STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: LAURA HARBOUR AND KAL-HARBOUR, INC. (T/A HARBOUR ROADS), Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law and an Order to Comply Under Article 19 of the Labor Law, both dated October 19, 2009, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 09-307 RESOLUTION OF DECISION

APPEARANCES

Linnan & Fallon, LLP (James D. Linnan of counsel.), for Petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WHEREAS:

On November 2, 2009, Petitioners Laura Harbour and Kal-Harbour, Inc. 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 October 19, 2009. The first Order is an Order to Comply with Article 6 of the Labor Law (Wage Order), which finds that Petitioners failed to pay wages to Christopher Kyer (Claimant) and demands payment of $6,372.24 in wages due and owing, interest at the rate of 16% calculated to the date of the order in the amount of $1,125.70 and a civil penalty in the amount of $6,372.24 for a total amount due of $13,870.18. The second Order (Penalty Order) finds that Petitioners failed to keep and/or furnish accurate payroll records for the period from May 6, 2008 through September 11, 2008, in violation of Article 19 of the Labor Law and demands payment of $500.00.

The petition challenges the Orders as unreasonable or invalid on the grounds that Petitioners were not Claimant's employer; that Petitioners contracted out certain work to Claimant and his business partner, Rik Seiler; and, that the Orders were based on an inadequate Department of Labor (DOL) investigation and were issued without an evidentiary hearing. Further, Petitioners challenge Claimant's claim of hours worked

and his hourly rate of pay. The petition also asserts that the Penalty Order is invalid or unreasonable as Claimant was not Petitioners' employee and therefore, there was no need for payroll records for him.

The Commissioner denies Petitioners' assertions, and asserts that there is no statutory authority for an evidentiary hearing prior to the issuance of an Order to Comply and only after the issuance of such order is a Petitioner afforded an opportunity to contest such order before the Board.

Upon notice to the parties, the Board held a hearing in Albany, New York on May 11 and August 12, 2011, before Board member and designated hearing officer, Jeffrey R. Cassidy. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

SUMMARY OF EVIDENCE

Laura Harbour's Testimony

Kal-Harbour, Inc. (T/A Harbour Roads) is a paving and seal-coat company owned by Laura Harbour that has been in business since 1989. Harbour Roads owns seal-coating and paving equipment, including a small truck with a 500 gallon tank that is used for seal coating asphalt surfaces. Laura Harbour testified that she wanted to get out of the seal-coating business, and that in August 2007, she leased her small truck to Rik Seiler, (and in 2008 to Seiler and Claimant) who was attempting to start a seal-coat business.

Harbour testified that Seiler marketed his own customers, but also got referrals from Harbour Roads. Harbour Roads did not receive any payments for jobs that Seiler found on his own and he kept what he collected for those jobs. When Harbour referred a job to Seiler, payment went to Harbour Roads, and payment ("commissions") [1] was made to Seiler after the truck lease fee and any material bought on Harbour Roads' accounts were deducted.

Harbour had concerns about Seiler's ability to run a business, and told him that he had to get a "DBA," a company name, and needed to develop a plan to monitor accounts. At some time during the winter of 2007/2008, Seiler told Harbour that he wanted to bring Claimant into the seal-coat business and described him as having a business background. According to Harbour, in the second week of April 2008, she discussed with Seiler and Claimant the upcoming seal-coat season and told them that they needed a business plan, a "DBA", insurance, and that they needed to pay estimated taxes and to maintain equipment. She described the seal-coat season as beginning usually around Memorial Day and ending approximately from the end of September through the third week in October.

Harbour testified that at the April meeting she told Seiler and Claimant that Harbour Roads could withhold taxes from their "commission" checks, and that subsequently she discussed with her accountant issuing them an IRS 1099. Harbour maintained that she understood that she could withhold taxes from them even though she

[1] Harbour used the term "commissions" to refer to payments that Harbour Roads paid Seiler and Claimant for seal coating and for paving job referrals that they made to Harbour Roads.

believed that they were independent contractors and not employees. Harbour Roads' paycheck company (Paychek) issued W-2 wage and withholding statements to Seiler and Claimant for the 2008 tax year.

