STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
WILSON QUICENO AND SENDEXPRESS INC. (T/A SEND EXPRESS),	:	
Petitioners,	:	DOCKET NO. PR 14-287
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law, an Order to Comply with Article 19 of the Labor Law, and an Order Under Article 19 of the Labor Law, all dated September 15, 2014,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Sean Wright, P.C. (Sean T. Wright of counsel), for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Wilson Quiceno, for petitioners.

Pedro Abril, Paul Appleby and Amy Clark, Labor Standards Investigators, for respondent.

WHEREAS:

On November 14, 2014, petitioners Wilson Quiceno and SendExpress, Inc. (T/A Send Express) filed a petition with the Industrial Board of Appeals (Board) seeking review of three orders issued by respondent Commissioner of Labor (Commissioner) on September 14, 2014. The Commissioner filed an answer on January 21, 2015.

Upon notice to the parties, a hearing was held on April 22, 2015 in New York, New York before J. Christopher Meagher, Esq., Member of the Board and designated hearing officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The order to comply with Article 6 of the Labor Law (wage order) directs payment of wages due and owing to claimant Pedro Abril in the amount of $540.00 for the period from September 5, 2012 to April 5, 2014, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $38.58, liquidated damages in the amount of $135.00, and a civil penalty of $540.00. The total amount due is $1,253.58.

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment of minimum wages due and owing to claimant Pedro Abril in the amount of $6,403.29 for the period from September 5, 2012 to April 5, 2014, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of $457.53, liquidated damages in the amount of $1,600.82, and a civil penalty of $6,403.29. The total amount due is $14,864.93.

The order under Article 19 of the Labor Law (penalty order) assesses petitioners a civil penalty in the amount of $1,000.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish the Commissioner true and accurate payroll records for each employee for the period from September 1, 2012 to April 5, 2014.

The petition alleges that the orders should be annulled because claimant was paid in full and at minimum wage or above for all hours worked during the period of his claim, including those over 40 per week.

SUMMARY OF EVIDENCE

The Wage Claims

On April 10, 2014, Pedro Abril filed claims under Articles 6 and 19 of the Labor Law with the Department of Labor (DOL) stating that he was employed by petitioners and owed regular and overtime wages during the period from September 5, 2012 to April 5, 2014.

Abril's minimum wage/overtime claim stated that he worked 60 hours over six days each week – Monday from 8:00 a.m. to 11:00 p.m.; Tuesday, Wednesday, and Friday from 9:00 a.m. to 6:00 p.m.; Thursday from 8:00 a.m. to 10:00 p.m.; and Saturday from 10:00 a.m. to 2:00 p.m. – with no meal break. He was paid a flat salary of $400.00 and later $450.00 per week for all hours worked, including those over 40, plus commissions. His claim for regular wages stated that he received no wages for the payroll weeks ending April 4, 2014 (60 hours) and April 11, 2014 (four hours).

Testimony of petitioner Wilson Quiceno

Petitioner Wilson Quiceno is the owner and operator of petitioner SendExpress Inc. (Send Express), a courier business in Queens, New York that provides pick up and shipping services for customers who wish to send packages to destinations in Central and South America.

Petitioner testified that he hired claimant in 2012 to assist the company's driver two days a week picking up, packing, and delivering packages for shipment. The other days he was assigned to work in the field as a salesperson soliciting new business locations where customers could drop off packages. At the hiring interview, petitioner told claimant he was expected to

work nine hours per day, Monday to Friday, with one hour for lunch, and Saturday from 10:00 a.m. to 2:00 p.m. He would receive a salary of $450.00 per week plus commissions of $.05 per kilogram for packages shipped from any new locations he opened.

As evidence of claimant's schedule of hours, petitioner submitted a letter he issued claimant on December 1, 2013 to remind him of the company's pick-up and drop-off times during the week and encourage him to be punctual and organize his time efficiently. The letter was signed by claimant and stated that on Monday and Thursday the company started collection at 8:00 a.m., with the "goal" to deliver cargo to the airport at 5:00 p.m. On Tuesday, Wednesday, and Friday the company's pick-up service was from 9:00 a.m. to 6:00 p.m.

