

The Order finds that the Petitioners failed to pay wages to the Claimant, Gambino Cruz (Claimant), in violation of Article 6 of the Labor Law. The Order demands payment of \$276.00 in unpaid wages for the period March 30, 2007 to December 10, 2007, interest at the rate of 16% calculated to the date of the Order in the amount of \$41.50 and a civil penalty in the amount of \$207.00, for a total amount due of \$524.50.¹ The Penalty Order demands payment of \$750.00 as a civil penalty for failure to keep and/or furnish true and accurate payroll records for each employee for the period March 30, 2007 through December 10, 2007. The Petition alleges that the Order is invalid and unreasonable because the employee did not work on the dates claimed and the Petitioner has true and accurate payroll records to support its claim.

Upon notice to the parties, the Board held a hearing in Garden City, New York on April 23, 2009 before Board Member Jean Grumet, the designated hearing officer in this case. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

SUMMARY OF EVIDENCE

The Petitioners operate a landscaping, irrigation, and garden maintenance business in Garden City, New York.

Petitioner Michael Moonan (Moonan) testified that Claimant worked in the maintenance section of Petitioner's business, mainly cutting grass. Claimant was half of a two man maintenance team with Jose Guarado. The two men shared a truck, and worked an identical schedule with a second two man maintenance team. Moonan stated that during the week beginning Monday, December 3, 2007, Petitioners were nearing the end of their season and work was slowing down. Moonan testified that no maintenance crews worked overtime, and that Ramon Baez (who worked on a sprinkler crew and had nothing to do with the maintenance crew) was the only employee who worked overtime during that week. Moonan testified that "if you look at other employees that worked those weeks you clearly see nobody worked on a Saturday" and he stated that the payroll records would support this assertion. Moonan testified that Claimant did not show up for work on Friday, December 7. Moonan stated that he called Claimant several times that night and on Saturday and left messages on his answering machine asking him why he did not come into work. According to Moonan, Claimant returned his call the following Monday morning and told him he was never working for Petitioners again.

Moonan testified that Petitioners' employees report their hours on an honor system, and submit handwritten paper chits at the end of the week with the number of hours worked. Moonan testified that the hours listed in the paper chits are subsequently transcribed to a "Timesheet" (Petitioners' Exhibit 2) which lists the daily hours of each employee. The "Timesheet" is given to the payroll company which prepares the "Payroll Register" (Petitioners' Exhibit 7). The "Payroll Register" lists each employee's total weekly hours but not the daily hours worked by each employee.

¹ We note that although the Order to Comply alleges a violation for the period covering March 30, 2007 to December 10, 2007 -- the entire length of Claimant's employment -- the actual period at issue in this case is December 7 - 8, 2007.

Moonan testified that on January 14, 2008, he received a copy of the claim from the DOL and a letter requesting a statement of Petitioner's position. The DOL's letter requested copies of payroll records or other documents that would substantiate Petitioners' position. That same day, Moonan responded and denied the claim, stating that Petitioners had payroll records to substantiate their position. Moonan testified that on March 3, 2008 the DOL sent him a second copy of the January 14, 2008 FAX, and that he responded that "These claims are not correct. Will mail payroll records." Moonan testified that he received a letter from DOL Senior Investigator Annemarie Culberson on May 22, 2008, stating that the DOL had still not received any of the requested records.

On cross-examination, when asked why Petitioners did not provide the DOL with the payroll records during the investigation, Moonan testified that they were in a box in his basement. Moonan stated "Don't forget it's 2007. I had to pull through 2008, find the papers. That's why it did take me a little time to find all the records they're asking for." He testified that on April 2, 2009, he submitted a handwritten "Timesheet" for the week of December 3-9, 2007 to the DOL, but he could not find the paper chits.

Moonan also testified that employees sign for their checks in the office before receiving them, and if there are any discrepancies in their hours, employees can refuse to sign. He stated that Claimant never contested the hours worked when he signed for his checks.

Claimant testified that his pay rate was \$12.00 per hour and that he received time and a half for over 40 hours. Claimant testified that he was paid by check, and the checks were left in the truck and distributed by the foreman who did not require a signature before distributing the check. Claimant testified that he worked on Friday and Saturday during the week in question gathering leaves at houses at the end of Long Island. He worked with Mr. Perry (who drove Claimant to work, and who Claimant believed was one of the owners of the company), Saul, and Ramon. He testified that during the week of December 3, 2007, he worked 50 hours but was only paid for 32, and he did not continue working for Petitioners because Moonan left him a note saying that he was no longer needed.

Senior Labor Investigator Sarsfield (Sarsfield) testified that the Order was issued in this case because despite numerous requests, Petitioner never provided payroll records to the DOL. Sarsfield testified that in evaluating employee records in wage or overtime claims, the DOL typically compares the timesheet listing the hours per day with the payroll record to ensure that employees were paid for all of the hours they worked.