Harbour reported Seiler and Claimant as employees when she signed New York State Tax and Finance "Quarterly Combined Withholding, Wage Reporting And Unemployment Insurance Return" forms (NYS-45-MN) for the second and third quarters of 2008. Those forms report $1,250 in payments to Seiler and Claimant during the 2nd quarter, and $4,242.88 in payments to Seiler, and $2,160.22 to Claimant, during the 3rd quarter.

Harbour met with Seiler and Claimant again during the first week in May 2008 to discuss how the seal-coat business was going to operate. She told them that "they would have to come up because the sealer -- by the end of the sealer season, they were going to take possession and buy the truck and be in business by themselves." Harbour told Seiler and Claimant that they needed to set up proper bookkeeping for the seal-coat work, and referred them to, Harbour Roads' bookkeeper, Brian Wiese.

Harbour related how commissions were paid on paving job referrals from Seiler and Claimant. Harbour Roads paid them commissions of between two and five percent of the net proceeds of a paving job for referring the job to Harbour Roads. When Harbour Roads was paid for the job, it paid commissions to Seiler and Claimant, each receiving 50% of the commission. Harbour also testified that Seiler and Claimant received commission checks for two paving job referrals.

Harbour further explained that in addition to Seiler and Claimant receiving commission checks directly from Harbour Roads for paving referrals, Harbour Roads also issued them checks for seal-coat work. When Harbour Roads received direct payment for their seal-coat work, which usually occurred if a job originated with Harbour Roads, it deducted the expenses Seiler and Claimant incurred, including the cost of leasing the Harbour Road truck, and paid them equal amounts of the balance. Harbour understood that all money that they earned would be split evenly.

The Paychex statements show that Harbour Roads paid Seiler $900 and Claimant $800 on June 13, 2008, and Seiler $350 and Claimant $450 on June 27, 2008. They both received checks for $1,162.76 on July 11, 2008. On September 6, 2008 Seiler was paid $1,080.12 and Claimant $997.46. Thereafter, Seiler received two more checks in the amount of $1,000 each, which were checks for work he did after Claimant quit on or about September 11, 2008. In total, Harbour Roads paid Seiler $5,492.88 and Claimant $3,410.22 for 2008.

Harbour challenged Claimant's claim that she promised him $18 an hour for his seal-coat work. She said that in 2008, Harbour Roads' starting rate for seal coating was minimum wage, or approximately $6.95 an hour, and that the only Harbour Roads employees who earned as much as $18 an hour were experienced heavy equipment operators or "rakers." She added that the wages she paid were consistent with area industry standards and that after the 2008 season, Harbour Roads hired Seiler as a paver at $12 an hour.

Harbour testified that Seiler and Claimant referred a seal-coat job for the New York State Department of Taxation and Finance to Harbour Roads. In October 2008,

after Claimant stopped working with Seiler, Harbour received a call from Claimant asking for money for the last job that he did with Seiler. She told Claimant that he was not an employee, that she didn't owe him any money, and that he needed to deal with Seiler. Later, she spoke with Seiler, and told him that he needed to resolve the issue with Claimant. Seiler responded that he would take care of the matter, and subsequently told her that he gave Claimant a check for $700. That check is dated October 30, 2008, and Harbour believed that it was for Claimant's 50% share of the commission for selling the Tax and Finance job.

Harbour testified that all Harbour Roads employees, including casual workers, were required to record their work hours on either a punch clock or time slips, and each foreman kept a daily job report that included each worker's hours. Seiler and Claimant scheduled their own hours and did not punch a time clock nor maintain time slips. Harbour explained that Seiler recorded his and Claimant's jobs and work hours on Harbour Roads daily job report forms which he submitted to Wiese. These daily job reports included job locations, dates, beginning and ending work times for each employee, and a general description of the weather.

Harbour admitted that she allowed them to use Harbour Roads' name, a truck with its name displayed, its business accounts to purchase equipment and materials, and its tools. She agreed that she had no proof that they carried liability insurance, a DBA, a partnership agreement, or that they were incorporated. She also agreed that she had no written lease agreement with them for Harbour Roads' truck.

