STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
ROY J. SCHUKRAFT, JR. AND RJS JANITORIAL, LLC,	:	
Petitioners,	:	DOCKET NO. PR 15-148
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19, and an Order under Articles 6 and 19 of the Labor Law, both dated March 11, 2015,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Andreozzi Bluestein Weber Brown, LLP, Clarence (*Randall P. Andreozzi* and *Michael J. Tedesco* of counsel), for petitioners.

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

WITNESSES

Roy Schukraft, Jr. for petitioners.

Labor Standards Investigator Paul Appleby and claimant Robert Scott Taylor, for respondent.

WHEREAS:

On May 7, 2015, petitioners Roy J. Schukraft, Jr. and RJS Janitorial, LLC (Schukraft and RJS) filed a petition with the Industrial Board of Appeals pursuant to Labor Law § 101 seeking review of two orders issued against them by respondent Commissioner of Labor on March 11, 2015. Respondent filed her answer on July 15, 2015.

Upon notice to the parties, a hearing was held in Buffalo, New York, on September 24, 2015, April 26, 2016, and June 9, 2016 before then Board member LaMarr J. Jackson, and on

August 10, 2017 before Board Member J. Christopher Meagher, the designated Hearing Officers in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and file post-hearing briefs.

The order to comply with Article 19 (minimum wage order) under review directs compliance with Article 19 and payment to respondent for unpaid overtime wages in the amount of $171,019.57[1] for the period from February 15, 2007 to December 15, 2012, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $61,173.47, and assesses 100% liquidated damages in the amount of $171,019.57 and a 200% civil penalty in the amount of $342,039.14, for a total amount due of $745,251.75.

The order to comply under Articles 6 and 19 (penalty order) under review assesses a $6,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for the period of February 15, 2007 through December 15, 2012. The penalty order also assesses a $6,000.00 civil penalty for violating Labor Law § 191 (1) (a) by failing to pay wages weekly to manual workers not later than seven calendar days after the end of the week in which the wages were earned for the period of February 15, 2007 through December 15, 2012. Lastly, the penalty order assesses a $6,000.00 civil penalty for violating Labor Law § 193 (1) by making prohibited deductions from the wages of employees for the period of February 15, 2007 through December 15, 2012. The total amount due is $18,000.00.

The petition alleges that the orders are invalid and unreasonable because: (1) petitioners were not the claimant's employer because the claimant was an independent contractor and not an employee; (2) respondent failed to take into account amounts paid for the benefit of the claimant by petitioners and such payments negate any underpayment calculated by the respondent; and (3) with respect to civil penalties, petitioners had a good-faith belief that the claimant was an independent contractor, and the civil penalties in the orders are otherwise excessive and unreasonable.

SUMMARY OF EVIDENCE

Wage Claim

Claimant Robert Scott Taylor (Taylor) filed a minimum wage and overtime claim with the respondent Department of Labor (DOL), dated February 20, 2012, alleging that he was owed unpaid wages for the period of January 1, 2010 to September 15, 2012. Claimant stated that he was hired in January of 2004 and worked as a cleaner for petitioners' janitorial business and received "40% of the account" as payment. At the same time, claimant also filed a claim for unpaid wages for the period of February 2007 through September 2015.

[1] During the hearing on August 10, 2017, respondent's counsel orally moved to amend the amount calculated for unpaid overtime wages in the minimum wage order from $171,019.57 to $169,578.18, based on respondent's review of monthly accounting statements entered into evidence (petitioners' exhibits 3 - 8). Petitioners had no objection to such amendment.

Testimony of Petitioner Roy Schukraft, Jr.

