

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 DAVINDER S. MAKAN AND MAKAN LAND :
 DEVELOPMENT-ONE, LLC, :
 :
 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, both :
 dated January 28, 2010, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 10-081

RESOLUTION OF DECISION

APPEARANCES

Nadine N. Parkes, Esq. for petitioners.

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

WITNESSES

Davinder S. Makan, Tracey Perna, Christine Anderson, Senior Labor Standards Investigator,
New York State Department of Labor Division of Labor Standards.

WHEREAS:

On March 25, 2010, Davinder S. Makan and Makan Land Development-One LLC (Petitioners) 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 January 28, 2010. The order to comply with Article 6 of the Labor Law (Wage Order) finds that Petitioners failed to pay wages to Tracey R. Perna (Claimant), and demands payment of \$5,600.00 in unpaid wages, interest at the rate of 16%, calculated to the date of the order in the amount of \$1,303.50 and a 100% civil penalty in the amount of \$5,600.00 for

a total amount due of \$12,503.50. The order under Article 19 (Penalty Order) finds that the Petitioners failed to keep and/or furnish accurate payroll records for the period from June 28, 2009 through August 15, 2009, in violation of Article 19 of the Labor Law, and demands payment of \$500.00.

The Petition disputes that any wages were due and owing to the Claimant and challenges the interest and the imposition of civil penalties. Respondent filed an Answer and a Demand for Bill of Particulars on May 17, 2010. Petitioners filed a Response to the Demand for Bill of Particulars on June 21, 2010.

Upon notice to the parties, the Board held a hearing in White Plains, New York on December 29, 2010 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. After the conclusion of the hearing, the Petitioners filed a post hearing brief on February 14, 2011, and the Commissioner filed a reply brief on February 25, 2011.

I. SUMMARY OF EVIDENCE

Testimony of Davinder S. Makan

Petitioner Makan is the sole owner of Makan Land Management-One (Makan Land), a small, family owned real estate management and development company run by Makan and his wife. Claimant worked for Makan Land as an office employee and receptionist from March 12, 2008 to August 15, 2008, and during that time, was its sole employee. Claimant, who was paid \$200 per day, was initially hired as a temporary, non-payroll worker. No money was withheld for taxes during her first three weeks of work; thereafter, Makan put Claimant on the payroll, began withholding, filed a corrected tax return, and paid Claimant's taxes for the first three weeks of her employment.

The monthly payroll is processed by Paychex, Inc., a payroll service. Claimant asked to be paid on a weekly basis rather than monthly, and Makan agreed to pay her "weekly draws" which he characterized as "advances" paid by check on Makan Land's checking account. These "advances" were reconciled by Paychex on a monthly basis and a Paychex generated check was issued to Claimant for the balance of her net monthly earnings minus legally required withholdings.

Makan testified that when paying Claimant her weekly "advance," he usually held back a part of what she had earned to take into account legally required withholding from her gross earnings. For example, if Claimant worked five days in a week, which was typical, her "advance" would be \$800 rather than \$1,000, with \$200 held back. Makan testified that if Claimant worked more or less than five days in a week, the amount he held back varied. For example, Makan "advanced" Claimant \$940 for one week when she worked six days, holding back \$260. In a week when she had to leave early one day, she was "advanced" \$660 for about four days' work. In weeks in which Claimant worked only two or three days but said she needed the money, Petitioners "advanced" "a full \$400 or \$600

without any deduction for withholding. Claimant's hours were "pretty regular," and she usually worked five days per week, and also worked extra hours on Saturdays. Makan kept records of the days Claimant worked (though not of the hours), but did not supply them to the DOL during the investigation or bring them to the hearing.