Seal coating is weather dependent, and according to Harbour, she typically planned for a "clean spell" of two days before and after seal coat was applied. She introduced into evidence a certified copy of meterological records on file in the National Climatic Data Center that shows weather conditions for Albany, Rensselaer, Schenectady, and Saratoga, counties where Seiler and Claimant worked. Harbour correlated these records with Claimant's claimed workdays and hours, the daily job reports Seiler submitted to Wiese, and Harbour Roads' own job reports. She gave an example of this analysis - Claimant claimed that he worked eight hours on June 4th and 6th, 2008, yet all four counties where he and Seiler performed seal coating reported rain for those dates. Further, Harbour stressed that no daily job report was submitted to Wiese for these dates.

Harbour explained that Harbour Roads bought bulk seal coat from Smith Seal Coating and Copeland Coating, and that she allowed Seiler and Claimant to purchase, under Harbour Roads' name, supplies at those locations. Harbour Roads paid for seal coat purchased at Smith's based on "pick-up slips," and not on invoices, and it was Harbour's position that the amount of seal coat that Seiler and Claimant bought at Smith's did not support the hours he claimed that he worked.

Brian Wiese's Testimony

Brian Wiese owns Book Solutions, a business consultation and development company that provided bookkeeping services for Harbour Roads. Wiese testified that in that role he monitored Harbour Roads' "internal controls," including employee wage records, and in 2008, Harbour Roads paid him $2,160 to work with Seiler to monitor his and Claimant's seal-coat work. He testified he obtained all his information about Seiler and Claimant's work from Seiler and that he never talked to Claimant.

Wiese met weekly with Seiler who provided him with the daily job sheets that showed a list of cash collected and jobs completed. Wiese explained that throughout 2008, the information he received from Seiler was used to construct a "Sealer Profit and Loss Statement," which was developed to show the profit or loss of the seal-coat enterprise. Wiese testified that "[t]he requirement for Rick and [Claimant] was as they went out on Harbour Roads jobs we wanted to have those job sheets filled out for Harbour Roads jobs." Those jobs included ones that Seiler and Claimant got on their own and residential and commercial jobs Harbour Roads referred to them. Wiese set up an Excel spreadsheet to track the seal- coat transactions, but he did not set up a separate company for Seiler and Claimant.

Seiler reported to Wiese 35 jobs for a total of $13,821.00, which Wiese described as "cash jobs that we did not see come through . . . Kal-Harbour's books . . . ." Also listed under 'QuickBooks Reported" on Wiese's accounting document is an amount of $35,041.01, which Wiese described as moneys paid directly to Harbour Roads for jobs it referred to Seiler and Claimant.

Wiese described the checks from Harbour Roads to Seiler and Claimant as the result of accumulating their sales and costs, or expenses, and "back[ing] out" their cash sales, and splitting the remaining difference, or profit, 50/50." According to Wiese, Seiler and Claimant paid some of their expenses, but others were charged directly to Harbour Roads.

Rik Seiler's Testimony

Rik Seiler testified that he attempted to set up a seal-coat business in 2007, and that in 2008 he decided to have Claimant as a "partner." He said that he introduced him to Laura Harbour as someone he was "going to bring aboard to be [his] partner . . . ." According to Seiler, there was no discussion between Harbour and Claimant about a rate of pay, or becoming a Harbour Roads' employee.

He and Claimant solicited business by distributing flyers that used Harbour Roads' name, or by contacting people that they knew. According to Seiler, they were paid in cash for seal-coat jobs that they found and they split it evenly at the end of each workday. Harbour Roads also referred jobs to them, and those jobs were mostly paid by check to Harbour Roads. He submitted to Wiese daily job reports, which were Harbour Roads' report forms, which included dates and locations of jobs, square footage or the charge for the job, and if the jobs was paid by cash or check. He testified that he filled out a daily job report for each job they completed and submitted them to Wiese, though he admitted that he might not have submitted reports for a couple of jobs. The daily job reports that he submitted show Claimant worked 16 days from May 5th through October 11th, but only show work hours for 10 of those days (60.5 hours).