Petitioner testified that he was familiar with the hours claimant worked because he was his supervisor and was in the office when he came in to work in the morning. Claimant would then leave for the field, however, and sometimes not return by the time petitioner left for the day. Petitioner was asked whether claimant ever worked more than 44 hours a week and replied that he would not. On cross-examination, petitioner acknowledged that he works in the Send Express office about 15 or 16 hours a week and during the rest of the week operates a second courier business he owns, also located in Queens.

As proof of payment of claimant's wages, petitioner submitted copies of receipts for salary payments issued him of $400.00 per week from September 12, 2012 to October 19, 2012 and $450.00 per week from October 23, 2012 to April 4, 2014, plus receipts for five quarterly commission payments issued him during the period from April 12, 2013 to April 4, 2014. The receipts were prepared and signed by the company's accountant. Petitioner did not submit any cancelled checks signed by claimant. Petitioner testified that claimant abruptly left his employment in April 2014 and did not return to pick up his last salary check of $450.00 dated April 4, 2014.

Testimony of claimant Pedro Abril

Claimant Pedro Abril testified that he was hired by petitioner in 2012 to supervise and assist the company's driver and helper two days per week picking up packages from the company's drop-off locations and delivering them for shipment. The other four days he was to solicit new "agencies" where customers could drop off packages. Petitioner agreed to pay him $400.00 per week plus commissions on any new agency locations he opened. After several weeks petitioner raised him to $450.00 per week. Claimant worked 60 hours over six days each week from September 5, 2012 until he resigned effective April 5, 2014 after a dispute with petitioner.

Claimant described his duties and hours supervising the pick-up and shipment on Mondays and Thursdays in detail: At 8:00 a.m. he met the driver and helper at the company's main office or at another agency to start the pick-up. After loading the packages there the crew stopped at each of the other agencies for petitioner's two companies in Brooklyn and Queens to load their packages and coordinate the shipping paperwork at each site. At the end of the day they returned to the office to finish the paperwork and proceeded to a warehouse to pack and load the boxes onto pallets and a truck for shipment. The crew did not reach the warehouse before 7:00 p.m. and did not finish loading the truck until 10:00 or 11:00 p.m., sometimes working until 2:00 or 3:00 a.m. when the truck was late. Petitioner was aware of claimant's

extended hours because they sometimes met at the office after the crew completed the shipment. Claimant also made a record of the hours the driver and helper worked on Monday and Thursday and submitted it to petitioner each week. The hours were the same as his own since the crew worked together all day long. While claimant received the letter from petitioner in December 2013 reminding him of the company's "goal" to deliver the cargo by 5:00 p.m., the crew could never complete the pick-up and shipment within that time frame.

Claimant testified that the remaining days of the week – Tuesday, Wednesday, and Friday from 9:00 a.m. to 6:00 p.m. and Saturday from 10:00 a.m. to 2:00 p.m. – he reported to the office in the morning to do administrative work and then went into the field to solicit new agencies. When he was supervising the pick-up and shipment on Monday and Thursday he did not have a lunch break and ate in the truck with the crew. When he was in the field the rest of the week he occasionally had a lunch break if he happened to return to the office for something but on most days did not because he was too busy performing his duties.

By 2013 claimant had successfully opened several new agencies and started receiving quarterly commission payments. That summer he worked seven days a week. In the first week of April 2014 he resigned and his last day of work was Saturday, April 5, 2014. He was not given his last salary check of $450.00 for the hours he worked during the payroll week ending Friday, April 4, 2014 or a check for the four hours he worked on Saturday, April 5, 2014.[1]

Claimant filed his claims with DOL on April 10, 2014, including a chart of the weekly hours he worked that the investigator compiled from information claimant provided. Claimant authenticated his claim forms and testified that the hours listed in the chart were true and accurate.

DOL's Investigation

In follow up to the claims, Labor Standards Investigator Paul Appleby issued petitioners a collection letter on April 21, 2014 requesting payroll records of all hours worked and wages paid the claimant during the period September 5, 2012 to April 5, 2014, including time cards, sign in sheets, computer logs, payroll journals, and any other records in his possession.

