

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

EDWARD L. MOSSOW T/A MAIN STREET AUTO,

Petitioner,

To Review Under Section 101 of the Labor Law:

An Order to Comply with Articles 6 and 19, dated
August 31, 2018,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 18-083

RESOLUTION OF DECISION

APPEARANCES

Edward L. Mossow, petitioner pro se.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Benjamin T. Garry* of counsel), for respondent.

WITNESSES

Edward L. Mossow, for petitioner.

Richard J. Munksi and Labor Standards Investigator Matthew Bolen, for respondent.

WHEREAS:

Petitioner Edward L. Mossow T/A Main Street Auto (hereinafter "Mossow") filed a petition with the Industrial Board of Appeals (hereinafter "Board") in this matter on December 12, 2018, pursuant to Labor Law § 101, seeking review of an order issued against him by respondent Commissioner of Labor (hereinafter "Commissioner" or "the Department") on August 31, 2018. Respondent filed an answer to the petition on January 10, 2019.

Upon notice to the parties a hearing was held in this matter on April 2, 2019, in Syracuse, New York, before Michael A. Arcuri, member of the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The order to comply with Articles 6 and 19 of the Labor Law (hereinafter “unpaid wages order”) under review directs compliance with Article 6 and payment to respondent for unpaid wages due to claimant Richard J. Munski (hereinafter “Munski”) in the total amount of \$1,533.00 for the time period from July 24, 2017 to August 2, 2017, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$264.77, 100% liquidated damages in the amount of \$1,533.00, assesses a 75% civil penalty in the amount of \$1,149.75, and assesses a separate \$250.00 civil penalty for a violation of Article 19 of the Labor Law, Section 661, and Department of Labor Regulation (12 NYCRR) § 142-2.6 for failing to keep and/or furnish for inspection true and accurate payroll records for each employee from on or about July 22, 2017 to August 4, 2017, for a total amount due of \$4,730.52.

Petitioner alleges that the order is invalid and unreasonable because Munski was paid for all hours worked except for \$333.00, which petitioner would pay. For the reasons discussed below, we reject petitioner’s argument and we affirm the unpaid wages order as issued against petitioner.

SUMMARY OF EVIDENCE

Wage Claim

The wage claim filed by Munski states that he was paid \$21.00 per hour by petitioner. The claim further states that he worked the following hours without payment: five days totaling 46 hours in the week ending July 28, 2017 and three days totaling 24 hours from July 31, 2017 to August 2, 2017. For this work, Munski claimed he was owed a total of \$1,470.00.¹

Petitioner’ Evidence

Testimony of Edward Mossow

Mossow testified that his autobody repair business is open during the week from 8 a.m. to 5 p.m. Mossow generally performs the auto-body work himself and hired Munski because he had fallen behind on work. Mossow testified that he hired Munski as a 40-hour per week auto-body repairman for a two-week trial at the rate of \$18.00 per hour. Prior to being hired, Munski had asked for \$21.00 per hour but Mossow does not pay \$21.00 per hour. Munski would leave at 4:30 p.m. most days and would not have worked more than 8 hours in a day. During his employment, Mossow instructed Munski to keep track of the hours that he worked and report them to Mossow’s wife, the business’s bookkeeper. Mossow’s wife would take that information and then fill out time cards and would then pay Munski, in cash, at the end of each week. Munski was paid straight time for all hours worked.

Mossow testified that during his first week, Munski only worked two days and was paid, in cash, by Mossow’s wife at the end of that week. Munski returned the following week and worked five days and was paid, again in cash, that Friday. During the second week Mossow

¹ The claim form filed by Munski calculates the amount of unpaid wages by multiplying his rate of pay times the number of hours worked in each week. The amount calculated by respondent and contained in the unpaid wages order, \$1,533.00, includes unpaid wages multiplied by one and one-half times the claimant’s regular rate, for all hours worked in excess of 40 in each week and is based on the hours listed in the claim form.

informed Munski that he was not satisfied with Munski's work and that Munski needed to improve. Munski returned to work for a third week but only worked for three days that week.

At hearing, Mossow entered two time cards into the record for weeks ending July 21, 2017 and July 28, 2017. Both time cards list an hourly rate of pay of \$18.00. The first time card states that Munski worked 8:00 a.m. to 5:00 p.m. with a one hour lunch break on July 20, 2017 and July 21, 2017 for a total of 16 hours. According to a notation on the time card, Munski was paid \$288.00 on July 21, 2017. The second time card states that Munski began work each day at 8:00 a.m., took a one-hour lunch at 12:00 p.m. each day, and ended work at 6:00 p.m. Monday through Wednesday, 7:00 p.m. on Thursday and 12:00 p.m. on Friday for a total of 41 hours worked. According to the time card, Munski was paid \$738.00 on July 28, 2017. Mossow testified that he did not know how many hours Munski worked during his third and last week of work because Munski failed to report his time for that week.