Seiler testified that the money that was paid by check directly to Harbour Roads was paid to them after Wiese calculated expenses that they charged to Harbour Roads. He also maintained that any money they received for the seal-coat operation, either directly from customers or from Harbour Roads, was split evenly and he explained why Harbour Roads took taxes out of their pay. He said that he asked Harbour to take taxes out of their checks because they collected a lot of cash and he wanted a better accounting of their money.

Seiler maintained that he gave Claimant a check, dated October 30, 2008, for $700 "because we had done a job and I had got the money and he helped me with it. And when the guy paid me . . . I gave him the check." He believed the job was a cash job for Performance Auto, which was done on October 11, 2008, and for which Seiler received $1,900. He added they spent $600 for seal coat for the job and he gave Claimant slightly more than half of their profit.

He recognized that they leased Harbour Roads' truck displaying its name, and admitted that he had no signed lease agreement for it. He carried and distributed a Harbour Roads business card; did not have a partnership agreement with Claimant; and, did not have a DBA, a business certificate, or any state filing showing that he and Claimant had a business. He agreed that they did not have any insurance (they used Harbor Roads insurance) and believed that Harbour Roads paid their worker's compensation.

He testified that he and Claimant did not report to anyone at Harbour Roads and that he and Claimant determined their own work schedules and that they never punched a time clock, which he had to do when he became a Harbour Roads employee. He confirmed Harbour's testimony that in November 2008, he was placed on its payroll at $12 an hour. He maintained that he and Seiler determined the amount of seal coat needed for a job, but conceded that they bought the seal coat, and tools and other material, through Harbour Roads' name.

Claimant's Testimony

Claimant testified that Seiler introduced him to Laura Harbour at a safety meeting at the Harbour Roads garage. According to Claimant, at that meeting he agreed to be paid commissions on paving jobs he would sell for Harbour Roads – jobs that he estimated and sold at night or on days when he and Seiler were not seal coating. Claimant described his job as a Harbour Roads commissioned salesman, and testified that commissions were based on "10 percent at gross margin," but, it would depend on the job sold – "If you sell it for 20 percent over the margin, you would get 20 percent over the margin." Claimant stated that they also discussed doing all of Harbour Roads' seal coating, and that Harbour agreed to pay him $18 an hour for that work, in addition to the paving job commissions.

Claimant insisted that he was never Seiler's business partner and was not an independent contractor. He stated that starting a business was never discussed; that they used Harbour Roads' truck, but without a lease agreement; that Harbour gave them Harbour Roads shirts to wear while working; that Harbour gave him business cards displaying Harbour Roads' logo, phone number and its web site; and, that he represented himself as a Harbour Roads employee while seal coating or selling paving jobs. Claimant also testified that Harbour gave them Harbour Roads signs to display on job sites and, that they distributed solicitation flyers showing Harbour Roads' name and phone number.

Claimant also testified that Harbour provided him with forms for selling and collecting for Harbour Road jobs and that he always used Harbour Roads' tools. He stated that seal coat material was invoiced to Harbour Roads, and that he understood that Harbour Roads paid for the material.

Claimant asserted that he kept a log of the number of hours he seal coated; that he worked 63 days from May 6th to September 11, 2008; that he worked a total of 474 hours over this period,[2] and that he never saw any cash payments, nor received any from Seiler or any customer. He agreed that he and Seiler did not punch a clock or log in hours with Harbour Roads, but testified that they called Harbour and told her their hours, though he admitted that he only did so once. Claimant testified that he never filled out any daily job reports, and that he never submitted any to Wiese or to Harbour Roads.

He knew, from a W-2 statement he received, that from May through September 2008, Harbour Roads issued him four checks totaling $3,220.20, but he did not know how much of that amount was for the commissioned sales jobs and how much was for seal coating, though two were for commissioned sales jobs and two were for seal coating. He also agreed that he received a check from Harbour Roads dated July 5th and did not receive another check until September 6th, a period during which, he asserts, he worked 209 hours. He did not complain to Harbour during this period about not being paid, but testified that he mentioned it to Seiler, who told him that Harbour said she was going to pay them.