Petitioners' attorney replied by letter dated May 12, 2014, asserting that claimant worked Monday and Thursday from 8:00 a.m. to 5:00 p.m., Tuesday, Wednesday, and Friday from 9:00 a.m. to 6:00 p.m., each day with a one hour lunch break, and Saturday from 10:00 a.m. to 2:00 p.m. As proof of claimant's wages and hours he submitted the receipts for salary and commission payments and petitioners' letter of December 1, 2013.

Appleby testified that petitioners' payroll records did not show the daily and weekly hours actually worked by claimant and he therefore calculated wages owed based on the hours stated in his written claim. Appleby utilized the payment records submitted by petitioners' attorney since the information coincided with what claimant said he was paid. Although claimant stated in a phone interview that he did not have a lunch break when he was in the field, but did when he was in the office, Appleby did not deduct for a lunch hour because it was never established when claimant was in the office and when he was not. Since petitioners did not

[1] Claimant was paid by check issued on Fridays for the payroll week covering the previous Saturday through Friday.

provide time records of actual hours worked there was insufficient information to exclude those hours.

By letter of June 4, 2014, Appleby issued petitioners a final collection letter, including an audit calculation of wages due, requesting that they remit the wages or the matter would be referred to orders to comply, including additional interest, liquidated damages, and civil penalties. Petitioners did not further respond and the orders under review were issued on September 15, 2014.

In support of the $1,000.00 civil penalty assessed in the penalty order, Appleby completed a "Labor Law Articles 6, 19 and 19-A Violation Recap" report recommending the penalty because petitioner failed to keep and/or furnish accurate time and pay records for at least one employee. In support of the civil penalties assessed in the wage and minimum wage orders, Senior Labor Standards Investigator Amy Clark testified that she completed a report titled "Background Information-Imposition of Civil Penalty" recommending penalties of 100%, taking into account the size of the employer, its good faith, the gravity of the violation, and the absence of adequate time and pay records.

GOVERNING LAW

Petitioners' Burden of Proof

Petitioners' burden of proof in this case was to establish by a preponderance of evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101 [1]; 12 NYCRR 65.30; *Matter of Ram Hotels, Inc.* PR 08-078 at 24 [October 11, 2011]).

Minimum Wage and Overtime

Article 19 of the Labor Law, known as the Minimum Wage Act, requires employers to pay each of its covered employees the minimum wage in effect at the time payment is due (Labor Law § 652). During the time period relevant to this proceeding, the minimum wage was $7.25 per hour from September 5, 2012 through December 30, 2013 and $8.00 per hour from December 31, 2013 through April 5, 2014 (Labor Law § 652 [1]; 12 NYCRR 142-2.1). An employer must also pay every covered employee an overtime premium of one and one-half times the employee's regular hourly rate for hours worked over 40 in a week (12 NYCRR 142-2.2) plus one hour's pay at the basic minimum hourly wage rate for any day in which the spread of hours exceeds 10 hours (12 NYCRR 142-2.4). In determining if an employee is entitled to spread of hours, all hours from beginning to end of an employee's work day are counted such as meal breaks and other off duty periods of one hour or less (12 NYCRR 142-2.18).When an employee is paid on a salary or any basis other than an hourly rate, the regular rate shall be determined by dividing the total hours worked during the week into the employee's total earnings (12 NYCRR 142-2.16).

An Employer's Obligation to Maintain Adequate Payroll Records

The Labor Law requires employers to maintain accurate payroll records that include, among other things, their employees' daily and weekly hours worked, wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment and maintain them for no less than six years (*id.*).

Employers are further required to furnish each employee a statement with every payment of wages listing the hours worked, rates paid, gross and net wages, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 142-2.7). The required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements and other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dept 1989]; *Matter of Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2013]).

In *Anderson v Mt. Clements Pottery Co.*, 328 US 680, 687-688 [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."

In a proceeding challenging such determination, the employer must then come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employees' evidence *(id.; Tyson Foods, Inc. v Bouaphakeo*, 577 US __ [2016]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's statements (*Doo Nam Yang v ACBL Corp.*, 427 FSupp2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 10, 2014]).

The Board has previously summarized the applicable federal and state principles governing the employer's burden of proof in cases before the Board, holding that petitioners have the burden of showing that the Commissioner's wage order is invalid or unreasonable by a

preponderance of evidence of the specific hours that claimant worked and that he was paid for those hours, or other evidence that shows the Commissioner's findings to be unreasonable (*Matter of Ram Hotels, Inc*, PR 08-078 at 24 [October 11, 2011]).

