

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

CHRISTOPHER PALAZZOLO,

Petitioner,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Articles 6 and 19 dated May
1, 2019,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
-----X

DOCKET NO. PR 19-083

RESOLUTION OF DECISION

APPEARANCES

Louis R. Rosenthal, Esq., Brooklyn.

*Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (Kevin E. Jones of counsel), for respondent.*¹

WITNESSES

Christopher Palazzolo, for petitioner.

Eder Vladimir Alvarado Funes, Tomas Carrera, Elias Redrovan and Senior Labor Standards Investigator Emelina Garcia, for respondent.

WHEREAS:

Petitioner Christopher Palazzolo (hereinafter “Palazzolo”) filed a petition with the Industrial Board of Appeals (hereinafter “Board”) in this matter on July 17, 2019, pursuant to Labor Law § 101, seeking review of orders issued against him by respondent Commissioner of Labor (hereinafter “Commissioner” or “the Department”) on May 1, 2019. Respondent filed an answer to the petition on August 20, 2019. Petitioner filed a reply to the Commissioner’s answer on September 19, 2019.

¹ Pico P. Ben-Amotz was respondent’s General Counsel at the time of the hearing. Jill Archambault is respondent’s Acting General Counsel at the time of decision.

Upon notice to the parties a hearing was held in this matter on January 24, 2020 in New York, New York, before Molly Doherty, the Chairperson of the Board and 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 (hereinafter “wage order”) with Article 6 of the Labor Law under review directs compliance with Article 6 and payment to respondent for unpaid wages due to three claimants in the total amount of \$10,908.25 for the time period from February 19, 2017 to August 18, 2017, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$3,054.47, 100% liquidated damages in the amount of \$10,908.25, assesses a 50% civil penalty in the amount of \$5,454.13. The penalty order under Article 19 (hereinafter “penalty order”) assesses a \$500.00 civil penalty 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 during the period from on or about August 6, 2017 to August 12, 2017. The total amount due in the orders is \$30,825.10.

The orders also name Eyal Yanyak (hereinafter “Yanyak”) and Imec Construction Corp. (hereinafter “Imec”) but only Palazzolo is a petitioner in this matter. As of the date of this decision, Yanyak and Imec have not filed petitions seeking review of the orders at issue here.

The petition alleges that the orders are invalid and unreasonable because petitioner was not the claimants’ employer but was an employee of Imec. The petitioner further asserts that he had no authority to hire or fire employees of Imec, that he did not control work schedules of employees at Imec, that he did not determine the wage rate for employees of Imec, and he did not maintain employment records for Imec employees. For the reasons discussed below, we find that the petitioner is individually liable as the employer of the claimants and affirm the Department’s order.

SUMMARY OF EVIDENCE

Petitioner’s Evidence

Testimony of Christopher Palazzolo

Palazzolo works in the construction industry and has done so for almost 30 years. Palazzolo testified that he met Yanyak in 2016 while Palazzolo was working as a project manager for another construction company. Yanyak was a machine operator for that construction company, operating heavy equipment and cranes. Palazzolo also testified that in 2015, Yanyak left the construction company where they met and that Yanyak hired Palazzolo to work for a company he started in early 2016, which was Imec. Imec did construction, concrete excavation and demolition work and it operated out of Yanyak’s house located in Brooklyn. Yanyak hired Palazzolo to be a project manager or foreman with a salary of \$3,000.00 per week. Palazzolo began working for Yanyak’s company in January or February 2016. Palazzolo worked for Yanyak until about the fall of 2017, when Palazzolo testified that Yanyak disappeared. Palazzolo testified that Yanyak stopped paying him in the late summer or fall of 2017, despite Palazzolo continuing to perform work for him. Palazzolo testified that Yanyak moved the company’s office to a Third Avenue location in Brooklyn and one Monday morning in the fall of 2017, Palazzolo walked into the office to find nothing was there. Palazzolo testified that he tried calling Yanyak and that he called the police and

that the police told Palazzolo that Yanyak went to the office Sunday night and removed all of the files and other things.