Petitioners submitted in evidence canceled checks from Makan Land to Claimant, which Makan testified were for her weekly "advances" for the entire period of Claimant's employment; they total \$17,000.00.¹ Except for the first check for \$600, dated 3/14/08 and stated to be for "3/12, 3/13/, 3/14," none of these checks states what it is for or what period it covers. Below is a list of the weekly Makan Land checks paid to Claimant:

<u>Date</u>	<u>Amount</u>	<u>Date</u>	<u>Amount</u>
3/14/08	\$600.00	6/13/08	\$809.60
3/28/08	\$1200.00	6/20/08	\$811.20
4/11/08	\$800.00	6/30/08	\$400.00
4/21/08	\$1137.00	6/30/08	\$600.00
4/25/08	\$940.91	7/2/08	\$600.00
5/5/08	\$931.62	7/11/08	\$800.00
5/9/08	\$800.00	7/18/08	\$660.00
5/16/08	\$800.00	7/25/08	\$940.00
5/22/08	\$800.00	8/1/08	\$800.00
5/30/08	\$800.00	8/8/08	\$800.00
6/6/08	\$800.00	8/11/08	\$800.00
		Total:	\$17,630.33

At the end of each month starting with April 2008, when Claimant went on payroll, Makan called in a report to Paychex, which Paychex used to reconcile Claimant's earnings for the month against her weekly "advances." This payroll journal listed Claimant's monthly earnings; her withholdings for Social Security, Medicare, and federal and state income taxes; and wages previously "advanced" to her by Petitioners. Paychex reconciled Claimant's monthly earnings against her weekly "advances," deducted withholdings², and issued a Paychex generated paycheck in her name for the balance or "net wages." The Petitioners gave the Paychex generated check to Claimant each month. Petitioners did not provide any of the cancelled Paychex checks to the DOL during the investigation, nor did they submit them as evidence at the hearing, although Makan testified, "[w]e can get them," it "takes no more than ten minutes to call Paychex and get copies."

After August 15, 2008, Claimant, who had said that she wanted a summer vacation, stopped coming to work. A couple of weeks later, she returned, but Makan told her that he had found someone else to do her job. Makan testified that Paychex payments to Claimant continued to come "while she [was] gone," and since the information he called in to Paychex was for the previous month, the last Paychex report covering Claimant and

¹ Petitioners and Perna agreed that Makan Land also reimbursed her \$630.33 for expenses she incurred.

² While Makan did not specifically so state, the thrust of his testimony was that Paychex, not Petitioners, calculated the exact amount of required withholding.

reflecting a Paychex payment to her is dated September 15, 2008. Makan testified that “we [gave] her the checks” and “we can get you the proof. The proof is already here, part of the reports.” Makan testified that taking into account both the weekly “advance” checks, and the monthly Paychex checks for any balance due her, Claimant was paid the full \$200 per day which she was owed for all days she worked, less required withholding for taxes. During the term of her employment, Claimant never complained that she was not paid in full.

Petitioners' Record Evidence

Petitioners submitted Paychex monthly payroll reports for April through August 2008. The Paychex payroll reports for April, May and June indicate that federal and state income taxes as well as Social Security, Medicare and New York disability payments were withheld from Claimant's pay. In the case of the April, May, and June 2008 payroll reports, there is a notation that “Paychex will make these tax deposit(s) on your behalf.”³ The reports for July and August 2008, by contrast, state with respect to “remaining deductions/withholdings/ liabilities” that “Paychex does not remit these funds. You must ensure accurate and timely payment of applicable items.” The following table shows amounts concerning Claimant recorded in each of the five monthly Paychex reports submitted by Petitioners:

	Monthly Earnings	Withholding⁴	Advances	Net Pay
April 2008	\$ 5,000.00	\$ 835.10	\$ 4,000.00	\$ 164.90
May 2008	\$ 5,000.00	\$ 735.10	\$ 4,000.00	\$ 264.90
June 2008	\$ 4,000.00	\$ 658.60	\$ 3,200.00	\$ 141.40
July 2008	\$ 3,600.00	\$ 278.00	\$ 3,000.00	\$ 322.00
August 2008	\$ 2,200.00	\$ 170.90		\$2,029.10
Total	\$19,800.00	\$2677.70	\$14,200.00	\$2,922.30

