

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 STANLEY A. WARSZYCKI and STANLEY :
 A. WARSZYCKI, INC., :
 :
 Petitioners, :
 :
 To Review Under Section 101 of the Labor Law: An :
 Order to Comply with Article 6 of the Labor Law, and :
 an Order Under Article 19 of the Labor Law, dated :
 May 6, 2008, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
 -----X

DOCKET NO. PR 08-113

RESOLUTION OF DECISION

APPEARANCES

Ahern & Ahern, Dennis P. Ahern, of Counsel, for Petitioner.

Maria L. Colavito, Counsel to the New York State Department of Labor, Benjamin T. Garry, of Counsel, for Respondent.

WITNESSES

Stanley A. Warszycki; Frank King, Senior Investigator, New York State Department of Labor Division of Labor Standards.

WHEREAS:

On July 28, 2008, Stanley A. Warszycki, Inc. and Stanley A. Warszycki (petitioner) filed a petition with the New York State Industrial Board of Appeals (Board) pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR part 66), seeking review of two orders to comply that the Commissioner of Labor (Commissioner or respondent) issued against them on May 6, 2008. The order to comply with Article 6 of the Labor Law (wage order) finds that petitioners failed to pay wages to eight named claimants, and demands payment of \$29,350.00 in unpaid wages,

interest at the rate of 16% calculated to the date of the order in the amount of \$2,405.85, and a 150% civil penalty in the amount of \$44,025.00 for a total amount due of \$75,780.85. At the hearing, the Commissioner amended the schedule of unpaid wages in the wage order to credit petitioners for \$4,300.00, based on amounts the petitioners and claimants agree were paid to the claimants. The amended wage order demands payment of \$25,050.00 in wages due and owing, interest at the rate of 16% calculated to the date of the wage order in the amount of \$2,064.38 and a 150% civil penalty in the amount of \$40,671.57 for a total amount due of \$67,785.95. The order under Article 19 (penalty order) finds that the petitioners failed to keep and/or furnish accurate payroll records for the period from March 29, 2007 through October 31, 2007, in violation of Article 19 of the Labor Law, and demands payment of \$500.00.

The petition alleges that the claimants were paid in full for their work putting in a driveway and waterfall, "but were never owed what was claimed."

Upon notice to the parties, the Board held a hearing in Garden City, New York on May 28, 2009 before Board Member Jean Grumet, Esq., the designated hearing officer in this matter. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

SUMMARY OF EVIDENCE

Petitioner Warszycki testified that he had been in the lawn maintenance and landscaping business, including the construction of retaining walls, since 1973, but that in 2007, he was repeatedly hospitalized and by August 2007, was running "[w]hatever of the business was left." In September 2007, his wife requested that they put their house on the market, and asked him "to do the retaining wall" and the "apron" or "beginning of the driveway" to make the house more marketable. Warszycki testified that he was too weak to do physical labor himself, so he obtained an estimate of \$45,000 for the job from a friend in the construction business. When he told the friend he could not afford that amount, the friend suggested that Warszycki hire day laborers.

According to petitioner, a week after he had this conversation with his friend, day laborers appeared at his house asking for work on three separate occasions¹. After Warszycki purchased materials and rented machinery including a bulldozer and a grading machine, work began on September 11, 2007.

According to Warszycki, on the first day of the job, claimants Manuel M., Jose M., and Eber Z. began grading and tamping down the soil so that the first course of blocks would be level. Warszycki testified that all three workers asked to be paid \$100 per day to

¹ The claimants' claims, however, indicate that claimants had been hired by Warszycki on various dates in the Spring and Summer of 2007 and worked in his landscaping business in Long Island homes until November 3, 2007. There was no claim that Warszycki did not pay claimants for work performed prior to September 24, 2007. The claims state that Manuel M. was hired on July 1, 2007, Jose M. was hired on May 5, 2007, Eber Z. was hired on July 10, 2007, Francisco Z. was hired on April 9, 2007, Hector L. was hired on May 1, 2007, Luis Z. was hired on May 5, 2007, and Francisco R. was hired on March 29, 2007.