On August 7, 2017, Mossow received a text message from Munski's phone number that stated, "I will be coming to get my tools either tuesday [sic] or wensday [sic] around 5 and settle up. With the pay you owe me - 333.00." Mossow testified that this text message proves that Munski received the two prior cash payments totaling \$1,026.00 and that Munski is only owed \$333.00.

Respondent's Evidence

Testimony of claimant Richard Munski

Munski testified that he was hired by Mossow to do welding, painting and autobody repair. He was to work 40 hours per week, from 8:00 a.m. to 5:00 p.m., but he may have actually worked from 7:00 a.m. to 4:00 p.m. Munski asked for \$22.00 per hour but Mossow offered to pay him \$21.00 per hour, which Munski accepted. Munski started work in the middle of July 2017 and worked for approximately three weeks. He worked the entire first week, totaling approximately 40 hours, and was paid over \$900.00 in cash at the end of that week. Munski was not provided with any documentation regarding the hours he worked that week. Munski asked Mossow for the paperwork he needed to fill out as a new employee. Mossow told Munski that he used a payroll service and that his wife would arrange getting the required paperwork.

Munski returned the following week and worked 46 hours. Munski initially testified that he was also paid for the second week of work. After further questioning, he testified that he was not paid for the second week of work and that when Munski asked Mossow for his pay, Mossow told him that he would be getting a check from Mossow's payroll service. Munski didn't understand how that was possible as he had not provided any information to Mossow or his wife. Munski again asked Mossow for the paperwork but was never provided anything. Munski worked a third week starting on July 31, 2017. Munski again asked Mossow about his paycheck and Mossow directed him to discuss the issue with his wife. Munski asked again about his paycheck on Wednesday August 2, 2017. Mossow again told Munski that his wife handles those issues. Munski did not return to work after August 2, 2017. Munski testified that he worked 24 hours the week of July 31, 2017 but later testified that he could not recall how many hours he worked that week. Munski testified that he sent Mossow a series of text messages, including the one dated August 7, 2017 that was entered into evidence by Mossow, in which he requested payment for all of the hours that he worked. Munski believes the \$333.00 in his text message refers to payments

due only for the three days worked during the week of July 31, 2017 and that he asked for the other pay that he was owed from a payroll service in a separate text message. There was no evidence of a separate message. Munski further testified that he had never seen the time cards that Mossow entered into evidence prior to the hearing, that he did not recognize the handwriting on the time cards, and that he never gave Mossow's wife any information regarding the number of hours that he worked or filled out time cards because Munski's hours were tracked by Mossow who "knew how many hours [Munski] had put in."

Testimony of Labor Standards Investigator Matthew Bolen

Investigator Matthew Bolen (hereinafter "Bolen") testified that respondent never received any records of hours worked by Munski or wages paid to Munski during the investigation. According to the information contained in respondent's file, Bolen testified that Mossow had emailed a different investigator stating that he had found the papers Munski used to record his time and that Mossow would be submitting those records to respondent. The email was sent by Mossow on November 20, 2017. Bolen testified that those records were not submitted to the Department by Mossow.

Bolen testified that civil penalties are assessed based on whether the Department receives records and by how cooperative the employer is. In this case a 75% civil penalty was assessed against the petitioner. The Department also issued a \$250.00 civil penalty for a "record keeping violation" as this was petitioner's very first violation.

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's Rules of Procedure and practice (hereinafter "Board Rules") (12 NYCRR) § 65.39.

Burden of Proof

Petitioner's burden of proof in this matter is to establish, by a preponderance of the evidence, that the order issued by the Commissioner is invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Matter of Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [October 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 (Labor Law § 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 [12 NYCRR] § 66.1 [c]). For the reasons discussed below, we affirm the unpaid wages order as issued against petitioner.

Petitioner's 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.” Article 6 also requires employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law § 195 [4]). 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]; Department of Labor Regulations [12 NYCRR] § 142-2.1 [e]). The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

In the absence of required payroll records, 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 if results may be merely approximate (*Matter of Baudo v New York State Indus. Bd. of Appeals*, 154 AD3d 535, 536 [1st Dept 2017]; *Matter of Ramirez v Commissioner of Labor of State of N.Y.*, 110 AD3d 901, 901-902 [2d Dept 2013]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 [3d Dept 1989]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp. v Hartnett* (156 AD2d at 821), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculation to the employer." Therefore, the petitioner has the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for these hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*Matter of Joseph Baglio and the Club at Windham*, PR 11-394, at p. 7 [December 9, 2015]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24).

