STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
PERRY STUART AND LONG ISLAND LIMOUSINE SERVICE CORP.,	:	
Petitioners,	:	DOCKET NO. PR 11-146
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 March 26, 2011,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Perry Stuart, *pro se,* for petitioners.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor, (Michael Paglialonga, of counsel), for respondent.

WITNESSES

Perry Stuart and Glenn Tanzillo, for petitioners.

Clifford Manigault; Thomas Brady; and Jeremy Kuttruff, Senior Labor Standards Investigator, for respondent.

WHEREAS:

The petition for review in this matter was filed with the Industrial Board of Appeals (Board) on May 13, 2011 and seeks review of two orders to comply issued by the Commissioner of Labor (Commissioner, Department of Labor [DOL], or respondent) against petitioners Perry Stuart (Stuart) and Long Island Limousine Service Corp. (Long Island Limousine) (together "petitioners") on March 26, 2011. The first order (wage order) directs payment to the Commissioner for wages due and owing to two claimants, Clifford

Manigault (Manigault) and Thomas Brady (Brady), for a total amount of wages of $1,896.00, with interest continuing thereon at the rate of 16%, calculated to the date of the order in the amount of $569.29, and assesses a 200% civil penalty in the amount of $3,730.00 for a total amount due on the wage order of $6,164.29. The second order (penalty order) imposes a $1,000.00 civil penalty for failing to keep and/or furnish true and accurate payroll records for the period from March 9, 2009 through May 14, 2009.[1]

The petition alleges that no money was owed to either claimant. With regard to claimant Manigault, the petition alleges that during the DOL investigation, petitioners provided "copies of checks that represented correct wages to Mr. Manigault. We also stated that our records showed no money was due Mr. Manigault." With regard to claimant Brady, the petition states that "Mr. Brady worked for two days during the week ending May 3rd and was paid $300.00" and that his only other work day was May 14th, when he was relieved of his duties for alleged misconduct and no check was issued for his work. The petition was amended to also challenge the civil penalties in both orders. Respondent filed its answer on July 26, 2011.

Upon notice to the parties, a hearing was held on July 26, 2012, in Hicksville, New York before Jean Grumet, Esq., Member of the Board and the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and to make statements relevant to the issues. Petitioners filed a post-hearing brief on August 13, 2012, and the respondent's brief was filed on August 17, 2012.

I. SUMMARY OF EVIDENCE

Testimony of Perry Stuart: Overview

Petitioners operate a bus and limousine service in Hauppage, New York which charters full size and mini-busses and vans. Petitioners have been in business for approximately five years and employ ten employees. Bus and van drivers are assigned work by petitioners' General Manager, Glenn Tanzillo (Tanzillo), based on "charter orders," which are confirmed contracts with customers. Tanzillo fills out weekly time records which contain start and end times for each driver based on handwritten notes on the charter orders, drivers' daily logs, dispatcher notes ("sometimes the dispatcher signs them in or out"), or conversations Tanzillo has with drivers about their departure and arrival times, confirmed with the charter orders. Some drivers complete daily logs which are either provided by petitioners or purchased by the driver; logs are required for interstate runs or those more than a 100-mile radius from the Hauppauge office.

No wage statements are provided to employees with their paychecks, nor do petitioners maintain a written pay policy. Employees are verbally informed of the pay they will receive for each job. "The allegation that it's always $150 is not accurate...if a driver works four hours, three hours, five hours, he could get $75." Employees are paid gross

[1] Unless otherwise specified, all dates below are in 2009.

wages weekly; each quarter's final paycheck reflects deductions for taxes and FICA withholdings for the entire quarter.