work from 8:00 a.m. to 5:00 p.m., with a 45 minute lunch provided by Warszycki , and a 15 minute break. Warszycki testified that he wanted “just those three guys, maybe four guys,” but other workers appeared at his house and Manuel suggested that work would go more quickly if there were more workers. Warszycki testified that he asked Manuel how long it would take to build the wall if he hired the additional workers, and Manuel replied “three to four days.” Warszycki said, ‘That sounds good to me... Let’s get it done.’ Warszycki further testified that “the next day was two more guys, which would be five, and the final days when they did the apron and the waterfall, the rest of them came, did the finishing touch, graded, everything done; all the debris is removed, put in the dumpster, and it is finished.”

Warszycki testified that the original three workers, Jose M., Manuel M. and Eber Z., “were there for three days, three to four day[s], and clean up,” while other workers worked “[b]etween three days and two days, that kind of stuff.” He also testified that Jose M., Francisco Z. and Selvin S. worked two days before being fired for smoking marijuana and drinking beer; that Selvin S. “came back and pleaded... so [he] worked three days;” that Eber Z., Francisco R. and Hector L. worked three days; and that Luis Z. “was there for four days.”

Warszycki testified that the claimants installed the retaining wall, and “[t]he waterfall they gave me as a present. There was a couple hours left over. They put a bunch of rocks and a pump, and that apron on the end of the driveway.” At another point in his direct testimony, Warszycki testified that the job “is not completed yet.” According to Warszycki, the wall was 55 feet long and started at four feet high but was graded and tapered down to two feet high, and was constructed of 350 16-inch-by-eight-inch, 80-to-85-pound blocks. The “most important” part of the work is the first course of blocks; once that is level, “you could go like hell; you just put glue down ... and put the spikes in it and the gravel, and you could lay a lot of blocks in basically a day.” The waterfall “is three rocks.” The apron on the driveway, made of 240 “pavers, which is blocks that interlock together,” was 300 square feet and tapered from 20 to 25 feet at its widest, tapering to 6 to 9 feet wide. Warszycki testified that when the retaining wall was three-quarters done, after “[p]robably three days,” the workers began work on the apron. According to Warszycki, the job continued into the following week on and off, depending on when workers showed up for work. Warszycki testified that he paid the workers in cash for the days that they were on the job.

Warszycki testified that Phil Pisani, a supervisor in the New York State Department of Labor’s (DOL) Division of Labor Standards, sent him a letter on November 23, 2007 notifying him of the claims. Warszycki testified that in a subsequent telephone conversation, Pisani suggested that he obtain signatures from the claimants stating that they were paid. Warszycki’s wife typed up an undated document, which states in English: “The following gentlemen state that they have been paid cash and were paid in full for all work done at ... Kings Park, New York.” Warszycki testified that he called Manuel M., the claimant who spoke the best English, and asked him to get each of the employees to sign this letter. Warszycki testified that Manuel and Eber signed the letter in his presence, but that he was not present when the other claimants signed the letter: “Manuel brought it back to me about a week [later]. I called him back, ‘You get it signed’ ‘I don’t know. This guy is

not around. This guy is not there.' I said, 'Please, get it done.' He brought it back and basically this is all the signatures."