Palazzolo testified that he supervised workers as part of his duties. Palazzolo also testified that if someone did not come to work when they said they were at work on time sheets, Palazzolo would tell the person to go to the office to confirm their hours. Palazzolo testified that Yanyak would send people to Palazzolo and “. . . tell me to put them on. I’d ask them what their position, what kind of experience they had, what they were asking for. Then I would call [Yanyak]. He would confirm, yes, go ahead, fill out a W-4 . . . get their information, and they would come to work.” He further testified that Yanyak “. . . would call me up, send me guys. Say, I’m sending you over some guys, talk to them, this is what they want, ask what they want, and set them up on one of the jobs.” When asked who had “final authority to hire or fire,” Palazzolo responded “Eyal Yanyak.” Palazzolo testified that employees would meet with Yanyak, who was not supervising on the job site, and then they would meet with Palazzolo after Yanyak as Palazzolo was supervising at the job sites.

Palazzolo testified that Yanyak added him to the company’s bank account so that Palazzolo could sign checks. He also testified that he signed checks because Yanyak did not know how to read or write so he asked Palazzolo to sign the checks, though Yanyak also signed checks. Yanyak delivered unsigned checks to Palazzolo that Palazzolo would sign and give to the employees. Palazzolo testified that he never paid any employees in cash. Palazzolo testified that there came a time when paychecks began to bounce and when employees came to Palazzolo to ask him about the bounced checks, he would tell them to go to the office to speak to the secretary or bookkeeper, Tina, or to speak to Yanyak. Palazzolo said the employees would also speak to other foremen and that he was the main foreman but there would also be a carpenter foreman, a labor foreman, and/or a layout foreman.

Petitioner offered into evidence two pages of a criminal court document that states that Yanyak, intermittently referred to in the document as “the informant,” owns Imec and Palazzolo was a former employee of Yanyak. The document appears to be a statement of a police officer but what was offered into evidence was incomplete, including missing the signature page. Petitioner also offered copies of four of his wage statements from Imec dated February 10, March 17, March 31, and April 7, 2017. The wage statements reflect a weekly gross salary of \$2,999.00.

During rebuttal, Palazzolo testified that he was not in charge of welding work but only concrete work and that another company, First Choice Contracting, where Bob worked, was in charge of the foundation work, which included welding work. Palazzolo testified that all the employees working at a job site interacted with each other and if Bob needed someone to do welding work, he may ask Palazzolo for someone but that Bob would hire and pay the welder through First Choice Contracting.

Respondent’s Evidence

Testimony of Eder Vladimir Alvarado Funes

Eder Vladimir Alvarado Funes (hereinafter “Alvarado”) testified that he completed an unpaid wages claim form. The form is dated September 22, 2017. The claim form states that Alvarado worked for Imec and that “Chris[] and Dominique” were the owners of Imec. The form

further states that Alvarado was hired by Gabriel and that his wage rate was \$27.00 per hour and that he worked for Imec from August 7 to August 19, 2017. The form also states that Alvarado was not paid for 36 hours of work, or \$972.00, and that he asked “Chris and Dominique” for his unpaid wages on September 13, 2017. Alvarado’s form also states that he did not receive a wage statement for a \$1,269.00 payment for 46 hours of work.

Alvarado testified that he was hired by Palazzolo. He testified that he never filled out paperwork so that he could get paid by check. Alvarado testified that he stopped working when he was not getting paid and he looked for Palazzolo for two weeks. When he finally found Palazzolo, he told Alvarado to go to Imec’s office. At the office, the secretary gave Alvarado a check for \$1,269.00, which was only some of what was owed and she told Alvarado that Palazzolo would pay him for the rest of his wages.

In response to being asked, “. . . do you believe that the gentleman sitting across from you who I identified as Mr. Chris², that he was your employer,” Alvarado said “yes.” Alvarado also testified that Palazzolo was a supervisor at the job sites.