Claimant testified that he first complained to Harbour in September 2008, after he took another job. During that conversation Harbour told him he was an independent contractor, a term he says she never previously used with him. Thereafter, he filed a claim with the Department of Labor (DOL) for unpaid wages. About a year after receiving a Harbour Roads 2008 W-2 statement, and after Claimant filed his wage complaint with the DOL, Harbour Roads issued him an IRS 1099 form asserting that he was not an employee.

Finally, Claimant testified about the effect of rain on seal coating. He stated that while seal coat cannot be applied when it is raining, it could be put down if rain was merely in the forecast. He testified that, "[d]epending on the weather, seal coat can be dried in five to ten minutes after it is put down."

FINDINGS

A. Standard of Review and Burden of Proof

The Labor Law provides that "any person . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner under the provisions of this chapter" (Labor Law § 101 {a]). It also provides that an order of the Commissioner shall be presumed "valid" (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an Order issued by the Commissioner must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). It is the petitioner's burden at hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board's Rules of Procedure and Practice §

[2] Claimant submitted a claim form with the Department of Labor representing 474 hours of work, though his work log shows 465 hours of work. He claimed $8,532.18 in owed wages (474 x $18) less $2,159.76 for the total amount he claimed he received from Harbour Roads. The record evidence shows that Harbour Roads paid Claimant a total of $3,420.20; $2,160.22 included a $1,162.76 check dated July 11th, and a $997.46 check dated September 6th.

65.30 at 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 AD 3d 850, 854 [3d Dept 2003]).

1. Claimant was Petitioners' Employee and not an Independent Contractor

Under Article 6 of the Labor Law, "employer" is defined as "any person, corporation or association employing any individual in any occupation, trade, business or service" (Labor Law § 190 [3]). "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 identical, the New York Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*see e.g. Ansoumana v Gristede's Operating Corp.*, 226 F Supp 2d 184, 189 [SDNY 2003]).

In determining whether an individual is an employee covered by the Labor Law or an independent contractor without wage and hour protections, "[t]he ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v Superior Care, Inc.*, 840 F 2d 1054, 1059 [2d Cir 1988]). The factors to be considered in assessing such economic reality include (1) the degree of control exercised by the Petitioners over the Claimant, (2) the Claimant's 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 Petitioners' business (*Brock* at 1058-1059). No one factor is dispositive (*Brock* at 1059).

We find that Petitioners did not meet their burden of proof in establishing that Claimant was an independent contractor. While we believe that Harbour was well intentioned when she attempted to help Seiler and Claimant start their own seal-coating business, being well intentioned is not the same as being legally correct. While Petitioners did not exercise day-to-day or operational control over Claimant or determine the prices he and Seiler charged, and while the permanence and duration of the working relationship was not long, we nevertheless find that Seiler and Claimant did not operate a business independent from Petitioners. Although Harbour was helping them to start a business, we do not find, based, in part, on Harbour's own testimony that "by the end of the sealer season, they were going to take possession and buy the truck and be in business by themselves," that Seiler and Claimant were independent contractors in 2008.

Moreover, Seiler and Claimant did not have their own insurance, did not have their own company name, did not own any of the equipment needed for their work, and did not have a business plan or any documents demonstrating that they operated a business. Petitioners provided them with their work supplies, allowed them to charge seal coat to Petitioners' account, provided them with Harbour Roads shirts to wear while working and Harbour Roads business cards to distribute. Although they leased Petitioners truck, it had Harbour Roads' name on the side and was insured under Harbour Roads' policy. Furthermore, Seiler and the Claimant sold paving jobs for the Petitioners, distributed flyers for their seal-coating business on Harbour Roads' letterhead and posted Harbour Roads' signs on completed jobs.

Against this background, we conclude that although Seiler and Claimant did have some involvement in a seal-coating business, Petitioners had a more substantial investment in the venture. Additionally, the Petitioners profited from their arrangement with Seiler and the Claimant in advertising and paving job referrals. Although Harbour testified she wanted to get out of the seal-coating business, the relationship she had with Seiler and Claimant throughout 2008 establishes that seal-coating was still an integral part of Petitioners' business.