On cross examination, Warszycki stated that he shut down his landscaping business in the fall of 2006, but continued to maintain a business cell phone through the end of 2007. Warszycki testified that he kept no records of the wages he paid to the claimants. He testified that he paid \$100 per day to all the workers because that was what each of the workers requested. He testified that he paid some of the workers by check because they requested checks that they could show to their landlord to prove that they earned good wages. Warszycki testified that the claimants gave the checks to their landlords, who cashed the checks, which were returned for insufficient funds. Warszycki testified he wrote two checks at a time when the employees "were working for me at the job." He identified a check dated October 20, 2007 written to Francisco R. as one of those two checks. Warszycki testified that he warned the claimants that the checks would "not be any good" but the claimants said this was not a problem because they were using the checks to show the landlord the kind of money they made." Warszycki recalled Francisco R's check amounted to "probably" \$700, but did not dispute that it was actually \$1,075.00. Warszycki testified that he wrote "probably four or five checks" to workers who wanted checks to show the landlord, and told them not to cash them because there was no money in the bank. Warszycki testified that "two or three other checks" were returned.

In response to questions from the Hearing Officer, Warszycki testified that work on the driveway apron began on the second day of doing the retaining wall. He testified that on the first day of work Manuel M., Jose M., and Eber Z. worked on the retaining wall from 8 a.m. until 4:30 or 5 p.m., and that on the second day, they were joined by Francisco Z. and Francisco R. who worked from 8 a.m. until 4:30 p.m. He testified that all eight claimants worked on the third day because he wanted to do the apron. In response to the Hearing Officer's question as to the time frame for the job as a whole, Warszycki testified that it was "[f]our, five days. Actually, it was probably more than that. In and out, in and out it was probably about six days, because not all the guys would show up at the same time." When asked by the Hearing Officer when the job was completed, Warszycki testified, "It was completed in November...by Manuel and Eber...There was extra clean-up to be done, and part of the wall...needed caps...They came in for approximately - I don't know - half a day, from 8:00 o'clock probably until 1:00 o'clock and they left." Warszycki testified that this occurred "right before Thanksgiving."

The Hearing Officer also asked Warszycki to further explain how he obtained the employees' signatures. Warszycki testified that he talked to Manuel, "the guy who understood perfect English ...and he said 'Not a problem. I'll come down here for you and vouch that everybody got paid.' I called up - he was the guy who actually brought the papers and got four guys to come down to his house and sign that they got paid." Warszycki further testified that:

"[I]t took us like two weeks before I could be able to get hold of them. Then I found out that one of the guys passed away. It took me - it took me almost two months. It wasn't very easy to find

those guys ... I said, 'Sign it.' They signed it ... It says 'paid', and I read them, because [Manuel] understood English probably 80 percent. I said to him, 'This says paid in full.' He says, 'No problem. Stanley, you are good.' I made him sign the paper. He was the first one. Eber was the second one. The rest of the other guys, we went by... Suffolk Community College, because they play soccer every Sunday . . . and I said, 'Can you get me some of the guys here?' He said, 'No problem,' and boom, boom, four guys, six guys. Then after that, there was only one guy, which is the dead guy. I couldn't get no signature. I was trying to get a hold of his wife. She moved to Honduras. He was completely paid. Everybody was completely paid."

In response to questions from the parties' lawyers, Warszycki clarified that after Eber signed, and obtained one other worker's signature, "we went to the soccer game, Suffolk Community College, and that is where I got the other four so there were six signed."

Warszycki testified that his business was a small operation, and that during his over 30 years in business he had never had a labor law violation.

Senior Labor Standards Investigator Frank King testified that he oversees and investigates cases, and that he supervised Cecilia Maloney and Juan Restrepo, the Labor Standards Investigators who investigated the claimants' claims against the petitioners. King introduced the DOL's file into the record.² The file includes eight claims: each dated November 2, 2007; signed and affirmed by a claimant under penalty of perjury; and listing the employer as Stanley A. Warszycki Inc., the kind of business as "landscaping and masonry," and the kind of work or occupation as "construction" or "construction worker." Each of the eight claim forms state that the respective claimant was hired on a specific date in 2007, between March 29 and July 10, and that the claimant's last day worked was October 31, 2007. Five of the claimants stated that their agreed rate of pay was \$150 per day, two stated that their agreed rate of pay was \$125 per day, and one, Luis Z., stated that his agreed rate of pay was \$100 per day starting the week ending September 29 through October 31. Each claim indicates that wages were paid both in cash and by check, including checks that were dishonored, and that when the claimant requested earned but unpaid wages, he was told, in substance, that the petitioner did not have money to pay him.

