STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: THOMAS SCHNEIDER AND JIM CELLI AND TNT TRANSPORTATION, INC., Petitioners, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 of the Labor Law and an Order Under Article 19 of the Labor Law, both dated August 12, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-300 RESOLUTION OF DECISION

APPEARANCES

Thomas Schneider, petitioner pro se, and for Jim Celli and TNT Transportation, Inc.

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

WITNESSES

Thomas Schneider for petitioners; Jeremy Kuttruff, Senior Labor Standards Investigator for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on September 27, 2010, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Thomas Schneider, Jim Celli, and TNT Transportation, Inc. on August 12, 2010. Upon notice to the parties, a hearing was held on March 9, 2012 in New York, New York, before Devin A. Rice, Associate Counsel to the Board and the designated Hearing Officer in this proceeding, with the respondent appearing by videoconference from Albany, New York. Each party was afforded a full

opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The first order is to comply with Article 6 of the Labor Law (wage order). It finds that the petitioners failed to pay wages in the amount of $5,427.00 to claimant Joseph Lattanzio from March 15, 2009 to April 19, 2009. The wage order further finds interest due at the rate of 16% calculated to the date of the order in the amount of $1,141.90, and assesses a civil penalty in the amount of $5,427.00, for a total amount due of $11,995.90.

The second order is under Article 19 of the Labor Law (penalty order). It finds that from on or about March 15, 2009 through March 19, 2009, the petitioners failed to keep and/or furnish true and accurate payroll records for each employee, and assesses a $500.00 civil penalty.

SUMMARY OF EVIDENCE

On April 27, 2009, Joseph Lattanzio filed a claim with the Department of Labor (DOL) alleging that he had not been paid by the petitioners, a car service located in Staten Island, New York, for work performed between March 9, 2009 and April 19, 2009. Specifically the claim alleges that he worked 60 hours a week every week during the claim period, except for the week ending April 12, 2009, when he worked 48 hours, that his rate of pay was $13.50 an hour, and that the petitioners had paid him no wages during that time period.

Petitioner Thomas Schneider testified that the petitioners did, indeed, fail to pay the claimant on time, but did eventually pay him in full except for $350.00 that they still owe him from work performed subsequent to the time period covered by the wage order. Weekly time records produced by Schneider showed that the claimant worked 53 hours and 20 minutes the week ending March 15, 2009; 53 hours and 20 minutes the week ending March 22, 2009; 54 hours the week ending April 5, 2009; 53 hours and 20 minutes the week ending April 12, 2009; and 53 hours and 20 minutes the week ending April 19, 2009. The time sheets indicate that the claimant's rate of pay was $14.00 an hour and $21.00 an hour for overtime. No time sheet was produced for the week ending March 29, 2009. Schneider further testified that he paid the claimant by money orders and payroll checks for the weeks in question, and admitted that these payments were several months late. Schneider produced copies and receipts for two money orders for $840.00, a money order for $749.00, a money order for $882.00, and a payroll check for $854.00, all of which were made payable to the claimant, and some of which appear to have been signed by him when negotiated. These payments purport to cover all of the weeks of the claim period except for the week ending April 12, 2009. The weekly time sheets and the corresponding money orders and checks match in terms of hours worked and wages paid.

Senior Labor Standards Investigator Jeremy Kuttruff testified that the order was based on the claim form because the petitioners could not adequately establish that the claimed wages were paid. Kuttruff further testified that after the petitioners advised him they had paid the claimant after the claim had been filed, he contacted the claimant, who denied that he had been paid. The petitioners then provided Kuttruff with receipts for money orders, but these receipts, according to Kuttruff, did not prove the amounts indicated

were actually paid to the claimant. The petitioners also provided a copy of a payroll check with the claimant's signature on the back. Kuttruff testified that the claimant continued to dispute that he was ever paid, and the wage order was therefore issued because the petitioners did not produce adequate payroll records, and therefore could not verify that the wages were paid.

The claimant did not testify.

FINDINGS

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).

The petitioners' burden of proof in this matter is 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).

The wage order

Article 6 of the Labor Law requires the payment of earned wages for clerical and other workers in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer (Labor Law § 191 [1] [d]). Additionally, the Minimum Wage Order for Miscellaneous Industries requires an employer to pay non-exempt employees overtime at a rate of 1 ½ times the employee's regular hourly rate for hours worked in excess of 40 in any give work week (12 NYCRR 142-3.2). The order finds that the petitioners owe the claimant wages in the amount of $5,427.00 for the time period from March 15[1], 2009 to April 19, 2009, and calculates the wages due based on the information in the claim form. Schneider, however, credibly testified that he paid the claimant, albeit late, for the hours the claimant worked during the relevant time period. In support of his testimony, Schneider produced weekly time records and copies of money orders and a payroll check that he said covered the wages owed, and which corresponded to the time records. Schneider's testimony and records were not rebutted. Therefore, we find that the petitioners met their burden of proof that they paid the claimant in full at an hourly wage rate of $14.00 for the weeks ending March 15, March 22, April 5, and April 19. However, no evidence of payment was produced for the week ending April 12, 2009, and no proof of hours worked was provided for the week ending March 29, 2009. Because the petitioners did not maintain adequate records of the hours worked or wages paid to the claimant for these two weeks, the Commissioner was entitled to use the best available evidence, which in this case, was the claim form (Labor Law § 196-a; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept. 1989]). The claimant alleged that he worked 60 hours during the week of March 29, 2009, which the petitioners did not dispute. The petitioners' records showed a payment to the claimant of

[1] We note that the time period in the order does not correspond to the claim. The claim alleges unpaid wages for the week ending March 15, 2009 to the week ending April 19, 2009. The order clearly omits the first six days of the claim period. Ultimately, this error has no impact on our decision.

$749.00 for that week, whereas he should have been paid $980.00 for 60 hours of work[2]. Therefore, we find that the petitioners owe the claimant $231.00 for the week ending March 29, 2009. The petitioners' records show that the claimant worked 53 hours and 20 minutes the week ending April 12, but provided no proof of payment. We find that the claimant is owed $840.00 for that week[3]. The wage order, therefore, must be modified to reduce the wages due and owing to $1,071.00.

Civil Penalty

The wage order imposes a 100% civil penalty. The petition does not object to the civil penalty, and it is therefore affirmed (*see* Labor Law § 101 [2] [objections not raised are deemed waived]).

Interest

Labor Law § 219(1) 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 section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

The penalty order

The penalty order assesses a civil penalty of $500.00 against the petitioners for failure to maintain true and accurate payroll records for each employee. The petitioners did not contest the penalty order and, in any event, produced no evidence that they maintained payroll records in the form required by Article 19 (Labor Law § 101 [2]). Accordingly, the penalty order is affirmed.

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[2] 40 hours at $14.00 an hour is $560.00. 20 hours of overtime at $21.00 an hour is $420. Therefore, the total earned is $980.00.

[3] 40 hours at $14.00 an hour is $560.00. 13 1/3 hours of overtime at $21.00 is $280.00.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to reduce the wages due and owing to $1,071.00 and the civil penalty to $1,071.00, with interest at 16% per annum recalculated based on the new principle amount;

2. The penalty order is affirmed; and

3. 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
May 30, 2012.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The wage order is modified to reduce the wages due and owing to $1,071.00 and the civil penalty to $1,071.00, with interest at 16% per annum recalculated based on the new principle amount;

2. The penalty order is affirmed; and

3. 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 by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
June 4, 2012.