The April, May and June payrolls indicate that Petitioners subscribed to two trademarked Paychex services, “Direct Deposit Readychex” and “Taxpay.” “Direct Deposit Readychex” appears to have been a service in which Paychex withdrew monies from Petitioners' corporate bank account by electronic funds transfer and issued Paychex checks for Claimant's monthly “net wages,” i.e. the difference between her weekly “advances” and her monthly after-tax wages. “Taxpay” appears to have been a service in which Paychex remitted employee withholdings by electronic funds transfer from Petitioners' corporate bank account to the appropriate authorities. The “Cash Requirements and Deposits Report” attached to the April, May and June 2008 payroll journals shows that monies were withheld from Claimant's wages for state and federal taxes, Social Security, and Medicare, and stated “Paychex will make these tax deposit(s) on your behalf.”

³ The April report makes this statement with respect to Social Security, Medicare and federal tax only, the May report with respect to those three plus state taxes.

⁴ The withholding amount shown in this table is the total amount of monies withheld on a monthly basis, including separate amounts recorded for Social Security, Medicare, disability, and in the case of the first three months Federal and State tax.

The July and August 2008 payroll journals contain no mention of the “Readychex” or “Taxpay” services. The tax withholding sections of the “Cash Requirements Reports” for the months of July and August 2008 state: “Paychex does not remit these funds. You must ensure accurate and timely payment of applicable items.” The July 2008 payroll, which has a run date of December 15, 2008,⁵ indicates that a Readychex electronic funds transfer was to occur on the following day, December 16, 2008, for the amount of \$322.00. The August 2008 payroll, also run on December 15, 2008, indicates that the Readychex service was not used to pay Claimant’s net wages of \$2,029.10 for August 2008. The August 2008 “Cash Requirements Report” refers to a \$2,029.10 “manual check” and states, “These amounts are for previously calculated checks that were issued by you. You may have already deducted these funds from your account.”

Testimony of Senior Labor Standards Investigator Christine Anderson

Christine Anderson (Anderson) is a Senior Investigator for the DOL’s Division of Labor Standards, and was the investigator assigned to this case. During her investigation, Petitioners supplied cancelled checks from Makan Land and a Paychex payroll journal, but Anderson was not given copies of checks remitted to the Internal Revenue Service, or copies of checks issued to Claimant by Paychex. The memo line of the Makan Land checks she received did not indicate the dates that the checks covered or what the checks were for, and there was no corresponding payroll journal showing what the checks represented. Anderson testified that “[t]here’s just check dates and dollar amounts.” Petitioners provided no time cards or any other documentation of Claimant’s weekly or daily hours.

Anderson testified that the Paychex payroll journals Petitioners supplied were deficient in numerous ways, including listing Claimant’s rate only as “\$4,000.00/Pay period;” failing to show any basis for her monthly “Earnings” (recorded in the report for July 2008, for example, simply as \$3,600, with no record of days or hours worked); and failing to confirm that she actually received any “Net Pay” (recorded in the report for July 2008, for example as \$322.00). In cases other than the present one which she investigated for the DOL, Anderson has accepted Paychex records as adequate, but such records, unlike those in the present case, showed the employee’s “rate of pay, hours worked, the period involved – the period start-and-end-date – the date of the check.... [t]he gross wages, the deductions taken, the net pay, and the check number.”