Testimony of Tomas Carrera

Tomas Carrera (hereinafter “Carrera”) testified that he signed a claim form that was filled out by someone named Christina from Make the Road New York with information that he provided. Admitted into evidence with Carrera’s claim form was a letter of representation signed by Carrera authorizing Elizabeth Sprotzer from Make the Road New York to be his representative before the Department. Carrera did not recall whether he told Christina that Palazzolo and Yanyak hired him. Carrera also did not recall whether he told Christina that he asked for his unpaid wages from Palazzolo and Yanyak. The claim form states that Carrera was hired on April 3, 2017 and that his last day of work was April 28, 2017. It also states that his rate of pay was \$42.00 per hour and that he was not paid for 40 hours of work during 5 days from April 24, 2017 to April 28, 2017. The claim form also states that Carrera was hired by “Chris and Eyal Yanyak,” that “Eyal Yanyak” was the superintendent, manager or foreman, and that Carrera asked for his unpaid wages from “Chris and Eyal Yanyak.” Attached to the claim was a copy of a check from Imec dated May 5, 2017 and with a notation in the memo line that reads “WE: 04-22-17.” Carrera testified that he received that check by going to see Palazzolo in the office, who gave him the check.

Carrera testified that he began working for Imec as a welder after a friend, Elias Redrovan (hereinafter “Redrovan”), advised that Carrera speak to Palazzolo.³ All of the work that Carrera did was related to welding and steelwork. Carrera testified that he asked Palazzolo to be paid \$45.00 per hour but that they agreed on \$42.00 per hour. Carrera testified that Palazzolo was his direct boss, who told him what to do and who gave him his paycheck. Carrera testified that he did not know Yanyak.

² During his testimony, after using pronouns rather than names to reference people, Alvarado was asked if by saying “him,” he was referring to the person sitting across from him while he testified, which was established on the record to be Palazzolo. Alvarado confirmed that he was referring to Palazzolo. Alvarado continued to refer to Palazzolo as “Chris” or “Mr. Chris” throughout his testimony.

³ Carrera referred to Palazzolo as “Mr. Chris” throughout his testimony. At the beginning of his testimony, he was asked if by Mr. Chris, he meant Palazzolo, who was sitting across from him. Carrera confirmed that “Mr. Chris” is Palazzolo.

Carrera testified that he was owed four weeks of pay and he spoke to an individual named Bob about the pay. Carrera told Bob that he was going to quit since he was owed four weeks of pay and Bob told him that he would pay him for three of the four weeks and he did pay him for three weeks in cash. Bob also told Carrera that Palazzolo would pay for the one remaining week, which Palazzolo did not do. Carrera testified that he asked Palazzolo for the wages that he was owed many times and that Palazzolo always told him that he would pay him but he never did. Carrera testified that when Palazzolo gave him the May 5, 2017 check, a copy of which was admitted into evidence, Palazzolo told him that he still owed him for another week.

Carrera initially testified that he worked for Bob after he worked for Palazzolo and Carrera later testified that Bob “was in charge of the whole work there . . . [h]e was the boss of another company.” Carrera did not recall the name of the company for which Bob was the “boss.” Carrera testified that he worked at a job site located at 555 Fourth Avenue in Brooklyn but he initially did not recall how many weeks he worked there. He subsequently testified that he first worked there for Imec and then he continued working there until October 14, 2018.

Testimony of Elias Redrovan

Redrovan filed a claim for unpaid wages that says he began working for Imec as a welder and laborer on February 19, 2017 and that his last day of work was August 18, 2017. The claim further states that he was paid \$45.00 per hour and it lists 8 weeks of work from the week ending June 23, 2017 to the week ending August 11, 2017 for which he was not paid for all of the hours that he worked. Attached to the claim form are receipts and notes about wages paid and wages owed that Redrovan testified Palazzolo or someone in Imec’s office gave to him. Also attached are copies of some checks, one of which is signed by Palazzolo. Admitted into evidence with Redrovan’s claim form was a letter of representation signed by Redrovan authorizing Elizabeth Sprotzer from Make the Road New York to be his representative before the Department.