Mossow asserts that Munski only worked for two days during his first week of work, five days during his second week, and three days during his third and final week of employment. Mossow also asserts that Munski was paid for all hours worked, except for those hours worked during the last three days, as evidenced by the two time cards entered into the record at hearing. The Board does not credit these records and finds that Mossow failed to keep the legally required payroll records.

It is undisputed that the records are incomplete. Munski worked over a three week period of time. The time cards entered into the records pertain to the first two weeks only. Additionally, the records are unsubstantiated. Mossow testified that the time cards were created by his wife based on documentation provided to her by Munski, but Mossow did not offer that documentation into evidence and Munski denied ever providing that documentation to Mossow's wife. Munski's un rebutted testimony was that he never punched in or out while working at the garage and that he had never seen the time cards prior to the hearing, nor did he recognize the handwriting on the time cards. Munski denied tracking his hours in writing or providing any documents regarding his hours worked to Mossow's wife. There is also no evidence that Mossow provided those records during the investigation. Mossow's wife, who purportedly created the time cards did not testify at the hearing. Petitioner's general testimony was insufficient to prove that the time cards were created contemporaneous with when Munski worked the hours and it does not support petitioner's assertion that the time cards are an accurate record of the specific hours worked by Munski.

The time cards are also inconsistent with Mossow's own testimony. For example, the second time card states that Munski began work each day at 8:00 a.m., took a one-hour lunch at 12:00 p.m. each day, and ended work at 6:00 p.m. Monday through Wednesday, 7:00 p.m. on Thursday, and 12:00 p.m. on Friday for a total of 41 hours worked. Mossow testified, however, that Munski would not have worked more than 8 hours in a day and that Munski would leave at 4:30 p.m. each day. The Board does not credit or give any weight to the time cards offered by petitioner.

The records offered by petitioner lack the specificity and the reliability to establish by a preponderance of the evidence the specific hours that the claimant worked and that he was paid for these hours (*Matter of Garcia v Heady*, 46 AD3d at 1090; *Matter of Angello v National Fin. Corp.*, 1 AD3d at 854; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24). Petitioner conceded that he did not pay claimant for all of the hours worked but he failed to offer sufficient evidence to reflect precisely what hours claimant worked and what hours he was paid for. We find the testimony and time cards that are part of the record are insufficient evidence to meet petitioner's burden to negate the reasonableness of the respondent's determination that petitioner failed to maintain legally required payroll records. As such, we affirm the Commissioner's determination that petitioner failed to maintain legally required payroll records.

The Unpaid Wages Order is Affirmed

Petitioner further argues that the unpaid wages order under review is invalid or unreasonable because the claimant is not a reliable source of information because his own text message states that he was only owed \$333.00. The Board disagrees. This argument confuses petitioner's burden of proof. Petitioner does not meet his burden through indirect means by attacking the Commissioner's investigation (*see Mohammed Aldeen and Island Farm Meat Corp. (T/A Al-Noor Live Poultry)*, Docket No. PR 07-093, at pp. 12-15 [May 20, 2009] citing *Matter of Angello v National Fin. Corp.*, 1 AD3d at 820-821 [assertions that Commissioner's order was not based on "credible proof" does not shift burden from employer with inadequate records]). In the absence of contemporaneous payroll records for its employee, it was petitioner's burden to submit sufficient affirmative evidence to negate the Commissioner's determination of wages owed. (*Matter of Joseph Baglio and the Club at Windham*, PR 11-394, at p. 7; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24).

Without specific evidence of precise hours worked, we give little credibility to Mossow's testimony regarding Munski's hours of work. Mossow failed to offer an explanation as to how the \$333.00 reflected in Munski's text message related to the specific hours worked by Munski. Mossow testified that Munski's hourly rate was \$18.00 but he did not explain which days and hours that Munski worked at the hourly rate of \$18.00 resulted in the admitted \$333.00 underpayment. In fact, Mossow testified that he did not know how many hours Munski worked during his last week of work, a work week that Mossow admittedly did not pay Munski's wages. Mossow's testimony was simply too general and flawed regarding the specific hours worked to overcome the presumption favoring the Commissioner's calculation (*Matter of Kehinde O. Adebawale*, Docket No. PR 17-050, at p. 4 [June 6, 2018]; *Matter of Young Hee Oh*, Docket No. PR 11-017, at p. 12 [May 22, 2014] [employer cannot shift its burden to DOL with arguments, conjecture, or incomplete, general, and conclusory testimony]).

