

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

JAMES A. KANE AND A & A PRIVATE
INVESTIGATIONS & SECURITY, LTD.
(T/A A&A INVESTIGATION & SECURITY),

Petitioner,

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 19, and an Order
Under Article 19 of the Labor Law, both dated
January 28, 2011,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PR 11-092

RESOLUTION OF DECISION

APPEARANCES

Joel M. Gluck, Esq., for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Paul Piccigallo of counsel), for respondent.

WITNESSES

James A. Kane, for petitioners.

Jose Mendez, Labor Standards Investigator, for respondent.

WHEREAS:

On March 29, 2011, petitioners James A. Kane and A & A Private Investigations & Security, Ltd. (T/A A & A Investigation & Security) filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued against them by the Commissioner of Labor (Commissioner) on January 28, 2011. The Commissioner filed an answer on May 18, 2011.

Upon notice to the parties, a hearing was held on August 5, 2014 in New York, New York before Board member and designated hearing officer J. Christopher Meagher, Esq. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (wage order) demands that petitioners comply with Article 19 of the Labor Law and pay the Commissioner \$9,631.25 in minimum wages due and owing to claimant employee Nelson G. Lopez for the period from December 31, 2004 to April 9, 2007, interest at the rate of 16% calculated to the date of the order in the amount of \$5,868.47, and a civil penalty in the amount of \$9,631.25, for a total amount due of \$25,130.97.

The second order (penalty order) under Article 19 of the Labor Law assesses petitioners a civil penalty of \$1,000.00 for failure to maintain and/or furnish true and accurate payroll records during the period from July 31, 2003 through July 31, 2009, and \$1,000.00 for failure to give each employee a wage statement with every payment of wages during the period from December 24, 2004 through April 9, 2007, for a total amount due of \$2,000.00.

The petition alleges that: (1) the underpayment determined by the Commissioner is in error because claimant did not work overtime and his last rate of pay was not \$20.00 per hour; (2) the civil penalties are unreasonable because petitioner cooperated in the investigation and claimant's paychecks included a breakdown of hours worked, wage rate, deductions, and gross and net wages paid; and (3) petitioner Kane is not individually responsible for any unpaid wages. Petitioner did not submit evidence challenging his status as an employer at the hearing and the latter issue is thereby waived pursuant to Labor Law § 101 [2].

SUMMARY OF EVIDENCE

Petitioner James A. Kane is president of A & A Private Investigations & Security, Ltd (T/A A & A Investigation & Security), a company located in Brooklyn, New York that provides security guards and performs private investigations for clients throughout the New York City area.

On July 27, 2007, claimant Nelson G. Lopez filed a claim for unpaid wages under Article 19 of the Labor Law with the Department of Labor (DOL) stating that petitioners employed him as a security guard at a building at 823 Park Avenue in Manhattan from December 24, 2004 to April 9, 2007 and did not pay him overtime for the hours he worked over 40 per week. Claimant stated that he worked Monday to Friday, 7:00 a.m. to 6:00 p.m., with a half hour break each day for lunch. He was paid \$9.00 per hour from December 24, 2004 to August 17, 2005; \$10.50 per hour from August 19, 2005 to July 20, 2006; and \$20.00 per hour from July 22, 2006 to April 9, 2007. He did not receive a wage statement.

Petitioners' Evidence

Petitioner James A. Kane testified that he scheduled security guards at the Park Avenue site 24 hours per day, seven days per week. Three guards worked Monday to Friday, for a total of 40 hours each, and two more worked Saturday and Sunday, for a total of 24 hours each. Claimant Lopez worked on the day shift during the week and was given a half-hour off each day

for lunch. Referring to claimant's written claim, petitioner acknowledged that he employed claimant for the period stated but denied that the daily hours listed in the claim are correct. Petitioner said he could not recall the exact hours that claimant did work, however, and had no records showing the specific hours that any guard worked at the site.

Petitioner testified that he posted a schedule at the beginning of each week to notify the guards what their hours were. He went to the building a couple of times each week and reviewed a logbook maintained by the building that recorded the entry and leaving times of everyone who came in or out of the building, including the security guards. From the logbook entries, he tabulated the actual hours worked by each guard and issued him a paycheck. Based on his recollection and preparation of the weekly payroll, petitioner said he was certain that claimant did not work overtime during the period of his claim. He also had contracts with the company that managed the building where it refused to pay him for overtime worked by any guard. To cover situations where a guard filled in for another who was absent or worked longer than his shift, petitioner would adjust the guard's schedule the next day with time off "so it would not go into overtime." Petitioner did not produce copies of his contracts with the company or the logbooks at the hearing.