We find that based on the totality of the circumstances, Claimant was dependent on the Petitioners' business for "the opportunity to render service" (*Brock*, 840 F 2d at 1059). Therefore, an employment relationship existed between Petitioners and Claimant and the Petitioners are liable for any unpaid wages under Article 6 of the Labor Law.

2. Petitioners Failed to Keep and/ or Furnish True and Accurate Records of Claimant's Work Hours

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 an 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 off six years (12 NYCRR 142-2.6):

> "(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) . . . .
> (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:

> "furnish 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."

Additionally, "[e]mployers, including those who maintain their records containing the information required by this section at a place outside of New York State, shall make such records or sworn certified copies thereof available upon request of the commissioner at the place of employment."

The only payroll records that Petitioners kept for Claimant were daily job reports that Seiler submitted to its bookkeeper and Paychek records for the four checks paid to Claimant during the claim period. The 16 daily job reports that Seiler submitted only reported Claimant's hours for 9 days,[3] and Seiler testified that he may not have submitted reports for all days that Claimant worked. The reports also did not include Claimant's time and arrival each day or Claimant's hourly wage rate.

Further, Petitioners concede that they did not submit any payroll records during the DOL's investigation as they argue it was not possible to keep and/or furnish such records because they did not believe he was Petitioners' employee.

3. Petitioners Failed to Meet Their Burden to Establish that the Wage Order is Invalid or Unreasonable.

An employer's failure to keep adequate records does not bar employees from filing wage claims. Where employee claims 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 § 196-2; *Angello v Natl. fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]. As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett,* 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 the Commissioner's calculation to the employer."

In *Anderson v Mt. Clements Pottery Co.,* 328 U.S. 680, 687-688 [1949], *superseded on other grounds by statute on other grounds as stated in Solano v A Navas Party Prod.* 728 F Supp 2d 1334 [SD Fla 2010], 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 by the Fair Labor Standards Act. In such a situation

[3] Seiler reported Claimant working 7 hours on October 11, 2008, a time beyond the claim period and a day Claimant testified was after he left Harbour Roads for another job.

> we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to then come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate."

Citing to *Anderson,* the Appellate Division in *Mid-Hudson Pam Corp.*, at 821 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 . . . Where 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."

Petitioners have the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimant worked and that he was paid for the those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078, October 11, 2011). Where a Petitioners' payroll records are inadequate, DOL is "entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378, [(1st Dept 1996], *citing Mid-Hudson Pam Corp.*)

We find that Petitioners' records were inaccurate or insufficient and we rely upon claimant's wage statement, as modified below, for the number of hours that he worked during the claim period. We do not, however, rely on his wage statement for his claimed hourly rate of pay.

Claimant's Work Hours

Claimant claimed 474 work hours over 63 days between May 5 and September 11, 2008, though his personal log of his workdays shows 465 hours. Petitioners, relying on Seiler's daily job reports, contend that Claimant worked a total of 15 days between May 5th and September 11th, and one day after that period on October 11th. Seiler's reports include some hours allegedly worked, but almost half do not record any hours. Seiler's reports also are not Petitioners' payroll records as they believed that Seiler and Claimant were independent contractors, and therefore did not keep payroll records for them.

Petitioners argue that Claimant's claimed hours are inaccurate and are not believable because many of his claimed work days were days when it rained, conditions not suitable to seal coating; because claimant bought seal-coat material when his log showed that he did not work; and, because the amount of seal coat material that he and Seiler bought was too small to justify the number of days that he claimed he worked.

Petitioners also argue that claimant's log book is suspect as it appears to record all work time with the same pen and is without seal coat residue that one might expect if recorded contemporaneously with seal-coat work.

Because Petitioners have inadequate payroll records, we must rely on the DOL's best evidence, even if it may not be entirely accurate (*Mt. Clemens Pottery Co.*, at 688; *see also Rivera v Ndola Pharm Corp.*, at 389). "The Department of Labor was entitled to make just and reasonable inferences and use other evidence to establish the amount of underpayments even though the results are approximate" (*TPK Constr Co v Dillon*, 266 AD 82 [1st Dept 1999]).