Because petitioner provided no evidence of legally required records of the daily and weekly hours worked or wages paid to the claimant, and proof that he was paid for those hours, the Commissioner was entitled to use the best available evidence as a basis for her calculation of underpayment (Labor Law §196-a; *Matter of Baudo v New York State Indus. Bd. of Appeals*, 154 AD3d at 536; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d at 901-902; *Matter of Joseph Baglio and the Club at Windham*, PR 11-394, at p. 7; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24). Here, we find the hours utilized by the Commissioner from the claim form to be a reasonable approximation of the hours worked by the claimant and his rate of pay during the relevant period and affirm the Commissioner's wage calculations in the unpaid wages order.

Interest

Labor Law § 219 [1] provides that when the Commissioner determines that wages are due, the order directing payment of those wages shall include “interest at the rate of interest 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.” Petitioner did not offer any evidence to challenge the imposition of interest. The issue is thereby waived pursuant to Labor Law § 101 (2). As such, we affirm the interest in the unpaid wages order.

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. Petitioner failed to offer evidence challenging the imposition of liquidated damages. The issue is thereby waived pursuant to Labor Law § 101 (2). As such, we affirm the liquidated damages in the unpaid wages order.

Civil Penalty

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 19 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.”

Bolen testified that civil penalties are assessed based on whether the Department receives records and how much cooperation the Department receives. Bolen did not testify about the respondent's consideration of the statutory factors and the application of such factors to this case to determine how much to assess in civil penalties. Petitioner, however, did not introduce any

evidence to challenge the civil penalty. The issue is thereby waived pursuant to Labor Law § 101 (2). As such, we are required to affirm the civil penalty in the unpaid wages order.

Non-Wage Related Civil Penalty

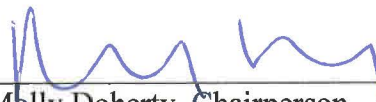
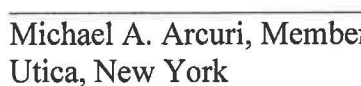
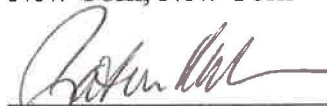

Labor Law § 218 (1) provides that where a violation is for a reason other than an employer's failure to pay wages, the order shall direct payment to respondent of a civil penalty in an amount not to exceed \$1,000.00 for a first violation. Here, respondent assessed a \$250.00 civil penalty against petitioner for violating Labor Law § 661 and Department of Labor Regulations [12 NYCRR] § 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about July 22, 2017 through August 4, 2017.

As set forth in more detail above, petitioner did not produce credible evidence to show that he maintained the required payroll records. Specifically, it is undisputed that petitioner's records were incomplete as he only was able to produce time cards for two of the three weeks worked by the Munski. As such, the non-wage related civil penalty for failing to keep true and accurate payroll records is affirmed.

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

1. The unpaid wages order and penalty order is affirmed; and
2. The petition for review be, and the same hereby is, otherwise denied.

Dated and signed by the Members
of the Industrial Board of Appeals
on December 11, 2019.


Molly Doherty, Chairperson
New York, New York
Michael A. Arcuri, Member
Utica, New York
Gloribelle J. Perez, Member
New York, New York
Patricia Kakalec, Member
New York, New York
Najah Farley, Member
New York, New York

evidence to challenge the civil penalty. The issue is thereby waived pursuant to Labor Law § 101 (2). As such, we are required to affirm the civil penalty in the unpaid wages order.

Non-Wage Related Civil Penalty

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. Here, respondent assessed a \$250.00 civil penalty against petitioner for violating Labor Law § 661 and Department of Labor Regulations [12 NYCRR] § 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee from on or about July 22, 2017 through August 4, 2017.

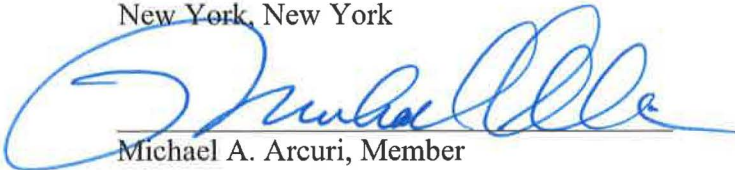
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New York, New York



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