Stuart alleges that the penalty order for the records violation is unreasonable because the DOL never demanded petitioners' payroll records. The imposition of a 200% penalty in the wage order is unreasonable because "[h]istory of previous violations, we don't have any." A prior violation involving Stuart was with a different company.[2]

Testimony of Perry Stuart: Clifford Manigault's Claim

Manigault's claim asserts that he is owed $965.00 in wages including $365.00 for March 9, 10 and 11; $450.00 for March 20, 21 and 22; and $150.00 for March 26. Although the petition avers that Manigault is owed nothing and was paid for all work, Stuart testified that Manigault is actually still owed a total of $535.00, including $450.00 for March 20, 21 and 22 and $85.00 for March 26. Stuart testified that Manigault was given a check for $600.00 but after Manigault quit, Stuart realized that he was actually owed only $535.00 and stopped payment, and was unable to find Manigault to issue a new check.

Stuart testified that Manigault did not work for petitioners on March 9. While Manigault may have driven the SUNY Old Westbury/NYIT shuttle that day and "may have taken the bus from Hauppauge," this work was subcontracted by petitioners to Alexandria Bus (Alexandria), a Brooklyn-based company, which was responsible for paying Manigault. Similarly on March 10, Manigault's daily log shows him working 12 hours on the SUNY/Old Westbury shuttle, but petitioners subcontracted all but 4 ½ hours of this work to Alexandria. "We paid them as a subcontractor." For March 11, Manigault's daily log indicates that he drove the SUNY/Old Westbury shuttle for 14 hours, but only 2 hours were driven for petitioners, which contracted out the other 12 to Wells & Wells. When customers call petitioners to charter a bus and none are available, Petitioners either refer the customer to another company or "I'll take the job and subcontract it out." In such cases, the subcontractor who supplies the bus pays the driver, whereas if petitioners use their own bus, "then 99 percent of the time I'll end up paying the driver."[3]

Stuart testified that Manigault is owed a total of $450.00 for March 20, 21 and 22, when he worked 8, 6, and 17 hours respectively for a promised wage of $150.00 per day. For March 26, Manigault is only entitled to $85.00, not $150.00, because he only drove the SUNY/Old Westbury shuttle for 6 ½ hours for petitioners, with another 5 ½ hours subcontracted to Alexandria.

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[2] DOL issued two orders to comply against Perry Stuart (T/A Long Island Airport Limousine) for violations of Labor Law §§ 191 and 661, in Case 08-01503. Stuart filed a petition with the Board challenging the orders in *Matter of Perry Stuart (T/A Long Island Airport Limousine),* Board Docket No. PR 09-111. The petition was withdrawn in accordance with a written stipulation of settlement between Stuart and the Commissioner on December 15, 2010.

[3] The petition contains no such allegations regarding subcontracting, nor were any subcontracts provided during the hearing.

Testimony of Clifford Manigault

Manigault testified that he was hired by petitioners as a bus driver in 2009, was told that he would earn $150.00 per day, and was never told that he would be paid at a different rate. He was never provided with a wage statement explaining how his pay was calculated, and never knew how much he was going to be paid because he was not always paid at the agreed wage rate. Manigault kept track of his time on a daily basis by completing driver's daily logs. Petitioners' supervisors dispatched him from petitioners' Hauppauge yard to SUNY/Old Westbury. Manigault considered the company that dispatched the driver the employer. He was never told his work was subcontracted to Alexandria or any other company, and he wrote "Alexandria Bus" in his log book only because that name was on the bus.

Manigault testified that he worked all seven days during the week of March 9-15, earning $1,050.00 (seven days at $150.00 per day), but was paid only $685.00, leaving a balance due of $365.00. He also worked but was not paid for March 20, 21, 22, and 26. On two occasions, he complained about his pay to Tanzillo, who told him he would "fix it on Friday," but when Manigault returned on Friday, Tanzillo did not have time to do it. Manigault was given a $600.00 check on April 2, but was unable to cash the check because there was a stop payment on it.

Testimony of Perry Stuart: Thomas Brady's Claim

Brady's claim asserts that he is owed $900.00 in unpaid wages for six days of work – May 5, 7, 8, 9, 12, and 14. Although the petition avers that Brady is owed nothing and was paid for all work, Stuart asserted in his opening statement that Brady is still owed $150.00, and later testified that he is still owed $300.00.