Anderson concluded that \$5,600.00 was due and owing to Claimant by adding up the Makan Land paychecks supplied by Petitioners, which (once she had deducted the \$630.33 which Claimant had agreed she was reimbursed for expenses) totaled \$17,000.00, and deducting that amount from \$22,600.00, the total amount Claimant claimed she earned during her employment, based on a pay rate of \$200.00 per day and on Claimant’s having consistently worked full five-day weeks.⁶ Anderson explained that while Petitioners denied

⁵ The April 2008 Payroll Journal has a run date of May 20, 2008. The May 2008 Payroll Journal has a run date of June 23, 2008. The June 2008 Payroll Journal has a run date of July 17, 2008. The July and August Payroll Reports both have run dates of December 15, 2008.

⁶ Claimant did not, “to my [Anderson’s] recollection,” refer to having received any Paychex checks in addition to Makan Land checks. Anderson assumed that the only wage payments to Perna were Makan Land checks.

that Claimant always worked full weeks, “[t]here is absolutely no proof” without substantiating records.

Anderson asked Petitioners for a W-2 tax form and proof of any tax payments, but nothing was provided. The record includes an April 17, 2009 letter from Anderson to Petitioners stating: “Claimant states that she was not taxed on the money earned and to date has not received a W-2.... If you are contesting this, remit copies of the cancelled checks remitted to the IRS and New York State tax.” Anderson assumed that the checks that were sent to her were the total amount paid to Claimant because Petitioners never produced any additional checks or any other documentation in support of their case.

Anderson based her recommendation of a 100% penalty on Petitioners’ lack of records and failure to cooperate. The payroll journals were not adequate and did not indicate the time period involved, and there were no hours listed. She found no prior violations by Petitioners, but Petitioners were in business more than three years, which “would indicate to me that they should understand how to keep records and what is required of them.” Anderson asked for a W-2 and copies of checks to show that taxes had been paid but Petitioners did not provide any documentation. Based on the fact that the Petitioners failed to remit payment or provide documentary proof that Claimant was paid in full, she recommended the 100% penalty. With regard to the violation of Labor Law § 661, Petitioners did not supply records of daily and weekly hours for a period of six years, nor did they supply payroll records which show the period of payment covered by each check.

Testimony of Claimant Tracey Perna

Claimant worked for Petitioners from March 12 to August 15, 2008. Her hours, “depending on demand,” were usually “9 to 6 or 7, or 8 to 7,” five or six days every week. The single time that Claimant needed to take a day off during the week, she worked an extra day, either the weekend before or the weekend after. Claimant worked many Saturdays, and never worked a total of less than five days in a week. Her duties included writing checks, scanning, making copies, answering phones, making appointments and running errands. Claimant wrote out most of her own paychecks, which Makan signed.

When Claimant was hired, Makan agreed to pay her \$1,000.00 per week payable each week. She was usually paid on Friday, but was paid the full amount of her pay only in her first two checks.⁷ Thereafter, she received only a portion of her promised pay:

“I was supposed to get a thousand, and I only got 800, then the next week that same 800, if I got it again, 200 of it went to the week before, so now I only had 600 for the week. So it was kind of a rolling thing.”

since Petitioners never produced any additional canceled checks, and since a Paychex check “may have been written, but was it ever given to the employee? Was it ever cashed?”

⁷ As previously stated, the first two Makan Land checks to Claimant were for \$600 on March 14, 2008 (when Claimant, who started work March 12, had worked three days) and \$1200 on March 28.

Claimant and Makan “always talked about” the rolling debt to her, and he told her that they were “going to keep going like this and they would just get caught up.” Makan told Claimant that she had the general ledger print out and could ascertain how much she had been paid and how much she was owed. Claimant was never told that she would be paid only once a month, or that she would receive weekly “advances.” Makan instructed her to not include a notation of the pay period in the pay checks she made out to herself (which Makan signed), because Petitioners wanted the freedom to allocate her pay to the expenses of any of its construction projects.

