STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: DUECK SUN KIM YOUN, D/B/A MOMO BESPOKE TAILOR A/K/A MOMO CUSTOM TAILOR, Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 and an Order under Article 6 and 19 of the Labor Law, dated October 3, 2008, - against - THE COMMISSIONER OF LABOR, Respondent.	:	DOCKET NO. PR 08-172 RESOLUTION OF DECISION

APPEARANCES

Diane H. Lee, Esq., for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WITNESSES

Deuck Sun Kim; Micaela Angel, Labor Standards Investigator; Cloty Ortiz, Senior Labor Standards Investigator; Kikyu Chung; and Tae Hung Kim.

WHEREAS:

On November 28, 2008, Petitioner Deuck Sun Kim-Youn D/B/A MoMo Bespoke Tailor A/K/A MoMo Custom Tailor (Petitioner) filed a Petition to review the two orders the Commissioner of Labor (Commissioner) issued against it on October 3, 2008. The first order is an Order to Comply with Article 19 of the New York Labor Law (Wage Order) and directs Petitioner to pay $70,180.12 in unpaid wages owed to seven employees, $10,736.60 in interest and $52,635.00 in civil penalties for failing to pay its employees minimum wage and overtime. The second Order was issued under Article 6 and 19 (Penalty Order) and

directs Petitioner to pay $9,000.00 in civil penalties based on its failure to keep and furnish the requisite payroll records ($3,000); its failure to provide wage statements to employees with every payment of wages ($3,000); and its failure to pay all manual workers within seven calendar days ($3,000).

In its Petition, Petitioner alleges that the Commissioner failed to take into account the actual hours worked by the employees during the relevant time period in calculating the wages due. In addition, Petitioner alleges that the civil penalty fails to take into account that Petitioner is a small business with limited funds and resources.

In her Answer, the Commissioner alleges that the investigation of Petitioner's business began when a former employee filed a complaint for unpaid wages with the Department of Labor (DOL) and due to the lack of payroll and time records, DOL performed its audit of unpaid wages based on employee interviews and the store's hours of operation. In addition, DOL's assessment of civil penalties was reasonable given the egregious nature of Petitioner's Labor Law violations.

Upon notice to the parties, a hearing was held on October 20, 2009 in New York City before Anne P. Stevason, Chairperson of the Board and the designated Hearing Officer in this proceeding.

I. SUMMARY OF EVIDENCE

Petitioner operates a menswear manufacturing and tailoring business. She testified that, during the period of 2001 to 2007, the business employed approximately four to six employees and was open from 10:00 a.m. to 8:00 p.m. Monday through Saturday. Employees had keys and sometimes started work earlier than the opening time and sometimes they started later. The employees were paid by the piece and Petitioner admitted that she failed to keep track of the hours worked by each employee although she did keep a notebook detailing what was paid to each employee. The business had a slow season from December to April each year where there was not much work and the employees would work only two to three times per week.

DOL initiated its investigation upon the filing of a complaint by Ki Kyu Chung on June 12, 2007 against Petitioner. Labor Standards Investigator (LSI) Michaela Angel (Angel) testified that she visited Petitioner's business for the first time on October 15, 2007. She observed five employees sewing men's suits. She spoke with the manager of the business and asked for payroll and time records but none were provided. No time clock or time records were observed. However, she did see some piece rate cards. The manager informed her that the business only kept the piece rate cards for a short period and then threw them away. At the end of the visit LSI Angel served the manager with a Notice of Revisit for October 19, 2007 requesting time and payroll records, and a Notice of Labor Law violations for failure to maintain records of hours worked; failure to provide employees with wage statements and failure to comply with apparel industry registration for the year 2007.

The employees were interviewed by the DOL employees accompanying LSI Angel on the inspection.

On October 19, 2007, Petitioner appeared at the DOL offices, identified herself as the owner of the business and presented a notebook that contained the names of the employees and the amounts paid. The notebook was in Korean but was translated by DOL. No record of time worked or rate of pay was in the notebook. Petitioner also stated that there were no other payroll records and no time records kept and that piece rate cards were kept for several months and then thrown away.

On May 2, 2008, Petitioner was served with a recapitulation sheet indicating that $78,891.30 was due to her employees in unpaid wages. She was also given a revised Notice of Labor Law Violations which added a failure to pay overtime and a failure to pay manual workers their wages on a weekly basis and removed the registration violation. At the meeting, Petitioner contested the calculations and stated that the employees did not work the time indicated since they took extended breaks and took extended leaves and vacation. Thereafter the employees were contacted and the audit was revised to reflect the information received from the employees as to vacations and sick leave taken during the period in question. The new audit totaled $70,180.11.