Stuart testified that Brady's time sheet and charter orders indicate that he worked on May 5, 9, 12 and 14. Stuart did not dispute that Brady was owed a total of $300.00 (at $150.00 per day) for May 12 and 14, but contended that he was paid $300.00 for May 5 and May 9. The Petition states: "Mr. Brady worked for two days during the week ending May 3rd and was paid $300.00."

Petitioners' May 2009 check register and bank statement show that Brady was issued a total of two paychecks: a $300.00 check dated April 29 which was cashed on May 1 and a $300.00 check dated May 11 which was cashed on May 15.[4] The check register does not indicate for which pay periods these two checks were issued.

Testimony of Thomas Brady

Brady testified that he was hired by petitioners as a bus driver on April 17, 2009, was told that he would earn $150.00 per day, and drove ten times: April 17, 18, and 30, and May 1, 5, 7, 8, 9, 12, and 14, 2009. Brady produced copies of charter orders for May 5, 7, 8, 9 and 12 which were given to him by the dispatcher or Tanzillo when he reported to the office

[4] In addition, a check for $305.00 was issued on April 29, 2009 for reimbursement for a bus repair Brady paid for while driving on April 18, 2009.

for his job assignment on each of these mornings. Although he also worked on May 14, he did not have a copy of the charter order for that day.[5] At the hearing, Brady remembered only receiving one paycheck for $300.00. He stated that he requested payment for unpaid work on several occasions, but was given excuses and told that no one was available to speak to him.

The DOL's Investigation and Petitioners' Response

Senior Labor Standards Investigator Jeremy Kuttreff (Kutreff), who has been employed as a DOL investigator for ten years, testified regarding the DOL's investigation. On May 26, 2009, Supervising Labor Standards Investigator Philip Pisani (Pisani) notified Long Island Limousine that Manigault had filed a claim for unpaid wages. The letter advised the employer to remit payment within ten days or provide a statement including "a copy of any payroll record, policy, contract, etc. to substantiate your position."

On June 24, 2009, petitioners' manager, Joe Stanza (Stanza), responded to Pisani stating that Manigault was paid for all of the jobs he was assigned and no additional payments were owed to him. Stanza enclosed copies from a check ledger indicating that checks in the amounts of $780.00, $720.00 and $485.00 were issued to Manigault on March 9, March 16, and March 24, 2009, respectively. The check ledger did not list the payroll period for which the checks were issued, the daily or weekly hours worked, the rate of pay, or any other information pertaining to what the checks were for. No cancelled checks were furnished to show that these checks had, in fact, been cashed.

On August 6, 2009, DOL notified Long Island Limousine that Brady had filed a claim for unpaid wages. This letter also reiterated information the DOL had previously sent about Manigault's claim. Again, the letter asked the employer to send payment or payroll records substantiating its' position. The DOL received no response to this letter.

On February 1, 2011, Kuttruff wrote to petitioners that DOL adjusted Manigault's claim to $965.00. Kuttreff's letter stated that petitioners failed to "send conclusive documentary evidence in the form of records of hours worked ... both daily and weekly maintained during the period of his claim, along with corresponding payroll registers and cancelled checks, substantiating that you paid [Manigault] the wages he earned during the period of his claim." The letter also reiterated that Brady filed a claim for $900.00. Attached to Kuttreff's letter were copies of both claims, Manigault's Driver's Daily Log sheets for the period of his claim, and a $600.00 check issued to Manigault on April 2, 2009 that had bounced. Kuttreff's letter also stated that because petitioners failed to send payment or documentary evidence substantiating their case, the DOL was referring the matter for issuance of an Order to Comply.