During the relevant time, petitioner Roy Schukraft, Jr. (Schukraft) owned and operated RJS Janitorial, LLC (RJS), a janitorial services company. RJS uses both independent contractors and employees to clean for clients. Before subcontracting an account, Schukraft reviews the account, personally performs a cleaning to determine the time it takes to perform the job, and offers the account to a subcontractor for a set percentage of his price estimate. For example, if a national cleaning company subcontracted the account to RJS for $400.00, Schukraft would review the job and if he concluded he would have bid the job at $200.00, he would offer the job to a subcontractor for 60% of the $200.00. If RJS was the primary contractor, it would still bid the job to the client for $200.00 but provide between 40% and 60% of the contract value to its independent subcontractor. If Schukraft felt that the contract was not lucrative as a subcontract, he used RJS employees to perform the cleaning services.

Schukraft met Taylor in December of 2003, when both were assigned to work at the same location. RJS was a subcontractor for another janitorial services company at the site and Taylor was working there as an employee of a temporary labor services company. After exchanging contact information, Schukraft and Taylor entered into an agreement in January 2004 whereby RJS subcontracted janitorial work to Taylor. In 2011, a second agreement entitled "Independent Contractor Agreement" was entered into by RJS and G&R Janitorial (G&R). It was signed by Schukraft, and Taylor as owner of G&R Janitorial. Schukraft testified that Taylor used the name G&R Janitorial for their agreement, but he was not aware of whether Taylor had any capital investment in the business.

Schukraft testified that during the relevant period, Taylor was free to seek work outside of jobs he got from RJS and was also free to turn down work offered by RJS, and that the client dictated the cleaning schedule, not Schukraft. Taylor was not required to advise RJS if he would not be able to clean the account per the agreed-to schedule but could do so as a courtesy. Taylor could obtain cleaning supplies and equipment from RJS, but was not required to use RJS supplies. RJS did not require Taylor to submit written or oral reports except when required by the national level company with which RJS had contracted. RJS did not provide Taylor with RJS business cards and he believed that Taylor advertised its services to the public at large, maintained a website, had its own employees, and carried its own liability insurance.

Schukraft testified that he provided monthly accounting statements to Taylor that were divided into three general sections. The first section identified the accounts Taylor had contracted to clean, including the name of the account, the agreed upon monthly rate, and the number of days per month the account would be cleaned. The second section listed the actual amount paid for these accounts and the date on which payment was made. The third section was separated into two subsections. The first subsection listed deductions for amounts paid by RJS on behalf of Taylor for business related expenses. Examples included deductions for phones, car insurance, car payments and cleaning supplies. The second subsection listed deductions reflecting payments made by RJS for Taylor's expenses that were personal in nature including, but not limited to, cash borrowed, gas cards, and child support payments. For these personal deductions, RJS would charge Taylor an additional administrative fee. Schukraft testified that this was standard industry practice. Schukraft compiled these monthly statements himself based on the underlying contracts. He

further testified that he offered other subcontractors the option of having business expenses deducted in similar fashion, but the deduction of personal expenses such as car insurance, parking tickets, car repairs, AAA membership, and rental payments was unique to Taylor. These deductions began in 2004 because Taylor did not have a phone or car at the time, which required him to use pay phones and limited the amount of work he could accept.

Schukraft testified that each deduction was made at the request of Taylor. He further testified that in 2012 he advised Taylor that he should use other income to pay his personal expenses, as Schukraft was no longer able to make such payments on behalf of Taylor because the amount of deductions had exceeded the amount Taylor was to be paid.

In late 2012, RJS terminated its relationship with G&R when Taylor failed to clean his accounts. Schukraft testified that he then employed Taylor as an individual, paying him in cash, for work at various locations. Taylor stopped working for Schukraft at the end of 2012.

Testimony of Claimant

Claimant testified that he met Schukraft in December of 2003 at a job site. At that time, Taylor was working for a temporary employment agency and Schukraft had "his own crew" working at the job site. After they exchanged contact information, Schukraft appeared at Taylor's house sometime after 11:30 pm on December 31, 2003 inquiring whether Taylor was interested in working with Schukraft, and if so, told Taylor that he had a job for him that would start the next morning cleaning a theatre. Taylor accepted the offer and began working January 1, 2004 with at least one other person at the theatre, performing a cleaning job assigned by Schukraft for which he was paid cash. Schukraft was present at the job site and bought lunch for the staff.

