STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
MITCHELL B. NESENOFF AND CES INDUSTRIES, INC.	:	
Petitioners,	:	DOCKET NO. PR 11-242
To Review Under Section 101 of the Labor Law: Two Orders to Comply With Article 6 of the Labor Law and an Order Under Article 19 of the Labor Law, all dated June 10, 2011,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Kaufman Dolowich Voluck & Gonzo LLP (Jeffery A. Meyer, Esq. of counsel), for petitioners.

Pico Ben-Amotz, General Counsel, New York State Department of Labor (Jeffrey G. Shapiro, Esq. of counsel), for respondent.

WITNESSES

Dr. Mitchell B. Nesenoff, for petitioners.

Rita Patel, Vinay Patel, Kenneth Rommel, Raymond Bersce, Henry Frost, and Elizabeth Ares, Labor Standards Investigator, for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on July 28, 2011, and seeks review of three orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Mitchell B. Nesenoff and CES Industries, Inc. on June 10, 2011. The Commissioner filed his answer on September 20, 2011.

Upon notice to the parties a hearing was held in this matter on November 25 and 26, 2013, in Hicksville, New York, before Anne P. Stevason, then Chairperson of the Board, and the designated Hearing Officer in this proceeding.

Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, make statements relevant to the issues, and file legal briefs.[1]

The first order to comply with Article 6 (wage order) under review directs compliance with Article 6 and payment to the Commissioner for wages due and owing to five named claimants in the amount of $162,889.30 for the time period from May 26, 2007 to June 30, 2010, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of $25,820.62, and assesses a civil penalty in the amount of $325,778.60, for a total amount due of $514,488.52.

The second order to comply with Article 6 (supplements order) under review directs compliance with Article 6 and payment to the Commissioner for vacation and holiday pay due and owing to three named claimants in the amount of $12,351.85 for the time period from June 13, 2007 to June 26, 2010, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of 2,295.87, and assesses a civil penalty in the amount of $24,703.70, for a total amount due of $39,351.42.

The order under Article 19 (penalty order) assesses a $500.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from on or about June 1, 2007 through June 30, 2010.

SUMMARY OF EVIDENCE

Petitioners' evidence

Petitioner CES Industries, Inc. (CES) was founded in the 1970's, and manufactures and sells educational training equipment hardware and software to various types of schools, laboratories and other educational institutions all over the world. The company is owned by petitioner Dr. Mitchell Nesenoff (Nesenoff), the president of the corporation, and the individual who designed and developed all the software and hardware sold by CES.

Petitioner Nesenoff testified that in or about 2007 CES began to experience a downturn in business and lost a contract to furnish technical and vocational education training materials and equipment to the New York City School District, which was the petitioners' the primary customer. This business trend also followed for other similar companies throughout the United States due to changes in the funding structure for education by the federal government. During that period CES went from annual revenues of 2.5 million dollars and 15 or 16 employees to about 1 million dollars in annual revenue and a staff of 7 employees in 2008.

Nesenoff explained that as a result of the loss of business and downturn in the economy, CES began to experience business interruptions and cash flow problems as a result of which it became necessary for CES to make severe cuts and layoffs to its workforce. Over the course of the next three and a half years, from January 2007 to August 2010, the time period relevant to

[1] The respondent made a motion to dismiss the petition at the close of the petitioners' case which was denied by the hearing officer.

this decision, CES became very inconsistent in how and when it would pay its employees, on some weeks failing to pay wages altogether and on other weeks only managing to pay employees in cash or by wire transfer.

Petitioner Nesenoff testified that beginning in mid 2006 he had several meetings with the petitioners' employees to inform them of some of the changes being adopted by the company due to market changes the company was experiencing. Nesenoff testified that he informed the employees, among other things, of cuts in personnel, wages and the work week, that were going to be made by the company. Additionally he testified that he informed all the employees that company paid vacation time was to be eliminated.

Nesenoff further testified that the operation at CES was shut down for extended periods of time in early 2008 for lack of business and that employees were essentially laid off. He indicated he would call them in when there was work and pay them accordingly. Nesenoff also produced and testified regarding payroll records for the claimants in this proceeding for the period 2007 to 2010. These records contain a number of weeks in which no employees were paid. Nesenoff testified that during many of those weeks, CES was closed and no employees worked. Nesenoff further testified that there were weeks that the employees were paid by cash or wire transfer and therefore there were no records of the payment. The payroll records produced by Nesenoff also reflect a number of weeks in which no wages were paid to employees in a particular week, and yet none of the claimants alleged not to have been paid for those weeks. Records and receipts were also produced by Nesenoff, showing proof of wire transfers and cash payments to the employees, but he did not know which weeks these payments were for. Finally, Nesenoff testified that he was "lazy" about record-keeping, and could never figure out how to properly change the rate of pay the employees received so instead would report a higher number of hours worked in a week to obtain a higher payment for the employee.