Kuttreff completed an Order to Comply Cover Sheet on February 1, 2011, which contained a document entitled "Background Information – Imposition of Civil Penalty," in which he recommended that a 200% penalty be assessed. Kuttreff testified that the 200% penalty was imposed because of the lack of good faith shown by the petitioners who failed

[5] Brady brought to the hearing copies of charter orders for all days he drove except May 14, but only those for the relevant period were entered into the record.

to respond to the DOL's notice of Brady's claim; sent no evidence that Manigault was paid other than the three legally inadequate check ledgers; did not respond to Kuttreff's detailed final letter explaining why an Order to Comply would issue if payment was not received; never explained why a check to Manigault had bounced; and because of petitioners' prior violations of Labor Law §§ 191 and 661 in 2008 which resulted in the issuance of an Order to Comply. Kuttreff also noted that with respect to the gravity of the violation, the amount of money owed was significant to two bus drivers who were still awaiting payment while the petitioners received the benefits of their work.

Testimony of Glenn Tanzillo

Petitioners' General Manager, Tanzillo, was called by petitioners as a rebuttal witness. Tanzillo testified that Manigault complained about his pay every week. Manigault did not give copies of his Driver's Daily Logs to Tanzillo, even when he complained about his pay. Tanzillo was not familiar with how the drivers fill out the driver's daily logs. Tanzillo denied telling Manigault that he would earn $150 per day regardless of the job he did.

Tanzillo fills out the time records every day and turns them in once a week to the bookkeeping office. Since Tanzillo assigns most of the drivers to their jobs, he knows what time they start and finds out what time they finished and then completes the sheet. These records are kept on a regular basis; Tanzillo does it daily except for weekend records, which he completes on Monday. Tanzillo only shows employees the time records "if they request it;" workers can also see the charter orders (contracts).

Tanzillo explained that when petitioners subcontract busses he hires "another company to do a job for us. We would pay the company that we hire and they pay the drivers." When asked how Brady could have copies of charter orders for days when, according to petitioners, he did not work, Tanzillo testified that Brady could have received the charter orders a few days before but not driven on the designated day because a bus broke down, a driver was switched, or the work was subcontracted out.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

When a petition is filed, the Board reviews whether the Commissioner's order is "valid and reasonable" (Labor Law § 101[1]). 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" (§ 101 [2]). The Board is required to presume that an order of the Commissioner is valid (§ 103[1]). If the Board finds that the "order, or any part thereof, is invalid or unreasonable it shall revoke, amend or modify the same" (Labor Law § 101[3]).

Pursuant to the Board Rules, "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." (12 NYCRR § 65.30) It is therefore the petitioners' burden of proof in this matter to prove the allegations in the petition by a preponderance of evidence. (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR § 65.30).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR § 65.39). For the following reasons, we affirm both orders in all respects and find that petitioners failed to meet their burden of proving that the Commissioner's orders were invalid or unreasonable.

Petitioner failed to keep required records

An employer's obligation to keep adequate employment records is found in Labor Law §§ 195(4) and 661 as well as in the implementing regulations. Title 12 of the New York Code of Rules and Regulations (NYCRR) § 142-2.6 provides, in pertinent part:

> "(a) Every employer shall establish, maintain and preserve for not less than six years, weekly payroll records which shall show for each employee:
> (1) name and address;
> (2) social security number;
> (3) the wage rate;
> (4) the number of hours worked daily and weekly...;
> (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
> (6) the amount of gross wages;
> (7) deductions from gross wages;
> (8) allowances, if any, claimed as part of the minimum wage;
> (9) net wages paid; and
> (10) student classification."
> . . .
> "(d) Employers...shall make such records...available upon request of the commissioner at the place of employment."

12 NYCRR § 142-2.7 further provides:

> "Every employer . . . shall furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages." (*See also* Labor Law § 195[3])

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid and to provide its employees with a wage statement every time they are paid. The required recordkeeping provides proof of proper payment to the employer, the employee, and the Commissioner.

We do not credit petitioners' time records which were produced for the first time at the hearing. Despite DOL's two requests that petitioners provide a statement including "a copy of any payroll record...to substantiate your position," petitioners provided no time or payroll records during the investigation other than a check ledger which purportedly showed

payments to Claimant Manigault issued March 9, 16 and 24. The Petition refers to time records not submitted to DOL during the investigation:

> "[i]n checking our records we have found that Mr. Brady worked for two days during the week ending May 3rd and was paid $300.00. The only other day he worked was on May 14th ...."