Senior Labor Standards Investigator, Frank King, testified that each of the eight claimants came to the DOL's Garden City office on November 2, 2007 alleging that they worked for Warszycki for as much as six weeks without being compensated for the work they performed. King stated that the claim forms were transferred to the Claims Intake Department in Albany, and then the Central Investigations Unit began a preliminary investigation of the claims. On November 23, 2007, a collection letter was sent to Warszycki. This letter listed the names of the eight claimants, the dates and amounts of

² State Administrative Procedures Act § 306 (2) provides that "records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference."

unpaid wages claimed, and asked for documents to be provided if petitioner did not agree the amounts were due. On January 15, 2008, Senior Investigator Anne Marie Culberson wrote to Warszycki stating that on December 12, 2007, Warszycki told Supervising Labor Standards Investigator Phil Pisani that the claimants would be paid directly and that Warszycki would provide documentation that this was done. Culberson's letter stated that to date, the DOL had received nothing. Culberson's letter reminded the petitioner that eight former employees were together owed \$29,350.00 and absent proof to the contrary, the DOL would uphold the claim. On May 29, 2008, the petitioner faxed a letter to the Division of Labor Standards which contained purported signatures from eight people stating that they were paid in cash and were paid in full, although there were no monetary amounts or dates listed on the letter.

King testified that he had telephone conversations with claimants Manuel M., Luis Z. and Jose M. on May 27, 2009 (the day before the hearing). In these conversations, each of the three claimants told him that Warszycki contacted them after the claim was filed. Manuel M. told King that he was paid \$1000.00; Luis Z. told King that he was paid \$1600.00, and Jose M. told King he was paid \$1000.00. King testified that he was not able to get in touch with the other claimants.

King identified a document entitled "Background Information – Imposition of Civil Penalty" which he stated was filled out by Senior Investigator Culberson, who recommended a 150% penalty. King stated that the penalty was appropriate based on the lack of cooperation and correspondence received from the employer, checks not honored and "the nine individual claimants all alleging the same issues." On cross-examination, King admitted that there had in fact been contact between Warszycki and Phil Pisani, and that he did not know the extent of their communication. Although the Civil Penalty document had "not generally cooperative" checked off, and stated, "has never responded to letters or phone calls," King admitted that this was incorrect, and acknowledged that there had been communication between the petitioner and DOL. When asked on cross-examination whether he believed that the civil penalty document was accurate and fair in regard to the petitioner, King responded, "I cannot make a statement on behalf of a colleague who is not here." King testified that the number of claimants on the Background Information sheet was incorrectly listed as nine, when there were actually eight. King testified that he had no idea of how long the petitioner had been in business or whether he had any previous Labor Law violations. He testified that having no violations in 37 years would be an important consideration in assessing a penalty, and stated that a 150% penalty was usually given to employers with a prior history of labor law violations.

STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections . . . not raised in the [petition] shall be deemed waived" (Labor Law § 101).

The Board is required to presume that an order of the Commissioner is valid. (Labor Law § 103 [1]). Pursuant to the Board's Rules of Procedure and Practice § 65.30 [12 NYCRR § 65.30], "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the petitioner to prove that the orders under review are not valid or reasonable.

Recordkeeping Requirements

Labor Law §§ 195(4) and 661 require employers to maintain payroll records. Section 661 requires employers to make such records available to the Commissioner:

"Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time"

The Minimum Wage Order for Miscellaneous Industries requires the following information to be maintained for a period of six years. 12 NYCRR 142-2.6 provides in relevant part:

- "(a) Every employer shall establish, maintain and preserve for not less than six years weekly payroll records which shall show for each employee:
 - "(1) name and address;
 - "(2) social security number;
 - "(3) wage rate;
 - "(4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
 - "(5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
 - "(6) the amount of gross wages;
 - "(7) deductions from gross wages;
 - "(8) allowances, if any, claimed as part of the minimum wage."

