statute (Labor Law § 193). Deductions for lease of a truck, for payment of damages to an employer's vehicle, or for loan payments are illegal under Article 6 (*id.*; *Matter of My Service Center, Inc.*, PR 06-086 [November 19, 2008] [illegal to deduct from wages for damage to vehicle]; *Matter of Dictor*, PR 09-003 [interim decision, June 18, 2009] [same]). Petitioners, therefore, were legally required to pay Moreau the wages he had earned for work performed within seven days after the end of the week in which they were earned. Petitioners conceded at hearing that they failed to do so because they disagreed with the amounts claimed by Moreau, believing he owed them for damage to their truck and rent.

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 did not produce any records of the actual hours Moreau worked or the wages they paid him. In the absence of these legally required records, respondent relied on Moreau's claim form, which was the best available evidence of the hours he worked and wages owed. Moreau's claim form is supported by his credible testimony at hearing and petitioners' admission that they made deductions from his wages for a GPS and refused to issue him a check because he had been in an accident causing damage to their truck and had not paid the lease fee for the vehicle. Article 6 of the Labor Law, as discussed above, prohibits an employer from making deductions from wages for loans, damage, or to lease a vehicle from the employer and requires prompt and full payment of wages. Petitioners failed to present any credible evidence contradicting Moreau's claim and their allegation that the orders are invalid or unreasonable because respondent failed to consider information or hold a conference is without merit (*see e.g. Matter of Guendjian et al.*, PR 15-313 at 6 [July 26, 2017] [due process is satisfied by the opportunity to file petition for review of Commissioner's orders with the Board]). We find petitioners failed to meet their burden of proof to show respondent's determination of wages due is invalid or unreasonable.

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 125% civil penalty. Labor Law § 218 (1) authorizes the Commissioner to assess a 200 % civil penalty where she finds the violations were willful or egregious or the employer previously violated the Labor Law, or an "appropriate" penalty upon giving "due consideration" to (1) the size of the employer's business; (2) the good faith basis of the employer that it followed the law; (3) the gravity of the violation; and (4) the history of previous violations. Abrilz testified that a 125 % civil penalty was "assessed due to the fact that the employer did not attend a compliance conference, repeat violations of illegal deductions, and also the failure to keep proper records." Abrilz did not participate in respondent's investigation of petitioners and did not testify as to the factors respondent considered in assessing a 125 % civil penalty. Additionally, Abrilz testified that petitioners did not have a history of prior violations. The civil penalty is revoked because there is no showing that the proper statutory factors were considered for assessing the penalty.

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." Interest is affirmed.

Penalty Order

The penalty order assesses a $500.00 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 August 16, 2015 through August 29, 2015. 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 $500.00 civil penalty imposed is affirmed because it does not exceed the amount allowed for a first violation.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to revoke the 125% civil penalty but otherwise affirmed; and
2. The penalty order is affirmed; and
3. The petition 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 October 25, 2017.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to revoke the 125% civil penalty but otherwise affirmed; and
2. The penalty order is affirmed; and
3. The petition 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 Utica, New York
on October 25, 2017.