At hearing, however, petitioners submitted purported contemporaneously maintained "time records" supposedly prepared by Tanzillo on a weekly (or according to Tanzillo, daily) basis. These "time records," on their face, contradicted the petition (and the "records" on which the petition was purportedly based) by indicating that Brady worked on May 5, 9, and 12. We find that the lack of consistency in the petition, the time records, and petitioners' testimony indicates that these records are not accurate and appear to have been compiled after the fact.

Likewise, the check registers provided by petitioners for Manigault during the investigation and for Brady at the hearing were legally insufficient because they did not contain all information required to be maintained by the statute and implementing regulation. They contained no information regarding the payroll period for which wages were paid, the employee's rate of pay, or the daily and weekly hours worked. petitioners' check registers stated only the name of the employee, the date that the check was issued, and the amount of the check.

The Petition alleged that "copies of checks that represented the correct wages issued to Mr. Manigault" were furnished to DOL and that "[o]ur records showed no money was due to Mr. Manigault." In reality, only a check register was furnished; neither bank statements nor canceled checks were provided to demonstrate that checks were actually cashed. Even setting that aside, the register indicated that Manigault was paid $780 on March 9, $720 on March 16, and $485 on March 24, but not for which pay period checks were issued, the wage rate and hours, or other information required by §§ 142-2.6 and -2.7. Moreover, Stuart's testimony contradicted the Petition's assertion that no wages were owed; he testified that he still owed Manigault $535.00 for unpaid wages for March 20, 21, 22 and 26.

Similarly, the check register produced at the hearing indicates that Brady was issued two $300.00 paychecks, one on April 29 and the other on May 11, but does not indicate for which period these payments were made. The Petition states that "[i]n checking our records, we have found that Mr. Brady worked for two days during the week ending May 3rd and was paid $300.00," yet Stuart testified that the May 11 check was for work performed the following week on May 5 and 9.

The importance of the legal requirement that employers keep records of employees' wage rates is especially clear in this case in which the lack of such records gave rise to mystery and dispute about what those rates were. While Manigault and Brady credibly testified they were told their pay would be $150.00 per day, Stuart testified that "if a driver works four hours, three hours, five hours, he could get $75," without explaining how any wage rate was calculated. Yet Stuart also testified that Manigault was entitled to $150.00 for 8 hours worked on March 20, for 6 hours worked on March 21, and for 17 hours worked

on March 22, but only $85.00 for 6 ½ hours worked on March 26.

The Wage Order is Affirmed

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 may credit the claimant'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."

Therefore, the 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 the claimants worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable. *Matter of Frank Marino, Rick Fiallo and F&M Cleaning, Inc.,* Board Docket No. PR 10-064 (May 30, 2012).

We find that petitioners failed to meet their burden of proving that the Claimants were paid for all work performed as alleged in the Petition. Indeed, petitioners' own testimony and evidence at the hearing contradicted the allegations of the Petition. While the petition averred that petitioners' records demonstrate that Manigault and Brady were paid in full for all work performed, Stuart testified that Manigault was, in fact, still owed $535.00 and Brady $300.00. Stuart's testimony that he tried, but could not find Manigault to issue a new check for $535.00 to replace the $600.00 check for which he stopped payment, flies in the face of the petition's contention that no wages were owed, as well as petitioners' position during the investigation that their purported check register entries constituted payment in full.

While the petition did not claim that Manigault was actually working for a subcontractor, waiving any such claim pursuant to Labor Law § 101[2], Stuart in testimony sought to present an elaborate account in which varying portions of Manigault's work for each of the three days from March 9 to 11 and March 26 had actually been subcontracted by petitioners to one of two subcontractors. No documents to support this claim, which Manigault contradicted, were provided. Even if petitioners were obtaining busses from "subcontractors" for part of the time Manigault worked, it is undisputed that petitioners continued to supervise and dispatch him in the same work and there is no evidence they ever ceased to employ him. Similarly, while the petition claimed that Brady worked two days during the week ending May 3 and also worked on May 14, Stuart testified that Brady actually worked May 5, 9, 12 and 14.