Labor Law § 195(3) and 12 NYCRR § 142-2.7 also require employers to provide wage statements to employees with every payment of wages. Labor Law §195(3) requires employers to:

"[F]urnish each employee with a statement with every payment of wages, listing gross wages, deductions, and net wages, and upon the

request of an employee furnish an explanation of how such wages were computed.”

Burden of Proof in the Absence of Adequate Employer Records

An employer’s failure to keep adequate records does not bar employees from making wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complainant’s assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. (See Labor Law § 196-a; *Angello v. National Finance Corp.*, 1 AD3d 850 [3d Dept. 2003].)

The Commissioner may use “the best available evidence” to determine if wages are due when the employer fails to maintain records required by the Labor Law. In *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 (3rd Dept. 1989), the Appellate Division upheld the Commissioner’s determination of wages due some forty-three employees from a variety of evidence, including complaints from two of the employees, lists of employees, and interviews of others. The Court held, “[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.” (emphasis added.) The court based its decision, in part, on the remedial nature of the prevailing wage statute and “its public purpose of protecting workmen.” (*Id.* at 821). The same standard applies under federal law where the United States Department of Labor brings an action in a representative capacity to collect unpaid wages on behalf of classes of employees (*Reich v Southern New Eng. Telecoms. Corp.*, 121 F3d 58 [2d Cir. 1997]).

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 680, 687-88 (1949), superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

“[W]here the employer’s records are inaccurate or inadequate ... [t]he solution ... is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer’s failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee’s labors without paying due compensation as contemplated by the Fair Labor Standards Act.”

Citing to *Anderson v Mt. Clemens*, the Appellate Division in *Mid-Hudson Pam Corp.*, *supra*, agreed: “The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here.”

The Board therefore follows the precedent set in *Mid-Hudson Pam Corp.* that where an employer fails to keep records, DOL may use the best available evidence to calculate back wages due and “to shift the burden of negating the reasonableness of the Commissioner’s calculations to the employer. . . In such a situation the amount and extent of underpayment is a matter of just and reasonable inference” (*Mid-Hudson Pam Corp.*, 156 AD2d at 821; *Matter of Abdul Wahid*, PR 08-005 [Nov 17, 2009]; *Matter of Dueck Sun Kim Youn*, PR 08-172 [March 24, 2010]).

Therefore, where an employer fails to keep required records, the burden of disproving the amounts sought by the Commissioner in her order rests with the employer. To hold otherwise would reward the employer’s disregard of its statutory obligation to maintain employee records.

FINDINGS AND CONCLUSIONS OF LAW

The Board having given due consideration to the pleadings, hearing, testimony, arguments, and documentary evidence, makes the following findings of fact and law pursuant to the provision of Board Rules 65.39 (12 NYCRR § 65.39).

We affirm the Commissioner’s amended wage order directing payment to the Commissioner of unpaid wages owed to the eight claimants. Since the petitioner failed to produce the payroll records required by Labor Law § 661 and 12 NYCRR § 142-2.6, DOL’s calculation of wages must be credited unless petitioner met its burden to negate the reasonableness of the Commissioner’s determination (*see National Finance Corp.* 1 AD3d 850). Warszycki’s testimony, the only evidence he presented, was too inconsistent and unreliable to satisfy this burden. Warszycki gave varying accounts of such things as the amount of time the job took to complete, when he closed his business, and how employees’ signatures were solicited. Warszycki presented no evidence to corroborate his testimony that the claimants had been paid in full. We give no weight to the letters allegedly signed by claimants stating that they were paid in full. Warszycki was not present when most of the claimants allegedly signed the undated document,³ which was in English although most of the claimants, according to Warszycki, were not fluent in English. There is no credible proof that the claimants signed the document, or if they did, that they understood what they had signed.