Redrovan testified that he began to work for Imec as a welder on February 18, 2017 after interviewing with Palazzolo and Yanyak. Redrovan testified that he first met Yanyak at a job site and that Yanyak sent him to the office to meet Palazzolo. He testified that in addition to working as a welder, he also worked as a driver or a helper. Redrovan was paid \$45.00 per hour and he sometimes worked more than 40 hours in a week. He was paid in check and cash. When Redrovan was paid in cash, Palazzolo gave him the cash. Redrovan testified that Palazzolo supervised him. He testified that Palazzolo would supervise the job sites but would go to the office on Friday afternoons because it was payday. Redrovan would sometimes drive Palazzolo to the office. Sometimes Palazzolo would go to visit other job sites and then a foreman named Simon would be in charge of the jobsite where Redrovan worked.

Redrovan testified that he was paid for overtime hours that he worked but that he was not always paid for the work that he did because he would be paid less than what he earned or because checks that he was given bounced. When Redrovan was not receiving the wages that he earned, he asked both Palazzolo and Yanyak for the money. Redrovan testified that Yanyak told him that Palazzolo was the boss and to speak to him about pay.

Redrovan testified that he met someone named Bob at the end of his time working for Imec when Palazzolo told him to go see Bob at a worksite located at 555 Fourth Avenue in Brooklyn. Redrovan testified that he worked at the Fourth Avenue site for about two weeks as a welder but

then Bob brought in his own welders. Redrovan testified that Bob never paid him because Redrovan worked for Palazzolo.

Testimony of Senior Labor Standards Investigator Emelina Garcia

Senior Labor Standards Investigator Emelina Garcia (hereinafter “Garcia”) testified that after Alvarado filed a complaint and the respondent sent notices of Alvarado’s wage claim to Imec, two additional claimants, Redrovan and Carrera, filed unpaid wage claims, which were added to the underlying investigation in this case. Before Redrovan’s and Carrera’s claims were added to the case, Garcia had already made contact with both Yanyak and Palazzolo. Thus, she testified, that she informed them of the addition of Redrovan’s and Carrera’s claims. Garcia testified that Palazzolo and Yanyak each told her that the other person was responsible for the unpaid wages. Garcia testified that she determined that Yanyak was liable for the wages because Yanyak owned Imec and that Palazzolo was also liable for the wages because he managed the day to day work of Imec, whereas, Yanyak did not. Garcia testified that by stating that Palazzolo managed the day to day work, she meant that he was responsible for the job sites each day. Garcia testified that both Yanyak and the claimants told her that Palazzolo paid the claimants. Garcia’s recollection was that she saw checks from Imec used to pay claimants. Garcia testified that Yanyak told her that he provided the money for Imec but did not run the business.

Garcia testified that she recommended a 50% civil penalty to be assessed because it was the petitioners’ first case. She also testified that the civil penalty could be assessed as high as 200% and that she had never recommended a less than 50% civil penalty.

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

Petitioners’ 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 and 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. (T/A Rodeway Inn)*, 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 wage order and penalty order issued against petitioners.

Petitioner Was the Claimant's Employer

We find that Palazzolo is individually liable as an employer the Labor Law. “Employer” is defined in Article 6 of the Labor Law to mean “include any person, corporation, limited liability corporation, or association employing any individual in any occupation, industry, trade, business or service” (Labor Law § 190 [3]). “Employed” means “permitted or suffered to work” (Labor Law § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (hereinafter “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 (*Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 635 [1st Dept 2013]; *Matter of Maria Lasso and Jaime M. Correa Sr. and Exceed Contracting Corp.*, Docket No. PR 10-182, at pp. 6-7 [Apr. 29, 2013], *affd sub nom. Matter of Exceed Contracting Corp. v Indus. Bd. of Appeals*, 126 AD3d 575, 576 [1st Dept 2015]; *Ansoumana v Gristede's Operating Corp.*, 255 F Supp 2d 184, 188 [SDNY 2003]; *Chung v New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n 6 [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 Cooperative, Inc.*, 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 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.*). Respondent determined that Palazzolo was the claimants’ employer based on the claimants’ statements that Palazzolo paid the claimants and because Palazzolo supervised the day-to-day work at the job sites where the claimants worked. Palazzolo’s burden was to prove at the hearing that he is not, as a matter of economic reality, the claimants’ employer (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 65.30; *Garcia v Hedy*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of Nan N. Oo*, Docket No. PR 18-063, at pp. 6-8 [September 11, 2019]).