Taylor testified that he started his own company because Schukraft told him that if he had one, then Schukraft could give him unlimited work. He chose G&R Janitorial as his d/b/a, which reflected his and his wife's initials. He used his Social Security number to register the d/b/a. Shortly thereafter, Schukraft provided Taylor with more work and a vehicle.

Schukraft and Taylor agreed to a percentage split between 40% and 60% of the accounts. On new accounts, Schukraft would meet or bring Taylor to the location, describe what needed to be done, and provide access or keys to the building. Initial supplies and equipment were provided by Schukraft. Taylor was paid once a month. Taylor kept track of some his hours but not all of them. He started with only a few accounts working 30-35 hours a week, but after two to three years was responsible for twenty to thirty accounts and was working an average of 50 to 70 hours a week, with some weeks exceeding 70 hours.

Taylor testified that he agreed to all the deductions made by Schukraft. He felt that using the same supplies Schukraft used during the initial cleaning would maintain a more professional appearance. Schukraft provided three different vehicles to Taylor over the relevant period, retained titles to them, and obtained the insurance. Taylor then made monthly payments to Schukraft for use of the vehicles, the insurance, and for interest on the payments. G&R's business insurance was also obtained with the help of Schukraft. With respect to the deductions, Taylor testified that he started paying for the personal deductions himself, such as child support and personal expenses

such as bowling, but as the deductions began to outpace his earnings, he needed to use the deduction method to pay for the expenses. He felt pressured to take work from Schukraft because Schukraft threatened to take away personal items such as the car, his phone, and his home. In December of 2012, RJS stopped making payments to G&R for Taylor's work but continued to use Taylor to service its accounts, with the work overseen by a manager. The manager later let him go.

Taylor acknowledged that G&R did advertise on craigslist and the yellow pages, obtaining two to three non-RJS accounts during the five-year period of the claim. G&R briefly had a business account, but Taylor elected to close the account because of a $7.00 monthly fee for the account. Taylor testified that he wanted to be classified as an employee but was pressured into starting his own business by Schukraft to get more work.

DOL's Investigation

Senior Labor Standards Investigator Paul Appleby (Appleby) testified that he received and reviewed the wage claims filed by Taylor, which included some of the monthly statements that Schukraft and RJS provided the claimant. As follow up to the claim, on May 14, 2013, he made the first written request to petitioners for names, addresses, telephone numbers, daily time records and weekly payroll records for all employees and contractors working as cleaners for RJS from May 1, 2007 through May 1, 2013. No response was received. He later communicated with an attorney for Schukraft and renewed his request for records, by written notice issued on June 18, 2013. At that time, Appleby also asked "for anyone who is being paid as independent contractors, I will need to review their contracts with RJS, proof of insurance, and DBAs." The representative ultimately informed him, through a telephone call on August 6, 2013, that no time records were kept and that hours were called into the petitioners' payroll services company by Schukraft.

Appleby concluded that Taylor was an employee and not an independent contractor based on Taylor's claim and statements about his work relationship with Schukraft and the fact that contrary evidence had not been submitted by petitioners. Appleby further testified that his determination was made based on the level of control exercised by RJS over Taylor; the number of hours Taylor worked for RJS versus non-RJS contracts; that Taylor had no opportunity for profit or loss from his work; and because Taylor was engaged in the same work for RJS prior to obtaining a d/b/a. Appleby added that if Taylor refused work, it would have negative consequences on his private life due to the personal deductions made by RJS from his pay.