On May 9, 2008, DOL received mail from Young Tai Choi (Choi) who indicated that he was Petitioner's representative. Included in the mail were 70 pages of "Personal Payroll Charts" which included weekly hours worked for each employee on the audit.

On June 26, 2008, Petitioner was served with the revised recapitulation sheet totaling $70,180.11. A meeting was held on July 2, 2008 with Petitioner and Choi at which time it was explained that the records sent by Choi would not be used in calculating wages owed because DOL believed that the records were fabricated after Petitioner was served with the initial recapitulation sheet and that Petitioner should make arrangements for payment. Petitioner stated that she would not pay. On October 3, 2008 the two Orders currently under review were issued.

Senior LSI Cloty Ortiz (SLSI Ortiz) testified that she completed the background information regarding the imposition of a civil penalty and recommended a 75% penalty even though the maximum penalty is 200%. She based her recommendation on the small size of the business and the initial cooperation of Petitioner. However, she also took into account the fact that the employees were not paid on time and false records were presented by Petitioner's representative during the investigation.

Claimant KiKyu Chung testified at the hearing that he worked for Petitioner from April 2005 to August 2005 and then again from November 2005 to May 12, 2007. He worked six days a week during the "busy season" and attached to his complaint was a list of all dates that he worked as well as all payments received. Chung's notes and the DOL Recap Sheet indicate that Chung did not work and was not credited for working between August and November of 2005.

Tae Hung Kim also testified at the hearing and stated that he was paid by the piece according to the number of pants he completed. He set his own hours and made about two pants per day. Sewing pants takes three to five hours and sometimes more. He had no fixed schedule.

II. STANDARD OF REVIEW

In general, 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).

Pursuant to the Board Rules of Procedure and Practice (Rules) 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 are not valid or reasonable.

III. FINDINGS AND CONCLUSIONS OF LAW

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

A. Petitioner failed to keep required records.

1. Record Keeping Requirements

Labor Law § 661 states in relevant part:

> "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 specifies the information required to be maintained. 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;
(9) net wages paid; and
(12) student classification."

§ 142-2.7 further provides:

> "Every employer . . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages."

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid, and to provide its employees with a wage statement every time an employees is paid. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

Petitioner admits that she did not keep the required time and payroll records and has disassociated herself from the records produced by her representative prior to hearing.

2. Time records must still be kept even though the employee is paid by piece-rate.

Although Petitioner's employees were paid according to the number of pieces that they produced, the Petitioner must still keep track of the hours worked by the employees to ensure that the employee is paid at least minimum wage for each hour worked and the appropriate premium pay if the employee works more than 40 hours per week.

In addition, when an employee is paid by piece-rate, the employer must keep track of the number of units produced daily and weekly and the piece-rate of pay. (12 NYCRR 142-2.6). These records must be kept for six years (*Id.*). Petitioner failed to keep the required records.

3. The Petitioner failed to establish by a preponderance of the evidence that the Commissioner's calculation of wages was unreasonable.

As discussed above, Labor Law § 661 and its implementing regulation found at 12 NYCRR 142-2.6 require employers to maintain payroll records that include, among other information, employees' daily and weekly hours worked, wage rates, and gross and net wages paid, and also require employers to keep such records open to inspection by the Commissioner or her designated representative.

Pursuant to Labor Law article 6, § 196-a (a), an employer's failure to keep adequate records, nonetheless, does not bar an employee from filing a wage complaint:

> "Any employee . . . may file with the commissioner a complaint regarding a violation of [articles 6 and 19] for an investigation of such complaint and statement setting the appropriate remedy, if any. Failure of an employer to keep adequate records . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages. . . ."

Labor Law § 196-a is within the Unpaid Wage Prohibition Act, enacted with the express legislative finding "that too often the working people of our state do not receive the full wages they have earned, and that some workers are never paid at all for their labor" and with the express intent to "ensure that working people are paid what they earn" (L 1997, ch 605 § 1).

The clear remedial purpose of the Unpaid Wage Prohibition Act mirrors that of the federal Fair Labor Standards Act (FLSA). As especially relevant here, in *Anderson v Mt. Clements Pottery Co.*, 328 US 680, 687-88 (1949), *superseded on other grounds by statute*, the U.S. Supreme Court long ago discussed the remedial nature of the FLSA, and in particular, 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."