There is no dispute that Palazzolo was not the owner in fact of Imec and that Yanyak was, but that does not exculpate Palazzolo from individual liability as a worker can have more than one employer (*Ansoumana v Gristede's Operating Corp.*, 255 F Supp 2d at 189). An individual may be held liable as an employer if that individual had the power to control employees, even if that control is only exercised occasionally (*see Moon v Kwan*, 248 F Supp 2d 201, 237 [SDNY 2002]; *Matter of Jagtar Singh*, Docket No. PR 14-245, at p. 8 [May 3, 2017]; *see also Herman v RSR Sec. Servs. Ltd.*, 172 F3d at 139). Here, based on the evidence in the record, we find it was reasonable

and valid for respondent to determine that petitioner was individually liable as the claimants' employer during the relevant period because Palazzolo "possessed the power to control" claimants even if he was not the owner of Imec (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d at 139). Even if Palazzolo was not the owner in fact of Imec during the relevant period, he had a supervisory role over the claimants and acted like their employer, which is sufficient to hold him individually liable as the employer (*See Matter of Nan N. Oo*, Docket No. PR 18-063, at pp. 7-8; *Matter of Jagtar Singh*, Docket No. PR 14-245, at p. 8).

Palazzolo testified that after Yanyak interviewed a potential employee, he interviewed those employees since he supervised at the job sites, asking them about their work experience and what type of work they wanted to do and then he would call Yanyak, who would tell him to go ahead and fill out paperwork to hire the person. While Palazzolo testified that he needed Yanyak's approval to actually put someone on payroll, we find that Palazzolo's own testimony showed that he was sufficiently involved in the hiring decisions to meet the first factor in the *Herman* analysis, that Palazzolo had the power to hire and fire (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d at 139). Additionally, Carrera credibly testified that he was hired by Palazzolo, detailing their negotiations regarding Carrera's wage rate. Redrovan testified that he interviewed with both Yanyak and Palazzolo before being hired.

Palazzolo's own testimony also shows that he supervised and controlled employee work schedules, the second factor in the *Herman* test (*id.*). Palazzolo testified that he supervised the workers and each claimant testified that he was supervised by Palazzolo. Palazzolo also testified that he would confirm time sheets submitted by employees accurately reflected the hours they worked and that if they were not accurate, he would send the employee to the office to correct them.

We also find there is evidence in the record that Palazzolo, at least for Carrera, determined the wage rate, the third *Herman* factor (*id.*). Carrera credibly testified with detail that he asked to be paid \$45.00 per hour but that he and Palazzolo agreed that he would be paid \$42.00 per hour. Additionally, Palazzolo signed some paychecks as evidenced from Palazzolo's testimony and a copy of a check made out to Redrovan from Palazzolo. Further, the three claimants credibly testified that Palazzolo paid them and that they asked Palazzolo for their pay when they stopped getting paid.

While there is not enough information in the record to determine whether Palazzolo maintained employment records, the fourth factor in the *Herman* test (*id.*), there is some indication that Palazzolo maintained some records as he testified that he confirmed the accuracy of employees' time sheets.

Palazzolo's testimony that he was only an employee of Imec and not an employer is too general and conclusory and, in fact, his specific testimony supports a finding that he was the claimants' employer. While Palazzolo offered copies of wage statements to evidence that he was an employee of Imec, the wage statements only evidence that he was on Imec's payroll, not that he did not have control over the claimants. We do not credit Palazzolo's unsubstantiated testimony that he was an employee with no control over the claimants because it was unconvincing and not corroborated by anyone else. Palazzolo's evidence was insufficient to meet his burden to prove that he was not the claimants' employer.