Respondent's evidence

The claimants – Vinay Patel, Rita Patel, Kenneth Rommel, Raymond Bercse, and Henry Frost, III – testified that during the claim period, the petitioners due to a downturn in business, frequently failed to pay their wages on time, sometimes failed to pay them at all, sometimes paid two weeks of wages at a time in order to "catch up," and ultimately did not pay any wages for the weeks they alleged they were unpaid in the claim forms they filed with the Department of Labor (DOL). Raymond Bercse, and Henry Frost, III, testified that they did receive some wage payments by cash or wire transfer, but they were not sure what weeks those payments were for. Kenneth Rommel did not recall whether the petitioners had ever paid him by wire transfers or cash, although the record indicated such payments were made to him.

Vinay Patel testified that he kept track of the weeks he was not paid and that if he listed it on his claim form, then he had worked that week and not been paid, and that if he did not work, then he did not expect to be paid for the time and did not include it in his claim. Vinay Patel also testified that he completed his wife's, Rita Patel's, claim form. She worked the same weeks he did with a few exceptions that he accounted for in the forms. Rita Patel testified that Vinay Patel completed her form.

Vinay Patel testified that generally the plant was closed every year at Christmas, the last two weeks of July, the Thursday and Friday of Thanksgiving week, and for five continuous

weeks in 2009 or 2010. Kenneth Rommel testified that the plant was closed for Christmas in 2009 and for five weeks in May, June, or July 2010. Raymond Bercse testified that the plant was closed for Thanksgiving and Christmas, but he claimed wages owed for those holidays because in the past the petitioners had paid him for it. He also testified that the plant was closed for five weeks in June or July 2010. The claimants denied that the plant was closed for Passover or that they were ever told the paid vacation was suspended for any period of time.

Supervisor Labor Standards Investigator (SLSI) Elizabeth Ares testified that she was assigned to the respondent's investigation of the petitioners in November 2010 when she was a Senior Investigator. She testified that based on the claim forms filed by the claimants, the petitioners' response to her requests for information, and further information she received from some of the claimants as a result of the information sent by the petitioners, she determined the amounts the claimants had been underpaid by the petitioners.

ANALYSIS

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

Burden of proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

Wage order

Article 6 of the Labor Law requires employers to pay wages to employees on each regularly scheduled pay day as set forth at Labor Law § 191. The respondent determined after conducting an investigation that the petitioners had failed to pay wages in the amount of $162,889.30 to five employees from May 26, 2007 to June 30, 2010. The Labor Law further requires employers to maintain records of, among other things, the daily and weekly hours worked by each employee, and the amount of gross and net wages paid (*see* Labor Law § 661; 12 NYCRR 142-2.6), and to provide to each employee with each payment of wages a statement listing hours worked, rates paid, gross wages, and net wages (12 NYCRR 142-2.7). It is undisputed that the petitioners failed to keep these required records, and Nesenoff, himself, admitted that he was "lazy" with respect to keeping wage and hour records.

In the absence of required records, petitioners then bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 818, 821 [3d Dept 1989]; *Heady v Garcia*, 46 AD3d 1088 [3d Dept 2007]). 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 of the Commissioner's calculation 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 that 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 (*In the Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011]). Where incomplete or unreliable wage and hour records are available, 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.*). In this case, the Commissioner used the best available evidence, which were the claim forms and the statements of the claimants, which were largely consistent with their testimony at hearing, whereas the petitioners' evidence was insufficient and nonspecific except that the petitioners demonstrated, as discussed below, that there was a three week period during the claim period during which no employees worked, and for which we find no wages are owed.

Nesenoff testified that the plant was closed for certain weeks during the claim period. Specifically, he alleged the plant was closed the first three weeks of January 2008, the week of Thanksgiving 2008, the week of Christmas in 2008, the entire month of January 2009, January 30, 2009 to February 27, 2009, the last two weeks of July each year, and during Passover each year, and that the claimants should not be compensated for weeks they did not work. The claimants, although not completely agreeing with Nesenoff regarding the time periods the plant was closed, agreed that there were closures. Vinay Patel testified that generally the plant was closed at Christmas and the last two weeks of July, and also the Friday after Thanksgiving. Kenneth Rommel testified that the plant was closed for Christmas in 2009 and for five weeks in May, June, or July 2010. Raymond Bercse testified that the plant was closed for Thanksgiving and Christmas, but he claimed wages owed for those holidays because in the past the petitioners had paid him for it. He also testified that the plant was closed for five weeks in June or July 2010. The claimants denied that the plant was closed for Passover. Based on this evidence, we find that the plant was closed for Thanksgiving and the Friday after Thanksgiving for each year during the claim period, that the plant was closed for the weeks of Christmas and New Year's each year during the claim period, for two weeks in July from 2007 to 2009, and for five weeks spanning May and June 2010, and, as discussed below, the claimants, if they claimed to be owed for these weeks, were owed vacation wages for those time periods.