Given the inconsistencies in petitioners' position regarding payment to the claimant, their failure to produce credible records, the introduction into the record of documents that appear to have been created after the fact, and Claimants' consistent and credible testimony

supported by documentary evidence in the form of Manigault's time logs and Brady's charter orders, we find that a preponderance of the credible evidence supports a finding that claimants were owed all wages found due and owing in the wage order.

INTEREST

Labor Law § 219 provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law § 14-a states that the "maximum rate of interest provided for in section 5-501 of the general obligation law shall be sixteen percentum per annum." While petitioners request that the Board order a lower amount of interest, the Commissioner has no discretion to charge a lower rate of interest, as such discretion was taken away by the Legislature in 1987 (*see* L. 1987, ch. 417; *see also Matter of Long Island-Airport Limousine Service Corp.*, PR 31-89 [September 24, 1992], *Matter of William Dictor,* PR 09-003 [June 18, 2009] page 3.

CIVIL PENALTIES

Labor Law § 218 (1) provides for "the appropriate civil penalty" for a failure to pay wages. 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, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements." For an employer "who previously has been found in violation... or... whose violation is willful or egregious," the statute specifies a 200% civil penalty.

At the hearing, petitioners argued that a 200% penalty was unreasonable because "[h]istory of previous violations, we don't have any," and that a previous violation involving Stuart was with a different company. DOL issued two orders to comply against Perry Stuart (T/A Long Island Airport Limousine) in DOL Case No. 08-01503. Subsequent to the issuance of these orders, Stuart filed a Petition with the IBA challenging these orders in *Matter of Perry Stuart (T/A Long Island Airport Limousine),* Board Docket No. PR 09-111. The Petition was withdrawn in accordance with a written stipulation of settlement between Stuart and the Commissioner on December 15, 2010. While the prior violation may have involved a different corporate entity, the orders in that case were issued against Stuart personally. Stuart is also one of the petitioners in the instant matter.

Respondent's Post- Hearing Brief alleges for the first time that the decision in *Matter of Long Island-Airports Limousine Service Corp., C.I.P.,* Board Docket No. PR 31-89 (September 24, 1992) "provides an independently sufficient basis on which to determine that the petitioner had a previous history of labor law violations." Although that decision named a different entity than the corporate petitioner here, Respondent attached a copy of the Board's September 24, 1992 cover letter from Perry Stuart for the proposition that Stuart was cited in the 1992 decision because it was "sent to his personal attention." We decline to consider the 1992 decision as evidence of a previous violation in the instant case because

Stuart was not a named party and the case involved a different corporation. We also decline to consider the post-hearing submission of the September 24, 1992 cover letter after the submission of evidence was completed. *Matter of NYC Dep't of Transportation (5 Dubois Avenue, Staten Island, NY),* Board Docket No. PES 06-004 (December 17, 2008); *Piotr Golabek and Amica Corp.,*Board Docket No. PR 09-127 (December 14, 2011).

There is, however, no need to rely on a history of prior violations to sustain the reasonableness of the penalty imposed by the DOL in the present case, in which the petitioners did not operate in good faith, their violation was serious, and they failed to comply with recordkeeping requirements. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the 200% civil penalty set forth in the wage order are proper and reasonable in all respects.

The Petition also requests that the Board overturn the DOL's imposition of a $1,000.00 civil penalty for failure to keep and/or maintain payroll records. Labor Law § 218(1) authorizes a penalty "not to exceed one thousand dollars for a first violation" of record-keeping or other requirements apart from the requirement to pay wages, and of "the appropriate civil penalty" for such a failure. Under this standard, imposition of a $1,000.00 civil penalty for petitioners' failure to keep required records is valid and reasonable. Petitioners did not produce any records that complied with the statute or implementing regulation.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Orders of the Commissioner are hereby affirmed; and

2. The Petition for review be, and the same hereby is, 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 New York, New York, on
December 14, 2012.