We are also unpersuaded by Palazzolo's rebuttal testimony that he did not oversee the welders, Carrera and Redrovan. Palazzolo knew that Carrera and Redrovan were claimants in this matter yet he did not testify on direct examination that they did not work for Imec. His rebuttal testimony that he did not oversee welders also did not include a statement that Carrera and Redrovan did not work for Imec, perhaps because Imec checks for Carrera and Redrovan were offered into evidence and Palazzolo did not dispute the validity of those checks. Additionally, Carrera and Redrovan, as detailed above, credibly testified about their relationship with Palazzolo.

Applying the *Herman* factors to the instant case, we find that, under the totality of the circumstances, Palazzolo was the claimants' employer as a matter of economic reality because Palazzolo hired employees, set the pay rate for Carrera and paid at least some of the wages to each claimant, and supervised their schedules and their work (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d at 139). As stated above, no one factor in the *Herman* test is dispositive (*id.*) We find here, that when applying the *Herman* test to the facts here, Palazzolo was, as a matter of economic reality, the claimants' employer for the relevant period and Palazzolo failed to meet his burden to prove that he was not their employer. As such, the Board affirms the respondent's finding that Palazzolo was an employer.

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). 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 weekly, the rate of pay, 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] § 142-2.6). 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, 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 Ramirez v Commissioner of Labor*, 110 AD3d 901, 901-902 [2d Dept 2013]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 [3d Dept 1989]).

Petitioner did not offer the legally required records of the days and hours that claimants worked, and the wages paid to them either at the investigative phase of this matter or at the hearing before the Board. As such, the Commissioner's determination that petitioner failed to maintain legally required payroll records was reasonable and valid.

The Wage Order Is Affirmed

Based on the record before us, we find that petitioner did not meet his burden to show that he was not individually liable as the employer nor did he maintain legally required records of hours worked and wages paid to the claimants. Petitioner did not introduce any evidence challenging the wages in the order. The issue is thereby waived pursuant to Labor Law § 101 (2). As such, we affirm the wage order.

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 the claimants were not paid all wages owed and 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 wage 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. Here, respondent correctly determined that the claimant was not paid all wages and petitioner failed to offer any 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 wage order.

The Civil Penalty is Affirmed

The wage order includes a 50% 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.”

Petitioner did not introduce any evidence to challenge the civil penalty. As such, we are required to affirm the civil penalty in the wage order (Labor Law §§ 101 [2] and 103 [1]).

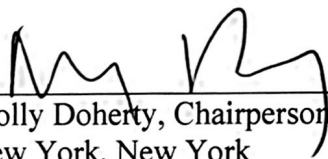
The Civil Penalty for an Article 19 Violation Affirmed

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 petitioner for failure to keep and/or furnish true and accurate time and payroll records for each employee from on or about August 6, 2017 to August 12, 2017. Petitioner did not challenge the \$500.00 Article 19 civil penalty included in the order. Thus, we are required to affirm the penalty order (Labor Law §§ 101 [2] and 103 [1]).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order and penalty order are affirmed;
2. The petition for review is denied.


Dated and signed by the Members
of the Industrial Board of Appeals
on August 12, 2020.



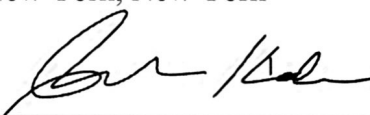
Molly Doherty, Chairperson
New York, New York

ABSENT

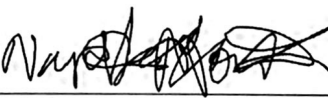
Michael A. Arcuri, Member
Utica, New York



Gloribelle J. Perez, Member
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Patricia Kakalec, Member
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Najah Farley, Member
Brooklyn, New York