

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

KIERAN J. TRAYNOR and KIERAN J. TRAYNOR
P.T., P.C. (T/A SUMMIT SPORTS & SPINAL
PHYSICAL THERAPY),

Petitioners,

DOCKET NO. PR 09-220

To Review Under Section 101 of the Labor Law:
An Order to Comply with Article 6 and an Order
under Article 19 of the New York State Labor Law,
both dated June 9, 2009,

RESOLUTION OF DECISION

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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APPEARANCES

Kieran J. Traynor, petitioner pro se, and for Kiernan J. Traynor P.T., P.C. (T/A Summit Sports & Spinal Physical Therapy).

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

WITNESSES

Kieran Traynor, Magvaleni Traynor, Kerry Bittrich, for petitioners; Labor Standards Investigator Enrico Taveras Anico and Claimant Stephanie Rogalewski, for respondent.

WHEREAS:

On August 10, 2009, Kieran J. Traynor and Kieran J. Traynor P.T., P.C. T/A Summit Sports and Spinal Physical Therapy (Petitioners) filed a Petition for review with the New York State Industrial Board of Appeals (Board), pursuant to Labor Law § 101 and Part 66 of the Board's Rules of Procedure and Practice (Board Rules) (12 NYCRR Part 66) seeking review of two Orders to Comply that the Commissioner of Labor (Commissioner, DOL [Department of Labor], or Respondent) issued against them on June 9, 2009. The first Order under Article 6 (Wage Order) finds that the Petitioners failed to pay wages to Stephanie Rogalewski (Claimant) for the period June 23, 2008 to June 27, 2008 in the amount of

\$540.00; interest at the rate of 16%, calculated through the date of the Order in the amount of \$82.14; and a civil penalty assessed of \$540.00, for a total amount due as of the date of the Wage Order of \$1,162.14. The second Order under Article 19 (Penalty Order) finds that the Petitioners failed to keep and/or furnish true and accurate payroll records for the period June 23 to June 27, 2008, and demands payment of \$500.00.

A petition for review was filed on August 10, 2009 and an amended petition (Petition) was filed on September 11, 2009. The petition alleged that the Claimant was not employed during the relevant period and challenged the civil penalties and interest imposed in the Order. Respondents filed an answer on October 21, 2009. Upon notice to the parties, a hearing was held on January 25, 2011 in White Plains, 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, to examine and cross-examine witnesses, to make statements relevant to the issues, and to make closing arguments.

The Petition alleges that Claimant did not work the week in question, that Petitioners furnished payroll records to the DOL, and challenges the penalties and interest.

I. SUMMARY OF EVIDENCE

Testimony of Kieran Traynor

Petitioners operate a physical therapy practice in Larchmont, New York. Claimant was employed as one of Petitioners' two front desk receptionists, and worked for three or four months during 2008¹ and received her last paycheck on June 20th for a pay period ending Saturday, June 21st. Claimant failed to show up for work the following Monday. After not hearing from her for a week, Traynor inferred that she had quit. Gabrielle Rubico, who was Petitioner's other front desk receptionist and the office manager, covered the front desk during the week of June 23-27.

In an e-mail exchange a week or two after Claimant failed to show up for work, Claimant asked Traynor why she had not received her paycheck. Traynor replied to the effect that he had not heard from her, and that he would like her to come in, and he also wanted to find out why she never returned to work. Claimant stated that she would have her boyfriend come over and pick up the paycheck; Traynor replied that there was no check, since she had left at the end of the pay period. Following this email exchange,² Claimant's mother came to Summit and also asked for her pay, stating that she was owed a week's wages since she had not taken any vacation. Traynor responded that Claimant was not owed any vacation pay.

When Traynor received letters from the DOL stating that Claimant was owed wages for the week of June 23- 27, he asked three Summit employees if they remembered that she was not there that week. Traynor typed statements dated October 21, 2008 for his wife

¹ Unless otherwise specified, all dates are in 2008.

² Traynor did not submit the actual emails.

averring that she was Petitioner's receptionist from October 2007 through June 27, 2008; that she quit because of bad working conditions including verbal mistreatment "by Kieran and his wife;" that when she requested her pay on July 7th, 11th, 17th and 22nd, the employer told her to come in and get the check, but no check was ever left for her; and that her mother went to pick up the check but Traynor refused to give it to her.

On September 8th, Petitioner responded to the DOL's request for either payment or a statement of the reasons wages were not payable to Claimant, with a letter from Traynor stating that Claimant never showed up for work and did not work the week she claimed. The DOL wrote to Claimant noting Petitioner's statement and requesting evidence that she had worked. Claimant responded stating that she worked that week from the hours of 8:00-4:00 with Gabriella Rubicco, Kailin Villamar, and Kerry Bittrich, and all of them could verify that she worked at Summit on those days in question.