As proof of payment, petitioner submitted a payroll summary listing weekly checks issued claimant from December 22, 2004 to March 12, 2007. He recorded the amounts of each check in a checkbook and sent the entries to his accountant to prepare quarterly and yearly tax statements. The summary indicates the date and amount of the check but does not list daily or weekly hours worked, wage rate, deductions, or gross and net pay. Petitioner said he did not know how the summary was prepared, or who prepared it, but believed it was done by someone in his accountant's office and represented the amounts paid the claimant during the period of his claim. Petitioner testified that he gave his employees periodic breakdowns of what their wage rate, taxes, and deductions were, but did not provide the statements weekly. He did not produce copies of the cancelled checks, checkbook entries, or statements at the hearing.

Petitioner agreed that he paid claimant \$9.00 per hour and \$10.50 per hour for the periods stated in his claim but denied that he paid him \$20.00 per hour for the period from July 22, 2006 to April 9, 2007. According to petitioner, claimant left his employment in April 2007 following a dispute over a raise petitioner gave him that the building's managers initially approved but then refused to reimburse. When petitioner told claimant two months later that he had to take the raise back, claimant walked off the job. Asked what rate claimant was getting prior to the altercation, petitioner said, "I don't recall." Asked whether it was as much as \$20.00 per hour, or was it less, petitioner replied, "It was less."

Petitioner submitted samples of some 18 weekly payment invoices he submitted to the management company during the period from March 8, 2005 to August 19, 2006. The invoices list the schedule of guards assigned and the rate at which he billed the company for those hours. Pointing to three invoices for the weeks ending July 31, August 8, and August 19, 2006, petitioner noted that he billed the company at the rate of \$20.00 per hour for one security guard posted Monday to Friday from 7:00 a.m. to 5:00 p.m., for fifty hours. Petitioner testified that if he were paying claimant \$20.00 per hour at the time, he would be losing money.

Responding to DOL's investigation, petitioner testified that after he was made aware of the claim he called the investigator several times and left messages but the investigator never

called him back. If he had, petitioner would have made an appointment to see him. He also faxed his accountant a letter from DOL and was assured that he would take care of the matter.

DOL's Investigation

Labor Standards Investigator Jose Mendez testified that he performed DOL's investigation of the claim. DOL submitted various documents and reports from the investigative file into evidence, including a "contact log" recorded by the investigators on a daily basis describing all contacts with the claimant and employer during the investigation.

Mendez testified that he made field visits to petitioners' business premises on July 28 and 31, 2009 to interview the employer and review relevant payroll records. As petitioner Kane was not present, he left a "Notice of Revisit" advising him that DOL would conduct another inspection on August 14, 2009 where he was requested to produce payroll records of all hours worked and wages paid his employees from July 2003 to the present. Petitioner Kane responded with a phone call to Mendez on August 5, 2009. Mendez informed him of the details of the investigation and reminded him that he should provide the relevant records by the scheduled return date. Petitioner Kane stated that the firm's records were in the possession of his accountant and he would have him contact the investigator. The accountant did not contact Mendez regarding the request and no records were ever produced.

Based on the information drawn from claimant's written claim, Mendez served petitioners an initial recapitulation of wages due on September 4, 2009. By letter dated November 2, 2010, Mendez issued petitioners a second recapitulation advising them that they owed claimant a total of \$9,631.25 in wages for the period from December 31, 2004 to April 13, 2007. The underpayment was based on an audit performed by Mendez that found claimant had worked 52 ½ hours per week and was paid at straight time for 12 hours of overtime each week and not at time and a half. Mendez requested that petitioners remit payment by November 18, 2010 or the matter would be referred to orders to comply, entailing additional interest and penalties.

Mendez testified that petitioners' accountant left him a phone message on November 22, 2010. Mendez returned the call and left him two voice mail messages but the accountant never called back. A district meeting was requested by petitioner and held by telephone with senior Investigator Gerard Capdeville on January 20, 2011. Petitioner stated that he had requested that Mendez contact his accountant for any payroll records and that he had no money to pay the claim. Capdeville responded that it was petitioners' responsibility as the employer to provide the records and petitioner Kane should have contacted the accountant himself to assure that they were produced. Petitioners did not remit payment or submit any further information throughout the remainder of the investigation.