Claimant testified that in addition to the Makan Land paychecks signed by Makan, she also received three small checks in amounts of “around” \$140.00, \$150.00, and \$240.00 from Paychex for April, May and June because she was working so many hours, so “rather than take a day off, he gave me, I think it was – I think he decided on \$10 an hour. That represented the extra hours that I was working in those time periods.” Claimant had no involvement with these checks, but saw and heard Makan call Paychex “and talk to his rep, and just give him numbers.” Makan gave Claimant these checks without any stubs attached, telling her they were payment for extra hours, but “[a]fter the third one he didn’t do that anymore; he said it was too costly.” Instead of paying extra for extra hours, Makan told her that if she felt she was working too many hours and wasn’t getting enough compensation, she should bring it to his attention and they would discuss how to handle the problem. Claimant testified that she never received Paychex checks after the first three, and specifically denied receiving a Paychex check for \$322.00 for July 2008.

During the course of her employment, Claimant, who never received a W-2, was paid a total of \$17,000 in wages by Makan Land. Claimant did not recall filling out a W-4 form concerning withholding for taxes, and testified that “[w]e were always going to talk about [tax deductions] down the line.” She testified that after initially paying her full weekly pay, Makan “started holding \$200 a week sometimes, sometimes not.... [T]here was nothing ever written in stone about anything... I never knew when the taxes were going to start...” When the time to file her taxes arrived, she called the Petitioners to tell them she had not received a W-2, but never received one. Claimant was never informed that the \$200 that was withheld from her check each week was being withheld for tax purposes.

II. GOVERNING LAW

A. 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 Petitioners to prove by a preponderance of the evidence that the orders under review are not valid or reasonable.

B. Recordkeeping Requirements

Article 19 of the Labor Law requires employers to maintain payroll records and to keep those records available for inspection by the Commissioner at any reasonable time (Labor Law § 661). The Commissioner’s regulations implementing Article 19, at 12 NYCRR § 142-2.6, provide that weekly payroll records must be maintained and preserved for six years and shall show, *inter alia*, the name and address; social security number; wage rate; number of hours worked daily and weekly; amount of gross wages; deductions from gross wages; allowances if any claimed as part of minimum wages; and net wages paid for each employee.

C. DOL’s Calculations of Wages 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].) As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-821 (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. Clemens 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.”

III. 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).

It is undisputed that Petitioners paid Claimant \$17,000.00 in Makan Land paychecks, and that Claimant earned and was entitled to be paid a total of \$22,600.00 over the course of her employment; Petitioners argue that she *was* paid that amount, including monthly “net” earnings totaling \$2,922.30, paid by Paychex-generated checks, and \$2,677.70 in monies which were withheld from Claimant’s pay and forwarded to the appropriate tax authorities. For the reasons stated below, we find that the Petitioners did not meet their burden of proof, and we affirm both the Wage Order and the Penalty Order.⁸

The Paychex Generated Checks

Petitioner Makan testified that Claimant was paid three Paychex checks totaling \$571.20 for net wages for payroll periods ending April 30, May 31, and June 30, 2008. Petitioners did not supply copies of these Paychex checks to DOL during the investigation, and Senior Labor Standards Investigator Anderson was unaware of their existence. Claimant testified that she received three Paychex checks in amounts she remembered as “around” \$140, \$150, and \$240, and was told by Makan that the checks were for overtime hours paid at a rate of \$10.00 per hour. Claimant testified that Makan agreed to pay her overtime, rather than giving her days off, but after she received the third check, Makan told her that it was “too costly.” Because Petitioners did not provide copies of cancelled checks, payroll records showing days and hours worked, or pay stubs, we find that Petitioners have not met their burden of proving that \$571.20 in net wages was paid to the Claimant.