On October 17th, and again on January 26, 2009, the DOL wrote to Petitioner noting that employers are required to keep records of employees' hours and to provide terminated employees with written notice of the date of termination within five working days. The DOL requested documentary evidence to demonstrate that the claim was invalid. After receiving no reply, the DOL issued the Wage and Penalty Orders on June 9, 2009. The Wage Order assessed a 100% civil penalty based on Petitioner's size and good faith, the gravity of the monetary violation, and the non-wage, recordkeeping violation. Taveras testified that Labor Standards Investigator, Lori Roberts, and Supervising Investigator Philip Pisani recommended the 100% penalty, and that he would assess the same penalty for the same reasons. The DOL assessed an additional \$500.00 civil penalty for the failure to keep records because Petitioner did not provide evidence of daily and weekly hours, such as sign-in sheets or time cards, and the payroll register provided by Petitioners was insufficient to meet Petitioner's recordkeeping obligation. Taveras noted that the maximum penalty for a first time record keeping violation could be \$1,000.00, and that the \$500.00 penalty was reasonable.

Testimony of Stephanie Rogalewski

Claimant was Petitioner's front desk receptionist from October 2007 until June 27, 2008, when she found another job. She was paid every two weeks, by check. Employees recorded their daily hours on a sign-in sheet, namely, a chalk board with each worker's name on it. Claimant and another worker, Gabby [Rubicco], worked the front desk together; Ms. Traynor came in once a week, for two hours, and left notes on the office computer through her home computer.

Claimant filed a claim because she worked from 8:00 a.m. to 4:00 p.m. each day during the week of June 23-27, 2008, and was not paid for her work. She requested payment from Petitioner twice by email, and also called twice and spoke to Gabriella Rubicco, who told her Traynor said "take a message and he would call [her] back." Traynor never returned her call, but "[t]hrough an email, he said, 'You can come pick up your check.'"

Respondent entered into evidence a copy of Claimant's July 11th email to Traynor, stating "Kieran - You owe me a paycheck for the week of June 23 that I worked for you. You can mail it to me at [address]." Claimant explained that while her computer saves

“sent” email for much longer, it saves “inbox” mail for only 30 days, and she did not have a copy of Traynor’s response. After receiving Traynor’s email, Claimant went to Petitioner’s office “a few times,” to pick up her paycheck, and her mother also went once. Traynor told her mother that Claimant would have to come in person to get her paycheck. Since Claimant had a new job, she could go to Summit only after 6 p.m., when Traynor was not there; when she did so, the check was never waiting as Traynor had said it would be.

In an October 1st email to Petitioner (which Traynor agreed “was probably sent to me”), Claimant again asked why “you are denying me what is owed to me. I came into the office at times that we had previously arranged, to obtain my check, and every time I was denied by you for reasons unbeknownst to me.” At no time did Traynor deny that she had worked the week of June 23rd. Claimant never received a letter of termination.

On cross-examination, Claimant agreed that she never telephoned to terminate her employment, and acknowledged that for the second half of the pay period (beginning June 30th), she simply did not come to work, without having called Petitioners to let them know.

Traynor’s Closing Statement

In his closing statement, Traynor repeated that Claimant did not show up for work during the week at issue, and that Claimant’s mother requested a week’s vacation pay, which Traynor refused. He believed they then “came up with this plan that she was there for an extra week.”

II. STANDARD OF REVIEW AND BURDEN OF PROOF

In general, when a petition is filed, the Board reviews whether the Commissioner’s order is valid and reasonable. 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” (Labor Law § 101). The Board is required to presume that an order of the Commissioner is valid (Labor Law § 103). 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 Rule 65.30 of the Board’s Rules of Procedure and Practice (Rules), 12 NYCRR § 65.30: “The burden of proof of every allegation in a proceeding shall be upon the person asserting it.” Therefore, the burden is on the Petitioners to prove that the Order was invalid or unreasonable.

An employer’s obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the 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.”

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 complaint'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. ”

In *Anderson v Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (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.”

Citing to *Anderson v Mt. Clemens*, the Appellate Division in *Mid-Hudson Pam Corp.*, *supra*, agreed: “The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee.... Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here.”

The Board follows the precedent set in *Mid-Hudson Pam Corp.* that where required employer records are unavailable, DOL may use “the best available evidence” to estimate

back wages due and “shift the burden of negating the reasonableness of the Commissioner’s calculations to the employer,” with “the amount and extent of underpayment... a matter of just and reasonable inference.” *See, e.g., Matter of Abdul Wahid*, PR 08-005 [Nov. 17, 2009]; *Matter of Dueck Sun Kim Youn*, PR 08-172 [Mar. 24, 2010].

III. FINDINGS AND CONCLUSIONS OF LAW

The main issue in this case is whether the DOL validly and reasonably concluded that Claimant worked the week of June 23-27, 2008. For the reasons stated below, we find that Petitioners did not meet their burden of proving that the Claimant was not working during the relevant period, and that the penalties and interest imposed were reasonable and valid. The Board makes the following findings of fact and law pursuant to Board Rule 65.39 (12 NYCRR § 65.39).