Warszycki’s testimony that he did not know the workers before they showed up unsolicited, and fired several on their second day of work, yet gave them “fake checks” to help them with their landlords, is not credible. The same is true of his testimony that although they showed up unsolicited, Manuel M., Eber Z. and other workers “knew exactly what to do,” and Warszycki relied on Manuel M. to estimate how many workers were needed and how quickly he could put the wall up. The workers’ sworn claims indicate that

³ Although at another point in the hearing, Warszycki implied that he, perhaps together with Manuel, obtained six signatures at a soccer game at Suffolk Community College, his initial testimony was that “I wasn’t there when they signed this. I was only there for two guys [Manuel M. and Eber Z.], that was it,” and that Manuel M. obtained the other signatures.

they had been hired by Warszycki on various dates in the spring or early summer of 2007, and had worked for his landscaping business at Long Island homes. This background helps explain how employees could continue to work for several weeks after payment became limited and sporadic.

Warszycki's testimony was often vague and included many inconsistencies and significant and unexplained shifts in testimony, for example, that the construction at issue, begun on September 11, 2007, was completed within a few days, "is not completed yet," took "almost two weeks on and off," took "[f]our, five days. Actually, it was...probably about six days, because not all the guys would show up at the same time," and was completed "[r]ight before Thanksgiving" when Manuel M. and Eber Z. reglued and straightened the retaining wall. It is reasonable to assume that a job estimated to cost \$45,000.00 would not take so little time to complete and would cost more than the \$4,300.00 that Warszycki claims he paid the claimants.

Similarly, Warszycki testified on direct examination that he paid employees in cash; on initial cross-examination, that he wrote two checks, one to Eber Z. that bounced and another to Manuel M., at a time when they "were working for me at the job" (presumably, based on Warszycki's other testimony, in September 2007); and later, that he wrote a check to Francisco R. dated October 20, 2007 (long after Warszycki claimed he fired Francisco R. and paid him in full) that was returned for insufficient funds, and that "probably two or three other checks" were also returned. Warszycki then testified that four or five checks were intended as "just fake checks" to be shown to workers' landlords and that the workers, even though they had been told this, nonetheless tried to use the checks to pay their rent. It strains credulity that Warszycki would give such short-term employees "fake checks" to be shown to landlords but not cashed; that workers given such "fake checks" and told that there was no money to cover them would nevertheless give the checks to the landlords to pay the rent; and that Warszycki would keep writing "fake checks" despite the fact that one had bounced. Warszycki himself testified "the money I never had in the bank because I was broke." It is far more plausible to credit the claimants' statements in their claim forms that paychecks were dishonored and Warszycki did not pay for work because he did not have the money.

Indeed, because the petitioner did not keep required records, "the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees" (*Angello v. National Finance Corp.*, 1 AD3d at 854). We have repeatedly held that where an employer fails to maintain required records, DOL may use the best available evidence, including only the claimants' sworn claim forms, to calculate back wages due to the employer's employees (*Matter of Abdul Wahid*, PR 08-005; *Matter of Dueck Sun Kim Youn*, PR 08-172; *Matter of Angela Jay Masonry & Concrete*, PR 06-073 [September 24, 2008]). Accordingly, we cannot say in the absence of accurate payroll records and based on the petitioner's nonspecific, contradictory, and at times incredible testimony that the Commissioner's calculation of the wages owed to the claimants was unreasonable.

For all of these reasons, we find that Warszcki did not meet his burden to show that the Commissioner's reliance on the claimants' sworn statements was invalid or unreasonable and we uphold the amended wage order in all respects.

The Commissioner also issued a penalty order against the petitioner finding that he failed to keep and/or furnish accurate payroll records for the period from March 29, 2007 through October 31, 2007, in violation of Article 19 of the Labor Law. The petitioner has not shown that the penalty order was unreasonable.