The *Anderson* Court found that an employee may be awarded damages "even though the result be only approximate. . . [and] [t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . .the Act" (*Id.* at 688-89).

Consistent with and relying on *Anderson*, the Appellate Division acknowledged "the remedial nature of the enforcement of the prevailing wage statute (*see*, Labor Law article 8) and its public purpose of protecting workmen" in *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 (3d Dept 1989). The Court determined that the remedial nature and public purpose of the statute

> "entitled the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate. When 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 such a situation the amount and extent of underpayment is a matter of just and reasonable inference and may be based upon the testimony of employees. 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."

(*Id.* at 820-821).

Like Labor Law article 8 and the FLSA, Labor Law articles 6 and 19 are remedial statutes predicated on the public policy of ensuring that working men and women are paid for their labor. Accordingly, applying the rationale of *Anderson and Mid Hudson Pam* and Labor Law § 196-a, where an employee complaint demonstrates a violation of Labor Law articles 6 and 19, the Commissioner may credit the reasonable assertions in the employee's complaint and any supporting employee statements and calculate wages due based on the information that the employee provided. The employer then bears the burden of proving that the disputed wages were paid or that they are not due to the employee.

By filing a timely petition with the Board, an employer who has failed to meet its burden of proof before the Commissioner may appeal for review of an order issued against it under articles 6 and 19 (Labor Law § 101). The Board conducts a de novo evidentiary hearing (12 NYCRR 66.1 [a] and [c]) to determine whether or not the Commissioner's order is reasonable and valid (Labor Law § 101 [1] and [3]). The order is presumed valid (Labor Law § 103 [1]), and the petitioner (employer) has the burden to prove by a preponderance of the evidence on the record that the order is not reasonable and/or not valid (12 NYCRR 65.30; *Matter of Mohammed Aldeen and Island Farm Meat Corp. [T/A Al-Noor Live Poultry]*, PR 07-093 [May 20, 2009] [*appeal pending]*; Borchers and Markell, NYS Administrative Procedure and Practice § 3.12, at 54-57 [2d ed]).

Here, Petitioner asserts that the Wage Order is unreasonable because the calculation of the amount of wages found due was based on the hours that the business was open without taking into consideration both that individual employees set their own hours and that

there was a busy season and a slow season during which employees' work hours further varied.

Petitioner's proof is general and inadequate. It does not account for employees on an individual basis: the specific dates each worked for the Petitioner; the hours each worked on a daily basis; or the rate of pay for each hour worked. Nor does Petitioner establish even the duration of either the busy or the slow season or the hours worked by each employee during these seasons. We therefore find that Petitioner did not meet the preponderance of evidence standard that is required for it to prevail.

B. Wages are due under the Minimum Wage Act.

The Minimum Wage Order for Miscellaneous Industries provides that an employer shall pay a non-residential employee minimum wage and overtime at a wage rate of 1 ½ times the employee's regular rate for hours worked over 40 in a work week subject to any applicable exemptions (12 NYCRR 142-2.2). The minimum wage was $6.00 per hour from May through December 2005; $6.75 per hour from January through December 2006; and $7.15 per hour from January 1, 2007 through July 2007.

As the Board has discussed in *Matter of Cayuga Lumber,* PR 05-099 (Decision on Reconsideration, September 26, 2007) the regular rate of pay, which is the basis for determining the premium pay for overtime, is calculated by dividing the employee's weekly salary by the regular number of hours worked per week.

In the instant case, the employees were paid weekly based on the number of pieces that they produced. However, if they work overtime, they are still entitled to premium pay for overtime hours which is equal to 1.5 times the regular rate which is defined as the amount regularly paid for each hour of work.

> "When an employee is paid on a piece work basis, salary or any basis other than hourly rate, the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total earnings." (12 NYCRR 142-2.16)

DOL properly calculated the overtime wages due.

C. Civil Penalties for failure to pay wages are affirmed.

The Wage Order additionally assessed a civil penalty in the amount of 75% of the wages due. The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amount set forth in the Order is proper and reasonable in all respects.

D. The Civil Penalties for failure to have records and issue pay statements and pay wages within seven days are upheld.

Petitioner did not contest the fact that she failed to keep required records, issue pay statements or pay wages within seven days. The Civil Penalties are upheld.

E. Interest is due.

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks 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 percent per centum per annum." Accordingly, we find the interest assessed is reasonable.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply with Article 19 (Wage Order) is affirmed in all respects.

2. The Order under Articles 6 and 19 is affirmed in all respects; and

3. The Petition is denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 24, 2010.