In the absence of adequate payroll records establishing that claimant was paid the wages due, the Commissioner issued the orders under review on January 28, 2011. In support of the 100% civil penalty assessed in the wage order, Mendez completed reports that considered the size of the business, good faith of the employer, gravity of the violation, history of prior violations, and any failure to comply with recordkeeping or other non-wage violations. As to petitioners' good faith, Mendez noted that petitioners' disputed the recapitulation of wages owed without submitting any time or payroll records. Regarding the gravity of the violation, claimant

had not been paid overtime from 2004 to 2007. As to recordkeeping or other non-wage violations, there were no records of hours worked or wage statements produced. Mendez testified that he believed the 100% penalty was reasonable because the employer made no effort to provide any records during the investigation and there was no evidence that he had even kept payroll records.

In support of the penalties assessed in the penalty order, Mendez issued a “Labor Law Article 6, 19 and 19-A Violation Recap” report recommending that a \$1,000.00 penalty be assessed for petitioners’ failure to maintain or furnish payroll records and a \$1,000.00 penalty for their failure to issue wage statements required by the Labor Law.

GOVERNING LAW

Standard of Review and Burden of Proof

The Labor Law provides that any person “may petition the board for a review of the validity or reasonableness of any . . . order made by the commissioner under the provisions of this chapter” (Labor Law § 101 [1]). If the Board finds that the order, or any part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (*Id.* § 101 [3]). An order issued by the Commissioner shall be presumed “valid” (*Id.* § 103 [1]).

A petition that challenges such order shall “state . . . in what respects [the order] is claimed to be invalid or unreasonable” (*Id.* § 101 [2]). Any objection “not raised in such appeal shall be deemed waived” (*Id.*).

The Board’s Rules provide that “the burden of proof” of every allegation in a proceeding “shall be upon the person asserting it” (12 NYCRR 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306 [1]).

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.

Petitioners Failed to Meet Their Burden of Proof to Establish That They Paid Claimant His Wages Due

The Labor Law requires employers to maintain contemporaneous 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 (*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 and 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, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the “best available evidence” drawn from employee statements or 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]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept. 2013]).

Labor Law § 196-a provides that where an employer fails “to keep adequate records . . . the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements.” In a proceeding challenging DOL’s determination, the employer must 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 (*Anderson v Mt. Clemens Pottery*, 328 U.S. 680, 688 [1949]; *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 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 Gattegno*, PR 09-032 [December 15, 2010]).

The Court in *Mt. Clemens Pottery* further described the nature of evidence the employer must provide to meet its burden to establish the “precise” amount of work performed: “Unless the employer can provide *accurate estimates* [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees’ evidence as to the amount of time spent in these activities in excess of the productive working time” (*id.* at 693 [emphasis supplied]; *Matter of Mohammed Aldeen*, PR 07-093 [May 20, 2009] [employer burden to provide “accurate estimate” of hours worked to overcome approximation drawn by Commissioner], *aff’d. sub nom. Matter of Aldeen v Industrial Board of Appeals*, 82 AD3d 1220 [2d Dept. 2011]).

Petitioner Kane testified in general fashion that claimant worked the day shift Monday to Friday, worked 40 hours per week, and never worked overtime. However, petitioner conceded that he could not recall the exact hours that claimant worked each day and had no payroll records showing the specific hours worked by any of the guards at the site. The Board has repeatedly held that general and conclusory testimony concerning the work schedules of employees is insufficient to meet an employer’s burden of proof (*Matter of Michael Fischer*, PR 06-099 at pp.3-4 [April 25, 2008] [employer testimony of general hours at worksite too general, conclusory, and incomplete to establish specific hours worked and thereby overcome presumption favoring Commissioner’s calculation]).

Petitioner Kane further testified that he tabulated claimant’s hours from a logbook maintained by the building of the entry and leaving times of anyone who entered the building. Based on his recollection and preparation of the payroll, petitioner said he was certain that claimant never worked overtime. He failed to submit copies of these time records at the hearing. Petitioner’s testimony drawn from hearsay records prepared by a third party some six years before is simply too vague and unreliable to establish an accurate estimate of the actual hours worked by the claimant during the period of his claim (*Matter of Mohammed Aldeen*, PR 07-093 at pp.13-15 [overly general, non-specific, and vague testimony is too unreliable to meet employer’s burden to establish an accurate estimate of hours worked]).