The Petitioner argues that the payroll register for the period June 22nd through July 5th, on which Claimant’s name does not appear, proves that Claimant did not work during the relevant period. This biweekly register, which lists only total hours worked during the pay period, as called in to ADP by Petitioner, is not a contemporaneous record of employees’ actual daily or even weekly hours, such as Labor Law § 661 and 12 NYCRR § 142-2.6 require. Indeed, the register does not show daily and weekly hours at all. The payroll register was prepared by ADP based solely on information that Petitioner called in well after Claimant stopped working. The actual daily records on which employees signed in and listed daily hours, and which could have definitively proved or disproved that Claimant worked after June 20th, were kept on a chalkboard, and were not retained by Petitioner for six years, as the statute and regulations require. Nor was a letter of termination provided to the Claimant as required by Labor Law § 195.6, which provides that “Every employer shall notify any employee terminated from employment, in writing, of the exact date of such termination as well as the exact date of cancellation of employee benefits connected with such termination.” Such a letter would have also provided definitive proof of the Claimant’s last day of work.

Having failed to maintain the legally required payroll records or a letter of termination, the DOL’s calculation of wages due based on the Claimant’s statements must be credited unless the Petitioners met their burden through other evidence. The Petitioner’s evidence was insufficient to meet this burden. Of three employees cited by Petitioner as able to verify Claimant’s last day of work, Petitioners called one, Bittrich, who testified that she did not remember which was Claimant’s last week. Traynor testified that although Natalie Ferruzza signed the identical statement he typed for Bittrich and Mrs. Traynor, she too could not remember which was Claimant’s last week. Mrs. Traynor’s testimony regarding who covered the front desk during the week of June 23-27 differed from her husband’s. Traynor testified that he asked Gabrielle Rubicco to cover the front desk in Claimant’s absence, a job he stated she would do in any event because Rubicco and Claimant worked together as front desk receptionists. Mrs. Traynor, on the other hand, testified that she was called in to work because there was no one to cover the front desk because Rubicco was working in the back. Mrs. Traynor could not remember if she worked the entire week at the front desk, but testified that she asked two part time workers to assist her, and “Maybe I asked Gaby to cover for me a little bit.”

It was also reasonable and valid to accept Claimant's statement that she worked until June 27th based on the two versions, hers and Traynor's, of what happened after she quit. According to Claimant, Traynor never stated, either by e-mail or in phone calls, that she had not worked the week of June 23rd; on the contrary, he told her to come get her check, but did not tender it when she did. According to Traynor, he e-mailed that the reason there was no paycheck for Claimant was that she left at the end of a pay period and did not return. Claimant, but not Traynor, submitted actual e-mails.

While the e-mails Claimant submitted do not include Traynor's response (according to her, because her computer retained only "sent" messages, not inbox messages), they do confirm that as of July 11th she was requesting payment "for the week of June 23 that I worked," and that she later e-mailed Traynor that she had come to Summit "at times that we had previously arranged, to obtain my check, and every time I was denied by you for reasons unbeknownst to me." This is consistent with her testimony and no contradictory documents were entered into the record.

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 § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." We therefore affirm the rate of interest imposed but find that the amount of interest assessed must be modified based on the reduction in the amount of wages found due.

PENALTIES

Labor Law § 218 provides that in assessing the amount of a penalty, the commissioner "shall give due consideration" to the following factors: (1) the size of the employer's business; (2) the good faith of the employer; (3) the gravity of the violation; (4) the history of previous violations; and (5) in the case of violations involving wages, benefits or supplements, the failure to comply with recordkeeping or other non-wage requirements. The Board finds that the considerations and computations that the Commissioner was required to make in connection with the imposition of the 100% civil penalty in the Wage Order is reasonable in all respects.

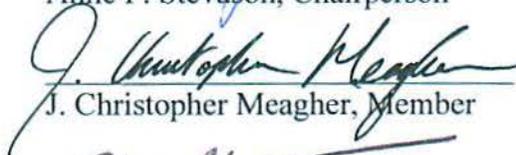
The Petition also requests that the Board overturn the DOL's imposition of a \$500.00 civil penalty for failure to keep payroll records. Labor Law § 218(1) authorizes a penalty "not to exceed one thousand dollars for a first violation" of record-keeping or other requirements apart from the requirement to pay wages, and of "the appropriate civil penalty" for such a failure. Under this standard, imposition of a \$500.00 civil penalty for the failure to keep required records is valid and reasonable.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Orders dated June 9, 2009 are affirmed;
2. The Petition is denied.



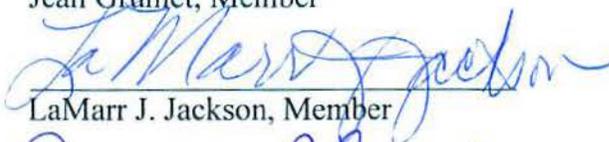
Anne P. Stevason, Chairperson



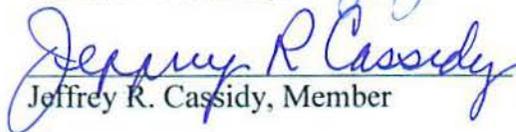
J. Christopher Meagher, Member



Jean Grumet, Member



LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at Albany, New York, on
December 14, 2011.