IMPOSITION OF CIVIL PENALTIES FOR FAILURE TO PAY WAGES

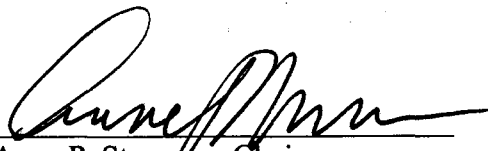
We find the Commissioner's failure to adequately explain its application of the criteria that must be given due consideration in assessing the 150% penalty against the petitioner to be arbitrary, and therefore unreasonable and we revoke the civil penalty portion of the amended wage order.

At the hearing, Warszycki testified that the penalty was excessive because he operated a small landscaping business for 37 years, never had a prior labor law violation, and cooperated with the investigation. In the face of such evidence, the burden shifted to the Commissioner to submit specific evidence explaining how the applicable factors that must be given due consideration were balanced to assess a 150% penalty for the violation, as opposed to another penalty amount within the Commissioner's discretion. The Commissioner failed to satisfy this burden.

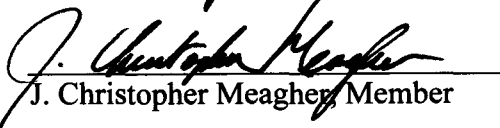
The Commissioner failed to submit sufficient testimony particularizing how the applicable factors were weighed to assess the specific penalty in this case. Investigator Annemarie Culberson, the Labor Standards Investigator who filled out the "Background Information - Imposition of Civil Penalty" form did not testify, and the testimony of Senior Labor Standards Investigator King did not adequately explain how the statutory factors were weighed to determine that Warszycki was not generally cooperative and "never responded to letters or phone calls." Senior Investigator King admitted that this was incorrect and acknowledged that there had been communication between the petitioner and DOL. When asked on cross-examination whether he believed that the civil penalty document was accurate and fair in regard to the petitioner, King responded, "I cannot make a statement on behalf of a colleague who is not here." The penalty form also states that nine employees were owed more than \$1,000, when there were only eight. King acknowledged that the civil penalty form was incorrect on this point also. King further testified that he had no idea of how long the petitioner had been in business or whether he had any previous labor law violations. He testified that having no violations in 37 years would be an important consideration in assessing a penalty, and stated that a 150% penalty was usually given to employers with a prior history of labor law violations. We therefore modify the amended wage order to reduce the civil penalty to \$0.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The May 28, 2009 amendment of the order to comply with Article 6 of the Labor Law dated May 6, 2008 reducing the wages due and owing to \$25,050.00 and charging interest at 16% calculated to the date of the original order is approved and affirmed and modified to reduce the civil penalty to \$0.00;
2. The order to comply under Article 19 of the Labor Law dated May 6, 2008 is affirmed; and
3. The Petition be and the same hereby is, denied.



Anne P. Stevason, Chairman



J. Christopher Meagher, Member



Jean Grumet, Member

LaMarr J. Jackson, Member

Absent

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
July 28, 2010.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The May 28, 2009 amendment of the order to comply with Article 6 of the Labor Law dated May 6, 2008 reducing the wages due and owing to \$25,050.00 and charging interest at 16% calculated to the date of the original order is approved and affirmed and modified to reduce the civil penalty to \$0.00;
2. The order to comply under Article 19 of the Labor Law dated May 6, 2008 is affirmed; and
3. The Petition be and the same hereby is, denied.



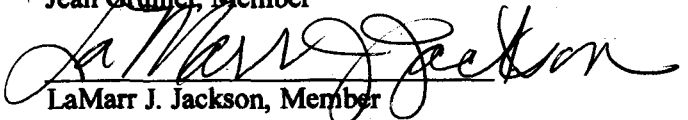
Anne P. Stevason, Chairman



J. Christopher Meagher, Member



Jean Grumet, Member



LaMarr J. Jackson, Member

Absent

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
July 28, 2010.