Petitioner asserted that he also had contracts with the company that managed the building where it refused to reimburse him for guards who worked overtime. When guards worked longer than their shifts, he adjusted their schedule the next day “so it would not go into overtime.” We give no weight to this testimony as it is self-serving and unsupported by copies of petitioner’s contracts with the company or daily time records showing the exact hours that claimant *did* work at the building. Moreover, the invoices pointed to by petitioner show on their face that he billed the company for one guard posted on the day shift from 7:00 a.m. to 5:00 p.m., for a total of 50 hours. The evidence does not suggest that claimant never worked more than 40 hours per week. Rather, it suggests that petitioner simply did not pay him the overtime premium for those hours.

Finally, petitioner Kane asserted that the underpayment is exaggerated because he did not pay claimant \$20.00 per hour for the period from July 16, 2006 to April 9, 2007, as stated in his claim. However, he did not submit contemporaneous payroll records or wage statements showing the exact rate that claimant *was* paid during that period of time. While billing invoices he pointed to might suggest he would be losing money at that rate, when asked the exact rate claimant was getting at the time, petitioner Kane said he could not recall. When asked whether it was \$20.00 per hour, or whether it was less, petitioner Kane said it was “less.”

Petitioner Kane’s vague speculation that claimant was paid a rate “less” than that utilized by the Commissioner to calculate back wages is insufficient to meet his burden of proof to establish the precise wages paid (*Matter of Young Hee Oh*, PR 11-017 at p. 12 [May 22, 2014]) [employer cannot shift its burden to DOL with arguments, conjecture or incomplete, general, and conclusory testimony]. In the absence of adequate payroll records, the Commissioner may rely on the “best available evidence” and draw an approximation of the hours worked and wages owed from the claimant’s written statements, even where imprecise (*Mt. Clements Pottery*, 328 U.S. 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 F.3d 58, 70 n.3 [2d CA 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”]).

For the above reasons, we find that petitioners failed to meet their burden of proof and affirm the Commissioner’s determination of wages owed in the wage order as valid and reasonable in all respects.

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 wage order and the issue is thereby waived pursuant to Labor Law § 101 [2]. We find that the computations made by the Commissioner in assessing interest in the wage order are valid and reasonable in all respects.

The Civil Penalties in the Wage and Penalty Orders Are Affirmed

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Articles 6 or 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 “in an amount equal to 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,” the amount shall not exceed \$1,000.00 for a first violation, \$1,500.00 for a second, and \$2,000.00 for a third (*Id.*). In applying his discretion, the statute directs the Commissioner to 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 record-keeping or other non-wage requirements” (*Id.*).

Investigator Mendez testified that he believed the 100% civil penalty in the wage order was reasonable because petitioners made no effort to provide any records during the investigation and there was no evidence that they even kept any payroll records. As to the various factors to be considered under the statute, Mendez completed reports stating that petitioners failed to act in good faith by disputing the underpayment without providing any time records to support his contentions; failed to pay claimant overtime for some 2 ½ years; and failed to maintain or furnish payroll records and wage statements in accordance with the recordkeeping requirements of the Labor Law. The latter violations also supported the civil penalties assessed in the penalty order.

We find that the considerations and computations the Commissioner was required to make in connection with the imposition of civil penalties assessed in both orders are valid and reasonable in all respects.

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is otherwise dismissed.



Vilda Vera Mayuga, Chairperson

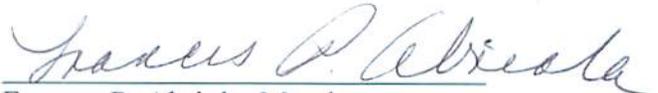


J. Christopher Meagher, Member

LaMarr J. Jackson, Member



Michael A. Arcuri, Member



Frances P. Abriola, Member

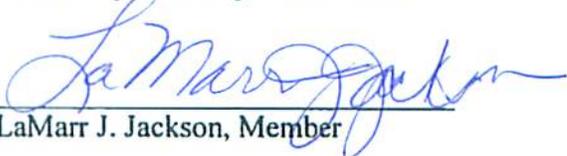
Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York on
April 29, 2015.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wage order is affirmed; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is otherwise dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member



LaMarr J. Jackson, Member

Michael A. Arcuri, Member

Frances P. Abriola, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Buffalo, New York on
April 29, 2015.