

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 DOROTHY GIORGIANNI and JAMAICA :
 TOWING, 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 Articles 6 and 7 of the Labor Law, :
 each dated July 23, 2009, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 09-252

RESOLUTION OF DECISION

APPEARANCES

Dorothy Giorgianni, petitioner pro se, and for Jamaica Towing, Inc.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin A. Shaw of counsel), for respondent.

WITNESSES

Dorothy Giorgianni and Mark Zimberg for petitioners; Senior Labor Standards Investigator Guanming Liu and Mark Zimberg for respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on September 11, 2009, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Dorothy Giorgianni¹ and Jamaica Towing, Inc. on July 23, 2009. Upon notice to the parties a hearing was held on October 12, 2011, in New York, New York, before Devin A. Rice, the Board's Associate Counsel, 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, and to make statements relevant to the issues.

¹ The petition was amended at hearing to include Dorothy Giorgianni as a petitioner.

The first order is an order to comply with Article 6 of the Labor Law (benefits order), which finds that the petitioners failed to pay medical benefits in the amount of \$1,536.76 to claimant Mark Zimberg from September 30, 2007 to April 22, 2008. The benefits order further finds interest at the rate of 16% calculated to the date of the order, in the amount of \$418.04, and assesses a civil penalty in the amount of \$1,536.76², for a total amount due of \$3,491.56.

The second order is an order under Articles 6 and 7 of the Labor Law (penalty order), which finds that the petitioners failed to notify a terminated employee, in writing, of the exact date of such termination as well as the exact date of cancellation of employee benefits connected with such termination within five working days after the date of termination in violation of Labor Law § 195 (6); and failed to notify an employee of cancellation of health insurance resulting in a lapse of coverage at commencement of need for medical and health care for the period on or about September 30, 2007 through May 23, 2008, in violation of Labor Law § 217. The penalty order charges the petitioners with a civil penalty of \$500.00 for each violation, for a total due and owing of \$1,000.00.

SUMMARY OF EVIDENCE

Petitioner Dorothy Giorgianni testified that petitioner Jamaica Towing, Inc. started providing health insurance benefits to claimant Mark Zimberg “maybe” in 2006. Written notice was never provided to the claimant of his coverage. Giorgianni stated that the claimant’s coverage was interrupted on more than one occasion, “maybe two times,” during the time he worked for the petitioners. The coverage was interrupted because of “non-payment on Jamaica Towing’s part.” Giorgianni further testified that written notification of termination of the claimant’s benefits was not provided to the claimant when he stopped working for the petitioners.

Claimant Mark Zimberg testified that the health insurance coverage provided to him by the petitioners lapsed on three occasions. Zimberg further testified that Giorgianni told him at the time to “hold on to all your bills. I’ll reimburse you.” Therefore, when Zimberg went to the pharmacy and learned that he had to pay for his medications out of pocket, he presented the bills to Giorgianni for reimbursement who told him that she would take care of them. However, when Zimberg later presented her with additional bills, she informed him that she could not take care of them at that time.

In rebuttal, Giorgianni testified that she did not believe the petitioners should be liable to pay the claimant’s deductibles, stating that “I cannot pay his deductibles which he always had to pay, his co-pay.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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).

² The petition does not specifically object to the imposition of a 100% civil penalty in this case, and therefore any claim that it is unreasonable or invalid is waived (Labor Law § 101 [2]).

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 (Labor Law § 101, 103; 12 NYCRR 65.30). The petitioners, for the reasons set forth below, did not meet this burden.

Benefits order

Labor Law § 190 (1) defines "wages" to include "benefits" as defined by Labor Law § 198-c. "Benefits" as defined by Labor Law § 198-c, includes health benefits. It is undisputed that the petitioners agreed to provide health benefits to the claimant, and that such benefits were in fact provided. Furthermore, the petitioners admit that the claimant's health insurance coverage was interrupted on more than one occasion, including the three month time period at issue. The petitioners also admitted they provided no written notice to the claimant of the lapses of coverage, or of the date of cancellation of benefits after his termination from employment. Finally, the petitioners argue that they should not be liable for the claimant's deductibles or co-pays, but did not present any evidence of the amounts of co-pays or deductibles they wanted credit for, and, in any event, we note that since the insurance had lapsed, co-pays and deductibles were not applicable.

The claimant on the other hand, testified in detail concerning the time period that coverage lapsed and the medical expenses he incurred during that time period due to the lapse of his insurance coverage. The respondent provided receipts to the Board detailing the claimant's medical bills, which the claimant paid out of pocket, during the time period during which the claimant's health coverage had lapsed due to nonpayment by the petitioners. These receipts total \$1,536.76, the amount found due and owing by the benefits order. We find that the health care expenses incurred by the claimant during the time his insurance lapsed is the responsibility of the petitioners under Article 6 of the Labor Law (Labor Law § 190 [1]), and therefore the benefits order is affirmed.

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." Therefore, the interest imposed by the wage order is affirmed.

Penalty order

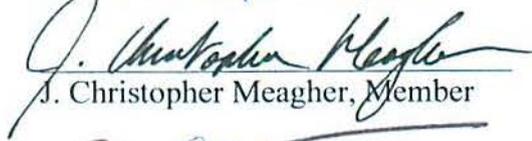
The penalty order finds that the petitioners violated Labor Law §§ 195 (6) and 217. Labor Law § 195 (6) requires employers to notify any employee terminated from employment, in writing, of the exact date of cancellation of employee benefits connected with such termination within five working days after the date of such termination. Labor Law § 217 (3) requires employers to provide written notice of termination of health insurance to affected employees. The petitioners did not raise an objection to the penalty order in their petition, and in any event, admitted to the violations at the hearing. Accordingly, the penalty order is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The order to comply with Article 6 of the Labor Law and the order under Articles 6 and 7 of the Labor Law, both dated July 23, 2009, are affirmed; and
2. The petition for review be, and the same hereby is, denied.



Anne P. Stevason, Chairperson



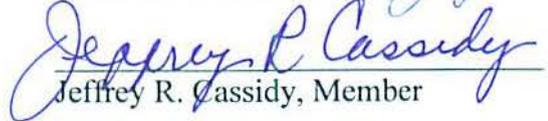
J. Christopher Meagher, Member



Jean Grumet, Member



LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

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