Having determined that Taylor was an employee under the Labor Law, and in the absence of legally sufficient payroll records, Appleby calculated the wages petitioners owed to Taylor based on Taylor's claim form and the documentation Taylor provided. Appleby testified that none of the deductions were credited as payments towards Taylor as they were all impermissible deductions. Appleby noted that respondent did receive some documents from RJS's attorney following a compliance conference. These documents were the monthly statements provided by RJS to G&R and were not daily time records or payroll records that contained all the required information under the Labor Law. Thus, Appleby calculated the wages due to Taylor based on the hours that Taylor reported that he worked and the minimum wage rate in effect at the time, and deducted the amount that he was paid, leaving a balance of unpaid wages.

GOVERNING LAW

Burden of Proof

Petitioner's burden of proof in this matter is to establish, by a preponderance of the evidence, that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; Board Rule 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it]); *see also Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [Oct. 11, 2011]). For the reasons stated below, we find that petitioner did not meet his burden of proof to show that the orders are unreasonable.

Minimum Wage and Overtime

Article 19 of the Labor Law, known as the Minimum Wage Act, requires employers to pay each of its covered employees the minimum wage in effect at the time payment is due (Labor Law § 652). During the period relevant to this proceeding, the minimum wage was $7.15 per hour from January 1, 2007 through July 23, 2009, and $7.25 per hour from July 24, 2009 through December 31, 2013 (Labor Law § 652 [1]; 12 NYCRR 142-2.1). An employer also must pay every covered employee an overtime premium of one and one-half times the employee's regular hourly rate for hours worked over 40 in a week (12 NYCRR 142-2.2). When an employee is paid on a salary or any basis other than an hourly rate, the regular rate shall be determined by dividing the total hours worked during the week into the employee's total earnings (12 NYCRR 142-2.16).

An Employer's Obligation to Maintain Adequate Payroll Records

The Labor Law requires employers to maintain accurate payroll records that include, among other things, their 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 § 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 and maintain them for no less than six years (*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 (Labor Law § 661; 12 NYCRR 142-2.7). 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 and other evidence, even though the results may be approximate (*Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901, 901 [2d Dept 2013]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dept 1989]).

FINDINGS

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

Petitioners were Claimant's Employer

Petitioners had the burden to prove by a preponderance of the evidence that claimant was not an employee, but was an independent contractor. To meet this burden, petitioners needed to offer credible and reliable testimony that the claimant in the orders was as a matter of economic reality in business for himself and was not dependent upon someone else's business to render services (*Brock v Superior Care Inc.*, 840 F2d 1054, 1059 [2d Cir 1988]).

Under Article 19 of the Labor Law, "employee" is defined as "any individual employed or permitted to work by an employer" (Labor Law § 651 [5]; *see also* Labor Law § 190 [2] [similar definition under Article 6]). "Employer" is defined as "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]; *see also* Labor Law § 190 [3] [similar definition under Article 6]). "Employed" is defined as "permitted or suffered to work" (Labor Law § 2 [7]). The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). Because the statutory language is nearly identical, the Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*Ansoumana v Gristede's Operating Corp.*, 255 FSupp2d 184, 189 [SDNY 2003]).

To determine whether an individual is an "employee" covered by the Labor Law, or an independent contractor excluded from its protections, "the ultimate concern is whether, as a matter of economic reality the workers depend upon someone else's business for the opportunity to render business or are in business for themselves" (*Brock v Superior Care Inc.*, 840 F2d at 1059). Factors to be considered in assessing such "economic reality" include: "(1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and, (5) the extent to which the work is an integral part of the employer's business" (*Id.* at 1058-59). "No one of these factors is dispositive; rather, the test is based on the totality of the circumstances" (*Id.* at 1059). Applying this test to the present case, we find that petitioners were Taylor's employer and credit Taylor's testimony establishing that, as a matter of economic reality, he was not an independent contractor.