This is also the case for the two additional checks for net wages in the amounts of \$322.00 for the payroll period ending July 31, 2008 and \$2,029.10 for the payroll period ending August 31, 2008 for which Petitioners also sought credit based on the Paychex payroll reports. While those documents indicate that Paychex computed these amounts as owed to Claimant for the stated periods, she denied receiving such payments and Petitioners provided no evidence, other than the Paychex payroll records, that the July and August 2008 net wages checks were given to the Claimant or were cashed by her. Claimant’s denial that

⁸ We note, at the outset, that Petitioners’ self-described practice of paying Claimant once a month violated the law. Labor Law §191(d) requires that a clerical worker such as Claimant “be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly.” It is undisputed that the Petitioners also failed to provide Claimant with check stubs as required by Labor Law § 195(3), which requires an employer to furnish each employee with a statement with every payment of wages listing gross wages, deductions and net wages. The Commissioner made no finding and no penalty was imposed with respect to these independent violations of the Labor Law.

she ever received the payments is consistent with the balance of the record. The Paychex payroll report for July 2008 (which was run on December 15, 2008) records that an electronic funds transfer from Makan Land's bank account was due to occur a day later, on December 16, 2008 to cover an August 5, 2008 check in the amount of \$322.00 which Claimant specifically denied receiving. Likewise, the August 2008 Paychex report underscores that Paychex did *not* issue a check for \$2,029.10, and states that that if a check was written at all, it was done manually by Makan Land, not by Paychex. Had such a Makan Land check ever been paid to Claimant, it would surely have been placed in evidence by Petitioners along with other canceled Makan Land checks.

Makan testified that while Claimant stopped coming to work after August 15, Paychex payments for her continued to come "while she [was] gone," that "we [gave] her the checks," and that "we can get you the proof. The proof is already here, part of the reports." Although Makan even added that it "takes no more than ten minutes to call Paychex and get copies," these cancelled checks were not produced during the investigation or at the hearing. Petitioners provided no testimony regarding when and how the Paychex checks were given to Claimant (who denied receiving them) after her termination. According to Makan, Claimant attempted to return to work a couple of weeks after she left, but he did not testify that he gave her the \$322.00 check at that time, much less the \$2,029.10 check which as of that date, could not even have been written. While it would have been possible to mail Claimant payments after her employment ended, Makan did not claim to have done so, or otherwise explain how or when he supposedly tendered to Claimant a check for \$2,029.10 (whether from Makan Land or from Paychex) weeks after firing her for taking an unauthorized vacation.

We find that the Petitioners did not meet their burden of proving that the five Paychex generated net pay checks for April through August, 2008 were paid to Claimant.

Alleged Tax Withholdings from Claimant's Wages

Petitioners also sought credit for \$2,677.70 shown in the Paychex journal as withheld from Claimant for forwarding to the appropriate authorities. We reject this claim for the following reasons.

Makan's testimony indicated that while he held back varied amounts, he did so in increments of a day's pay or some other round amount (for example, paying \$800 rather than \$1,000 for a five-day week, or \$940 rather than \$1,200 for a six-day week). Petitioners did not explain, moreover, why there were Makan Land checks to Claimant for such amounts as \$1137.00, \$940.91, \$931.62, \$809.60 or \$811.20.⁹ Petitioners provided no plausible explanation as to how Makan selected the amount of each week's "advance," or how he decided whether and how much to hold back from Claimant's \$200 per day gross earnings.

⁹ While it is possible some of these payments constituted reimbursement for expenses (which Petitioners and Claimant agreed totaled \$630.33), Petitioners provided no explanation, much less documentation for the explanation.

It is clear from Makan's own testimony that the Paychex journals on which Petitioners rely – and which they argued show “withholdings” which Petitioners claim should be credited towards the gross wages they paid her – were based solely on figures Makan called in to Paychex at the end of the month, not on reliable records. Makan never explained the discrepancy in amounts between the weekly “advance” checks and the amounts listed in the Paychex payroll reports. Anderson testified, and her April 17, 2009 letter to Petitioner confirms, that she requested proof of any tax payments made by Petitioners with respect to Claimant, but “Nothing was ever given to” her. These records give no hint, for example, of how or by whom withholdings (in amounts that appear to have varied inexplicably from month to month¹⁰) were computed, an especially glaring omission in light of Claimant's uncontradicted testimony that she never even completed a W-4 form. Nor did Petitioners explain, or even acknowledge, the fact that after June 2008, the records which they submitted and on which they seek to rely cease to reflect any withholding from Claimant's earnings for income taxes, or transfer of funds from Makan Land's account for remission to the government of amounts withheld for any purpose. Again, it is noteworthy that the Commissioner requested, but was never furnished, proof that tax payments to the government were made.