FINDINGS

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).

The Commissioner's Determination of Wages in the Minimum Wage Order Is Affirmed

We find that petitioners failed to meet their burden of proof to establish the precise hours worked by claimant and that he was paid for those hours or that the inferences supporting the calculation of wages made by the Commissioner in the minimum wage order were otherwise unreasonable.

Petitioner did not submit daily or weekly time records required by the Labor Law to establish the precise hours that claimant worked but asserted in conclusory fashion that he worked no more than 44 hours per week. He claimed familiarity with claimant's hours because he was his direct supervisor and was in the office when he came in to work in the morning. Petitioner admitted, however, that he worked in the office only 15 or 16 hours per week and spent the remainder of his time running a second company he owned. He further admitted that after reporting to work in the morning claimant went into the field and would often not return by the time petitioner left for the day. The Board has repeatedly held that such general, incomplete, and conclusory testimony concerning the amount of work performed by an employee is insufficient to meet an employer's burden of proof (*Matter of Young Hee Oh*, PR 11-017 at 12 [May 22, 2014] [employer cannot shift burden with arguments, conjecture, or incomplete, general, and conclusory testimony]; *Matter of James A. Kane*, PR 11-092 at 7 [April 29, 2015] [conclusory testimony that employee never worked overtime or more than set number of hours per week insufficient to establish precise hours worked]).

Petitioner testified that he set claimant's work schedule at 44 hours per week and as evidence of his schedule submitted a letter signed by claimant setting forth the company's collection times. The letter stated that on Monday and Thursday pick-up started at 8:00 a.m., with the "goal" to deliver the cargo at the airport by 5:00 p.m. On Tuesday, Wednesday, and Thursday the pick-up service was from 9:00 a.m. to 6:00 p.m. The letter is not evidence of the *actual* hours that claimant worked on Monday and Thursday, however, but simply a statement of the company's pick-up and desired delivery times on those days. Claimant did not even participate in the collection process the other days.

Claimant credibly testified that when he supervised the collection process on Monday and Thursday the crew started the pick-up at 8:00 a.m. and worked all day loading packages at each agency before returning to the office to finish paperwork. They then proceeded to a warehouse to pack and load the boxes onto pallets and a truck for shipment. The crew did not reach the warehouse before 7:00 p.m. and did not finish loading the truck until at least 10:00 or 11:00 p.m., sometimes working until 2:00 or 3:00 a.m. when the truck was late. Petitioner was aware of claimant's extended hours on those days because they sometimes met at the office after shipment

was complete. Claimant also made a record of the driver and helper's hours on Mondays and Thursdays, which were the same as his own, and gave it to petitioner each week. While petitioner stated in his December 2013 letter that it was the "goal" to deliver the cargo by 5:00 p.m., the crew could never complete the pick-up and shipment within that time frame. Claimant further testified that on Tuesdays, Wednesdays, and Fridays from 9:00 a.m. to 6:00 p.m., and Saturdays from 10:00 a.m. to 2:00 p.m., he performed administrative work in the office in the morning and then proceeded to the field to solicit new agencies. We credit claimant's testimony concerning his hours, as it was detailed, specific, and corroborated by his claim filed with DOL on April 10, 2014, immediately following his resignation.

Petitioners argued in closing that claimant had flexibility when he was in the field to take a lunch break if he wanted to and the investigator's notes indicated he received one when he was in the office. According to petitioners, DOL should have deducted a full hour from its calculations for each day he worked during the period of the claim. However, claimant credibly testified that he never received a meal break when he supervised the collection on Monday and Thursday. When he was in the field the other days he sometimes had one if he returned to the office to get something, but on most days he did not because he was too busy performing his duties. The investigator testified that without time records of the actual hours worked he did not deduct for those hours because there was no way to establish when claimant was in the office and when he was not. Without such records, there was insufficient evidence to exclude them from the calculation. In light of petitioners' failure to maintain required time records of the daily and weekly hours worked by claimant, including a lunch hour, we find the Commissioner's determination reasonable.