Petitioners failed to prove by a preponderance of the evidence that Taylor was an independent contractor. At the outset of their relationship, Schukraft had an established business, RJS. Taylor had no such established business. He was employed by a temporary labor services company and had no car or telephone. Petitioners approached Taylor, at his home, to ask him to work for RJS. After several days of working for RJS, Schukraft urged Taylor to sign an independent contractor agreement with RJS. The independent contractor agreement was signed by Taylor personally and not on behalf of G&R on January 5, 2004. When Taylor did eventually create a separate business entity, some three and a half years later, it was at the behest of Schukraft with the promise of more work. G&R's business insurance was obtained with the aid of Schukraft

and Schukraft provided all equipment that enabled Taylor to take on RJS accounts. The totality of the circumstances reveals that Taylor was dependent upon Schukraft and RJS to render cleaning services.

That Taylor may have had an opportunity for profit and loss if he obtained supplies from Schukraft at a lower cost, does not, by itself, indicate he was an independent contractor. The work that Taylor performed was an integral part of the petitioners' business. Similarly, claimant's admission that he had obtained non-RJS cleaning accounts, in and of itself, is insufficient to prove that Taylor was an independent contractor, and not an employee of RJS. Taylor credibly testified that over the five-year period of his claim he had two to three non-RJS cleaning accounts. Two of these accounts lasted less than a month and one lasted a year. Petitioners did not refute this with any specific testimony.

Considering the factors identified in *Brock* to determine whether someone is an independent contractor, we find that Taylor was not an independent contractor because petitioner controlled the means and manner in which Taylor performed his duties, set the rate of pay, and ultimately provided no persuasive evidence to show that Taylor was an independent contractor (*Brock v Superior Care, Inc.*, 840 F2d at 1058-59). Furthermore, Taylor's role did not involve an opportunity for profit or loss, there was no specialized degree of skill and independent initiative required to perform his work, and the cleaning services that Taylor performed for petitioners were integral to its business as a janitorial company. Indeed, the very services that Taylor provided to RJS were those that it provided to its clients (*id.*). Accordingly, we find under the totality of the circumstances that Taylor was not as a matter of economic reality in business for himself, but rather, that he was dependent on petitioners to render cleaning services. Taylor is an employee under the Labor Law.

Petitioner Failed to Maintain and Provide Payroll Records

We find that petitioners failed to meet their burden of proof to establish the "precise" hours worked by claimant, and that he was paid for those hours, or that the inferences supporting the calculation of wages made by the Commissioner in the minimum wage order are otherwise unreasonable.

Petitioners submitted two sets of records at hearing: (1) monthly statements, and (2) monthly estimates regarding the maximum number of hours required to clean each account, in support of their argument that Taylor was paid all monies due and owing. Neither of these sets of records satisfy the requirements of Article 19 of the Labor Law, as they do not consistently and credibly track the precise hours worked by Taylor, and the wage rate he was paid for that work, as required by Article 19. The records introduced at hearing only demonstrate the amounts ultimately paid to Taylor and estimates, created by Schukraft, of the maximum number of hours each account should have taken to clean. They lack the necessary information required to comply with the payroll records regulations (Labor Law § 661; see also 12 NYCRR 142-2.6 [a]). Accordingly, we cannot credit these records as accurate or reliable evidence that Taylor was properly compensated for the hours that he worked.

Where the employer has failed to keep legally 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 though the results may be approximate (*Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901, 901 [2d Dept 2013]; *Matter of Garcia v Heady,* 46 AD3d 1088 [3d Dept 2007]; *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dept 1989]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp.*, 156 AD2d 818, 821 (3d Dept 1989), "[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 calculations to the employer." In addition, 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" as required (*Anderson v Mt. Clemens Pottery Co.*, 328 US 680, 688-89 [1949]; *see also Mid Hudson Pam Corp.* 156 AD2d at 821; *Matter of Mohammed Aldeen*, PR 07-093 [May 20, 2009], aff'd *sub nom Matter of Aldeen v IBA*, 82 AD3d 1220 [2d Dept 2011]).

We find respondent properly calculated the underpayment of wages due to Taylor based on the minimum wage rate at the time and Taylor's statements regarding the hours worked and amounts paid as reflected by the monthly statements. The underpayment as written in the minimum wage order, however, is modified to accurately reflect the amount respondent re-calculated was owed during the hearing to $169,578.18.