Petitioners' "Timesheet" for the week of December 3 - 9, 2007 indicates the following:

<u>Employee Name</u>	Regular	Overtime	<u>M</u>	<u>T</u>	<u>W</u>	<u>T</u>	<u>F</u>	<u>S</u>
	<u>Hours</u>	<u>Hours</u>						
Baez, Ramon	40	10	8	8	8	8	8	
Cruz, Gambino	32		8	8	8	8		
Guarado, Jose	40	9	8	8	8	8	8	
Villanueva, Saul	40	9	8	8	8	8	8	

The “Payroll Register” for the same period, indicates that Ramon Baez was paid for 50 hours (40 regular hours and 10 overtime hours); the Claimant was paid for 32 hours; Jose Guarado was paid for 49 hours (40 regular hours and 9 overtime hours); and Saul Villanueva was paid for 49 hours (40 regular hours and 9 overtime hours).

GOVERNING LAW

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]). It is a Petitioner’s burden at hearing to prove the allegations that are the basis for the claim that the order under review are invalid or unreasonable. *See* Rules § 65.30 [12 NYCRR § 65.30] (“The burden of proof of every allegation in a proceeding shall be upon the person asserting it”); *Angello v. Natl. Fin. Corp.*, 1 AD3d 850, 854 (3d Dept 2003).

It is therefore Petitioners’ burden in this case to prove by a preponderance of the evidence the allegations in the Petition that Claimant did not work on the dates claimed and that Petitioners maintained accurate payroll records.

An Employer’s Obligation to Maintain Records and DOL’s Calculation of Wages in the Absence of Adequate Employer Records.

The law requires employers to maintain payroll records that include, among other things, its employees’ daily and weekly hours worked, wage rate, and gross and net wages paid. (Labor Law §§ 195 and 661, and 12 NYCRR 142-2.6.) Employers are required to keep such records open to inspection by the Commissioner or her designated representative. *Id.*

An employer’s failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint’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. (Labor Law § 196-a; *Angello v. National Finance Corp.*, 1 AD3d 850 [3d Dept 2003]). As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3rd 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 *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.”

FINDINGS

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 provisions of Board Rule 65.39 (12 NYCRR 65.39).

We find that Petitioners failed to meet their burden of proving that Claimant did not work on December 7 and 8, 2007. Moonan’s insistence that no maintenance employees worked overtime during the week of December 3 is contradicted by the documents he submitted into evidence. Both the Payroll Register (which lists regular and overtime earnings), and the Timesheet (which lists the purported daily hours) for the week of December 3 show that three employees worked significant amounts of overtime during the relevant period, including Jose Guarado, the maintenance employee who worked in a two man team with Claimant, and who Moonan testified worked identical hours as Claimant. Ramon Baez worked and was paid for ten hours of overtime, and both Jose Guarado and Saul Villanueva worked and were paid for nine hours of overtime during the relevant period.

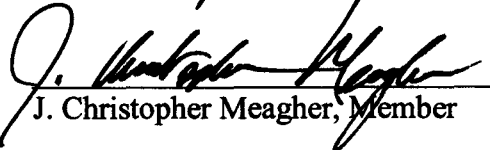
According to Petitioners’ “Timesheet,” Baez worked 8 hours each day from Monday through Friday and did not work on Saturday or Sunday, yet in a column entitled “overtime hours” an additional 10 hours of overtime are listed, although there is no indication of which day the overtime was worked. The Payroll Register shows that Baez was paid for 10 hours of overtime during the week in question. Likewise, the “Timesheet” indicates that Jose Guarado and Saul Villanueva each worked 8 hours each day from Monday through Friday and did not work on Saturday or Sunday. In the column entitled “overtime hours” an additional 9 hours of overtime are listed, although there is no indication of which day the overtime was worked. The Payroll Register shows that Guarado and Villanueva were each paid for 9 hours of overtime for the week of December 3. The Board finds that the Petitioners’ “Timesheet” (which was submitted to the DOL a year and a half after it was first requested) is internally inconsistent and lacks sufficient probative weight.

We find that the DOL acted reasonably in relying on Claimant's calculations of his earnings for the week of December 3, 2007. Because the Petitioners failed to produce credible time records, DOL's calculation of the regular and overtime wages owed must be credited unless Petitioner met its burden to prove that the employee was paid the disputed wages. (*See, e.g., Angello v. National Finance Corp.*, 1 AD3d 850 [3d Dept 2003]. The burden is not an impossible one. However, in this case, Petitioners' evidence was too lacking in probative weight to shift the burden. Given the burden of proof in Labor Law § 196-a and the burden of proof which falls on the Petitioners in a Board proceeding, 12 NYCRR 65.30, "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, supra* at 854.) Petitioners failed to produce accurate and credible daily time records required by the Labor Law, and therefore, DOL's calculations must be credited.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

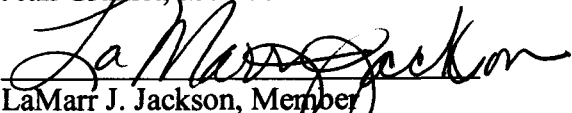
1. The Orders to Comply with Article 6 and 19 of the Labor Law both dated November 17, 2008, under review herein, are affirmed; and
2. The Petition for Review be and the same hereby is, denied.


 Arne P. Stevason, Chairman


 J. Christopher Meagher, Member

Absent
 Mark G. Pearce, Member

Absent
 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
 July 22, 2009.