In addition, Petitioner's evidence of the inaccuracy of Claimant's records, is unavailing. The meteorological records attempting to show that Claimant could not have worked on various days because of rain is not compelling because the records do not show, other than by county, where it specifically rained, and in many cases do not show at what time or how much it rained. Further, Claimant may have done other jobs, such as procuring materials, or soliciting business on days when seal coating was not possible. That Claimant bought seal coat material on non-work days does not establish that he did not work on the days he claimed. Also, the fact that Claimant's log did not appear to have any seal-coat residue on it, or that it was completed with the same pen, does not establish that it is inaccurate, or contrived.

Petitioners' argument that the amount of seal coat that Seiler and Claimant purchased is inconsistent with the number of days that Claimant said he worked is similarly unavailing. Seiler's job sheets show seal-coat jobs accumulating to 114,652 square feet (54,852 square feet plus 59,800 square feet calculated from charges of $8,970 at $.15 a square foot). Harbour testified that the amount of seal coat needed for a given area, after being diluted by 20% water, is determined by dividing the square footage of the area by 50. The "pick-up slips" from Smith's Seal Coating show that Seiler and/or Claimant bought 3,238 gallons of seal coat during the claim period, or 3,885 gallons diluted seal coat that they could have applied during Claimant's employment. Using the square footage formula means that they purchased enough seal coat to cover 194,000 (3,385 x 50) square feet, or more than 74,000 square feet than what Seiler's job reports show was seal coated during the claim period.[4]

We credit DOL's determination of the number of hours Claimant worked during the claim period, less 9 hours, for a total of 464 hours, which is the number of hours listed on Claimant's hourly log.

Claimant's Rate of Pay

Claimant testified that Harbour offered to pay him $18 an hour for all his work hours in addition to being paid commissions for selling paving jobs. We find Harbour's testimony that she did not offer Claimant $18 an hour credible.

Harbour believed that Seiler and Claimant were operating a business independent of Harbour Roads, and while we find that her belief, for the reasons stated, was incorrect, her belief establishes that she did not commit to pay either Seiler or Claimant a set

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[4] Seiler's job reports include 1 day (July 15) when Claimant did not work. On that day he collected $867 for seal coating, representing 5,780 square feet of material ($867/.15). Subtracting this amount from the difference between 194,000 and 114,652 leaves 73,568.

hourly wage rate. Harbour had no reason to offer an hourly wage to either of them if she believed that they were going to operate their own seal-coat business. Further, the fact that she established a specific commission rate for Claimant to sell paving jobs supports her position that she did not offer a specific wage rate to Claimant for the seal-coat work.

We also credit her testimony that she never hired anyone to do seal-coat work at a rate at or near $18 an hour. She paid Seiler, after the seal-coat endeavor failed, $12 an hour for paving work, which indicates the improbability that she would have offered Claimant at a 50% higher rate when he was inexperienced and only doing seal coating.

We further find that Claimant's apparent lack of interest in not being paid for seal coating from the beginning of July to the beginning of September an indication that he did not expect to be paid an hourly wage rate. It is likely that Claimant did not complain about not being paid wages for almost three months because he expected payment from Seiler, or from Harbour Roads, based on revenues received from their seal coating. He testified that he brought up the issue of not being paid with Seiler – notably he did not bring the issue up with Harbour. His complaint to Seiler, and not to Harbour, suggests that he was expecting money from the seal-coat operation itself, and not a wage rate from Harbour Roads.

The record evidence establishes that Harbour Roads issued Claimant four checks for a total of $3,420.20 ($800.00 dated 6/13, $450.00 dated 6/27, $1,162.76 dated 7/11, and $997.46 dated 9/6). Claimant stated on his claim form that he had been paid $2,159.76 ($1,162.76 and $997.00), and subtracted this from his claim of $8,532 for a total claim of $6,372.24. The hearing record shows that two of the four checks were for commissions for sale of two paving jobs and two were for seal coating work, but is unclear which checks are for which. However, Claimant agreed that $2,159.76 was paid for wages, and not for commissions, as he deducted that amount from his claimed wages, and we rely on his claim.