The Interest in the Wage Order is Affirmed

Labor Law § 219 (1) provides that when the Commissioner 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."

The Commissioner's determination of interest due was required by statute and did not exceed the statutory limit, and is therefore not unreasonable or invalid, but must be reduced proportionally based on the modified principle amount.

The Civil Penalty in the Wage Order is Revoked

Labor Law § 218 requires the Commissioner to assess an appropriate civil penalty in cases where she finds that an employer has violated a provision of Article 19. The law requires respondent to consider the size of the business, the employer's good faith basis, the gravity of the violation, the history of previous violations, and the failure to comply with recordkeeping and other non-wage requirements (Labor Law § 218). In cases where the employer is a repeat offender or the violations are willful or egregious, respondent may assess up to a 200% civil penalty. Respondent assessed a 200% penalty on the minimum wage order issued against petitioners for a total amount of $342,039.14.

Petitioners assert respondent's civil penalty assessment is unreasonable because petitioners had a good faith basis for believing they complied with the Labor Law. The record demonstrates that they had consulted with an attorney in revising their independent contractor agreements to be in compliance. Respondent offered no testimony or other evidence with respect to the civil penalty assessment. We find respondent failed to rebut petitioners' assertion. (*See e.g., Matter of Rodney Brayman and Phoenix Beverages MTO, LLC and Phoenix Beverages, Inc.*, PR 15-311, at pp. 12-13 [January 25, 2017]). As the record does not support respondent's assessment of civil penalties in this matter we revoke that portion of the minimum wage order.

The Liquidated Damages Assessed in the Minimum Wage Order Are Revoked

The minimum wage order includes liquidated damages in the amount of 25% of the wages owed. 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." On the record before us, petitioners had consulted with an attorney in revising their independent contractor agreements to comply with the law. Respondent presented no evidence to rebut this evidence or to show petitioners acted in bad faith. The record, therefore, does not support respondent's assessment of liquidated damages in this matter and we revoke that portion of the minimum wage order.

The Penalty Order is Revoked

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. Pursuant to Labor Law § 218 (1), the penalty order assesses civil penalties of $18,000.00 against petitioners for the following counts for the period of February 15, 2007 through December 15, 2012:

Count one, for failing to maintain required records (Labor Law § 661 and 12 NYCRR 142-2.6); count two, for failing to pay wages weekly to manual workers not later than seven calendar days after the end of the week in which the wages were earned (Labor Law § 191 (1) (a)); and count three, for making prohibited deductions from the wages of employees (violating Labor Law § 193 (1)).

Respondent assessed $6,000.00 for each count against petitioners. This amount exceeds the statutory maximum (Labor Law § 218 (1)). Petitioners challenged the penalties in their petition, and since respondent offered no explanation at hearing as to the how the civil penalty was determined, the penalty order is revoked as unreasonable for assessing a civil penalty in excess of that allowed by statute for a first violation.

////////

/////

//

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is modified to reduce the wages due and owing to $169,578.18; and

2. The interest in the minimum wage order is reduced proportionally; and

3. The liquidated damages and civil penalties assessed in the minimum wage order are revoked; and

4. Respondent is directed to issue a modified minimum wage order consistent with this decision within 30 days; and

5. The penalty order is revoked; and

6. The petition be, and hereby is, granted in part and denied in part.

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
October 24, 2018.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is modified to reduce the wages due and owing to $169,578.18; and

2. The interest in the minimum wage order is reduced proportionally; and

3. The liquidated damages and civil penalties assessed in the minimum wage order are revoked; and

4. Respondent is directed to issue a modified minimum wage order consistent with this decision within 30 days; and

5. The penalty order is revoked; and

6. The petition be, and hereby is, granted in part and denied in part.

Molly Doherty, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
in Syracuse, New York, on
October 24, 2018.