In any event, without canceled checks, Paychex bank statements or similar proof, it is impossible to ascertain whether money shown as withheld from Claimant's wages was ever remitted to the appropriate tax authorities. This is particularly the case with regard to the July and August Paychex payroll reports which show that withholdings were made, but state, “Paychex does not remit these funds. You must ensure accurate and timely payment of applicable items.”

Petitioners' Post-Hearing Brief calls it “absurd... to believe that monies deducted by Paychex were not paid to the particular tax entity. It is absurd to believe that checks issued by Paychex were not received by the Claimant.” We do not agree. Petitioners, not Paychex, were responsible for paying Claimant properly, and Petitioners did not show that they did so.

Accordingly, it was reasonable and valid for the Commissioner not to credit Petitioners with having paid \$2,677.70 in wages withheld from Claimant's pay, because there was no evidence that this money was remitted to the appropriate taxing authorities.

The Penalty Order for Failure to Maintain Records is Affirmed

Article 19 requires employers to maintain payroll records and to keep those records available for inspection by the Commissioner at any reasonable time (Labor Law § 661). The Commissioner's regulations implementing Article 19 at 12 NYCRR § 142-2.6 provide that an employer must maintain payroll records, including records of daily and weekly hours worked, for a period of six years and shall show, *inter alia*, the name and address; social security number; wage rate; number of hours worked daily and weekly; amount of gross wages; deductions from gross wages; allowances if any claimed as part of minimum wages;

¹⁰ For example, Claimant's earnings and “advances” as shown in Paychex reports for April and May 2008 were identical, yet her withholdings were recorded as different.

and net wages paid for each employee. Makan testified that he kept records of the days Claimant worked but did not provide them to the DOL during the investigation or submit them as evidence during the hearing. The Petitioners' Paychex payroll records for the relevant period, which were supplied to the DOL and entered into evidence, were deficient because they did not include the daily and weekly hours worked.

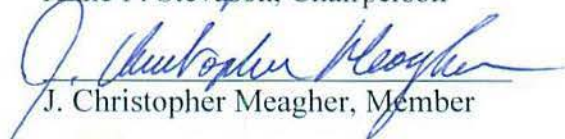
IMPOSITION OF CIVIL PENALTIES IN THE WAGE AND PENALTY ORDERS

Labor Law § 218 provides that in assessing the amount of a penalty, the commissioner "shall give due consideration" to the following factors: (1) the size of the employer's business; (2) the good faith of the employer; (3) the gravity of the violation; (4) the history of previous violations; and (5) in the case of violations involving wages, benefits or supplements, the failure to comply with recordkeeping or other non-wage requirements. The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the civil penalty amounts are reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

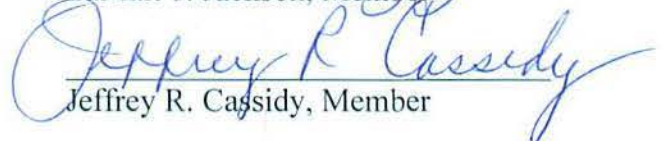
1. The Order to Comply with Article 6 of the Labor Law, dated February 6, 2009, under review herein, is affirmed;
2. The Order to Comply under Article 19 of the Labor Law dated February 6, 2009 is affirmed; and
3. The Petition for Review be, and the same hereby is, otherwise denied.


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 Albany, New York, on
October 11, 2011.