We find that Claimant was entitled a minimum wage payment of $7.15 an hour (Labor Law § 652[1]) times 465 hours for a total of $3,324.75, offset by the $2,159.75 Claimant claimed he had been paid for a net total of $1,165.00.

4. DOL's Calculation of a 100 % Civil Penalty is Unreasonable and is Revoked.

If the Commissioner determines that an employer has violated Article 19 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing (*see* Labor Law § 218 [1]). Along with the issuance of an order directing compliance, the Commissioner is authorized to assess a civil penalty based on the amount owing. Labor Law § 218(1) continues:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of these provisions, rules, or regulations, or to an employer whose violation has been found to be willful or egregious, shall direct payment to the Commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages . . .

> found by the Commissioner to be due, plus the appropriate civil penalty . . . In assessing the amount of the penalty, the Commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages . . . the failure to comply with recordkeeping or other non-wage requirements."

The Wage Order assessed a civil penalty, in the amount of 100%, or $6,372.24, of wages due. Senior Labor Standards Investigator Lori Roberts identified a DOL form that she used to assess the 100% civil penalty. That form states that Roberts recommended the 100% penalty "[t]aking into consideration the size of the firm, the good faith of the employer, the gravity of the monetary violation(s) and non-wage and recordkeeping violations(s) disclosed during the course of the investigation." The hearing officer questioned Roberts about the criteria she used in determining the civil penalty:

> "The Hearing Officer: So then what was the standards that we[re] used, or what were the criteria that we[re] used for 100 percent penalty in this case?
>
> "The Witness: In this case it was the department's determination that the claimant was an employee and was owed wages. We didn't receive records from the employer showing wages were paid, so the lack of records. The employer was a smaller employer, and our starting point was 100 percent."

We find the imposition of the 100% civil penalty unreasonable and we revoke it. Petitioners showed that they were cooperative in the investigation, acted in good faith, had no history of previous violations, and were a relatively small company. During the investigation, Petitioners provided Paychek statements, checks that Claimant received, and the payment for, and dates of, jobs Seiler submitted to Wiese. The only other record available that was not provided DOL during the investigation was the daily job reports, and those reports did not show all of the hours that Claimant worked.

6. The DOL Investigation was Reasonable and Petitioners were not Entitled to a Hearing Prior to the Board Hearing.

Petitioners argue that the DOL conducted an inadequate investigation and its Orders were issued without the opportunity for a hearing. We find that there is insufficient evidence to support Petitioners' contention of an inadequate investigation. Further, we have consistently held an employer is not entitled to a hearing prior to the issuance of orders and that employers' due process and notice requirements are satisfied by an employers right to appeal to the Board (*see e.g. Matter of Fischer,* PR 06-099 [April 23, 2008]).

5. The Commissioner's Interest Calculation is to be Adjusted Consistent with the Reduction in the Amount of Wages Found Due.

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

We find that the interest rate set forth in the Wage Order is valid and reasonable in all respects, but that the amount of interest assessed must be modified based on the reduction in the amount of wages found due.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Wage Order in the amount of $6,372.24 is reduced to $3,324.75 less $2,159.75 that Petitioners paid Claimant for a total of $1,165.00 due and owing and the interest is to be recalculated on that amount.

2. The Civil Penalty of 100% of the wages due is revoked in its entirety

3. The Penalty Order of $500 is affirmed.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
January 30, 2012.

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We find that the interest rate set forth in the Wage Order is valid and reasonable in all respects, but that the amount of interest assessed must be modified based on the reduction in the amount of wages found due.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Wage Order in the amount of $6,372.24 is reduced to $3,324.75 less $2,159.75 that Petitioners paid Claimant for a total of $1,165.00 due and owing and the interest is to be recalculated on that amount.

2. The Civil Penalty of 100% of the wages due is revoked in its entirety

3. The Penalty Order of $500 is affirmed.

Anne P. Stevason, Chairperson

J. Christopher Meagher, Member

Jean Grunet, Member

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
January 30, 2012.