Petitioners testified that there were numerous cash payments and wire transfers made to the claimants during the claim period, which the claimants did not dispute receiving, and which the respondent appears to have credited in some instances; however, due to the petitioners admittedly "lazy" recordkeeping, it is impossible to determine from the record which weeks these payments were for, and therefore, whether such weeks were claimed as unpaid by the claimants. As it was the petitioners' burden in the absence of sufficient records to prove what weeks the payments corresponded to, and Nesenoff was unable to do so, we do not credit the petitioners with any additional payments not already accounted for in DOL's audit, and affirm the wages found due in the wage order as reasonable based on our review of the claims and the respondent's calculations.

Supplements order

The respondent also found that the petitioners violated Article 6 of the Labor by failing to pay $12,351.85 of holiday and vacation pay to Bercse, Frost, and Rommel for the time period from June 13, 2007 to June 25, 2010. Under Article 6, the requirement to pay wages includes vacation and holiday pay if there is an agreement to provide such benefits (*see* Labor Law §§

190 [1] and 198-c [2]; see also *Ross v Specialty Insulation Mfg. Co.*, 96 Misc 2d 940 [Sup Ct, Albany County 1978], affd 71 AD 2d 766, [3d Dept 1979].). Nesenoff testified that prior to the claim period, the petitioners provided their employees with two weeks paid vacation per year, taken in July when the plant was closed. He further testified that the petitioners informed their employees in 2007 that they would no longer provide paid vacation time. Rommel and Frost credibly testified that the petitioners' policy was that employees received two weeks paid vacation per year, and were paid for the weeks of Christmas and New Year's during which time the plant was closed. Rommel and Frost further testified that they were never notified of any change to the vacation policy, which was not rebutted by the petitioners. Since the claimants' version of the vacation policy was not rebutted, we uphold DOL's determination that certain holidays and vacation periods were to be paid. We have reviewed the claims and the respondent's calculations and find them reasonable and consistent with the testimony at hearing, and affirm the vacation and holiday pay found due in the supplements order.

Civil penalty

The Petitioner further alleges that the imposition of 200% civil penalty in the wage order and the supplements order by the DOL was invalid and unreasonable. We agree.

Labor Law § 218 (1) provides that a 200% civil penalty may be assessed where the employer has prior Labor Law violations or where the violation is willful or egregious. The "Imposition of Civil Penalty" worksheet indicates both "no prior history" and a prior Labor Law violation from 2008 that has been resolved, although prior violations were not mentioned during SLSI's testimony as a reason for assessing a 200% penalty and there is no reliable evidence in the record of any prior violations by the petitioners. Since the penalty therefore could not have been predicated on a prior violation, the 200% civil penalty must have been based on a willful or egregious violation. However, the worksheet does not indicate a finding of a willful or egregious violation, nor did SLSI Ares' testimony support such a finding. Indeed, during the investigation, correspondence was sent to the petitioners stating that if they did not pay the wages due and owing, an order would be issued assessing a 100% civil penalty. Ares did not offer a reasonable explanation as to why the penalty amount was increased from 100% to 200% except to say that she discussed it with her supervisor, who agreed that a 200% penalty was warranted. The Commissioner did not provide any alternative civil penalty other than 200% on the record before us. Accordingly, as no explanation was provided by the respondent for the statutory basis for imposing a 200% civil penalty, the civil penalty is revoked with respect to both the wage order and the supplements order.

Interest

New York State Labor Law Section 219 (1) provides that when the Commissioner of Labor determines that wages are due and owing to employees that the order directing payment (Order to Comply) shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of the payment." The maximum rate allowed to be imposed under Section 14 [a] is 16% per annum (New York State Banking Law § 14 [a]).

Penalty order

The penalty order assesses a $500.00 civil penalty against the petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from on or about June 1, 2007 through June 30, 2010. The evidence amply demonstrates that the petitioners did not keep and/or furnish accurate payroll records. The penalty order is, therefore, affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed with respect to wages and interest dues and, revoked with respect to the civil penalty; and
2. The supplements order is affirmed with respect to supplemental wages and interest due and revoked with respect to the civil penalty; and
3. The penalty order is affirmed; and
4. The petition for review be, and the same hereby is, granted in part and denied in part.

Vilda Vera Mayuga, Chairperson

Absent

J. Christopher Meagher, Member

LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
December 17, 2014.