Additionally, the record shows claimant is owed wages in an amount greater than stated in the Minimum Wage Order, as he was paid at a regular rate below minimum wage of $7.25 per hour for the payroll weeks ending September 14, 2012 to October 19, 2012. Claimant is also owed one hour's pay at minimum wage for two days worked in excess of 10 hours (Monday and Thursday) in each of those weeks as "spread of hours" payments (12 NYCRR 142-2.4).[2] While we are limited in our review to the amounts set forth in the order issued by the Commissioner, the Commissioner's calculation of wages in the Minimum Wage Order in this case is simply under inclusive and does not make the approximation of wages unreasonable since it is only an estimate (*Matter of Sodhi Longia*, PR 11-276 at 12 [September 16, 2010]).

In the absence of adequate payroll records submitted by petitioners, the Commissioner was entitled to rely on the written claim filed by claimant in this case as the "best available evidence" and draw an approximation of his hours worked and wages owed drawn from such statement, even where imprecise (*Mt. Clements Pottery Co.*, 328 US at 687-88 ["The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [recordkeeping] requirements of . . . the Act"]; *Reich v Southern New England Telecommunications Corp.*, 121 F3d 58, 70 n.3 [2d Cir 1997] [finding no error in damages that "might have been somewhat generous" but were reasonable in light of the evidence and "the difficulty of precisely determining damages when the employer has failed to keep adequate records"]). Petitioners failed to overcome that

[2] The Commissioner's calculations do not reflect that underpayments were calculated at the higher minimum wage of $7.25 per hour during those weeks, or at the higher minimum wage of $8.00 per hour for the weeks ending April 4 and 11, 2014 covered by the Wage Order. Spread of Hours payments in the latter order are also owed for two days during the week ending April 4, 2014.

approximation with credible or reliable evidence at hearing establishing the precise hours claimant worked, and that he was paid for those hours, or with other evidence showing the Commissioner's findings to be unreasonable. The determination of wages owed in the minimum wage order is therefore affirmed.

The Commissioner's Determination of Wages in the Wage Order Is Affirmed

As proof of payment of the wages owed, petitioners submitted receipts for salary and commission payments issued the claimant during the period from September 5, 2012 through April 4, 2014 that were prepared and signed by petitioners' accountant. Petitioners did not submit any cancelled checks signed by claimant. Claimant testified that he did not receive a paycheck for the 60 hours he worked during the week ending Friday, April 4, 204 and the 4 hours he worked on Saturday, April 5, 2015. Without proof that claimant actually received these wages, petitioners failed to meet their burden of proof that he was paid the precise wages owed for the work that he performed. The Commissioner's determination of wages in the wage order is therefore affirmed.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment 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 payment." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen per centum per annum."

Petitioners did not challenge the interest assessed in the minimum wage and wage orders and the issue is thereby waived pursuant to Labor Law § 101 (2) ("Any objections to the . . . order not raised in such appeal shall be deemed waived").

Liquidated Damages

Labor Law §§ 198 (1-a) and 663 (2) provide that when wages are found to be due, the Commissioner shall assess against the employer the full amount of the underpayment and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law. Such damages shall not exceed 100% of the total amount of wages found to be due.

Petitioners did not challenge the liquidated damages assessed in the minimum wage and wage orders and the issue is thereby waived pursuant to Labor Law § 101 (2).

Civil Penalties

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Article 6 or Article 19, he must issue an order directing payment of any wages found to be due, plus "the appropriate civil penalty."

If a violation involves a willful or egregious failure to pay wages, or an employer who has previously been found in violation, the penalty "shall" be double the total the total amount

found to be due (*id.*). For all other types of violations, the amount of the penalty is discretionary. Where the violations involve "a reason other than the employer's failure to pay wages," such as a penalty for failure to furnish or maintain adequate payroll records in violation of Article 19, the amount shall not exceed $1,000.00 for a first violation, $2,000.00 for a second violation, and $3,000.00 for a third or subsequent violation (*id.*). In applying her discretion for wage and non-wage violations, the statute directs the Commissioner to give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, 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" (*id.*).

Petitioners did not challenge the civil penalties assessed in the minimum wage, wage, and penalty orders and the issue is thereby waived pursuant to Labor Law § 101 (2).

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is affirmed; and

2. The wage order is affirmed; and

3. The penalty order is affirmed; and

4. The petition for review be, and the same hereby is, dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York on
July 13, 2016.