

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
G.R.J.H., INC., ALICIA METZ and LAUREN L. SIMONS,	:
	:
Petitioners.	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 6 of the Labor Law	:
and Two Orders under Article 19 of the Labor Law,	:
all dated August 31, 2009,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----X	

DOCKET NO. PR 09-288

RESOLUTION OF DECISION

APPEARANCES

Hacker & Murphy, LLP (John Harwick of counsel), for petitioner.

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

WITNESSES

Lauren L. Simons, Christopher Peifer, for petitioners; Elizabeth Ares, for respondent.

WHEREAS:

On October 14, 2009, the Industrial Board of Appeals (Board) received a petition for review in this matter. On November 30, 2009, the Board received a first amended petition. An answer to the amended petition was filed on January 21, 2010. On October 22, 2010, the Board received a second amended petition, and an answer to the second amended petition was filed on November 2, 2010. The petitions (petition) seek review of three Orders to Comply. The first Order (Wage Order) directs Petitioners to pay to the Commissioner of Labor (Commissioner) wages owed to claimants Mingma Tshering Sherpa and Pema Chhewang Sherpa in the amount of \$3,370, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of \$385.57, and a civil penalty in the amount of \$3,370.00, for a total of \$7,125.57. The second Wage Order directs Petitioners to pay to the Commissioner wages owed to claimants Selina Brown, Kevin Patterson, Christopher Peifer, and Prashant Rai, in the amount of \$4,536.25, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of

\$701.15, and a civil penalty in the amount of \$4,536.25, for a total of \$9,773.65. The third Order (Penalty Order) directs Petitioners to pay \$1,000 for failure to keep and/or furnish true and accurate payroll records for its employees. Upon notice to the parties a hearing was held on March 29, 2011 in Albany, New York, before Board Member Jeffrey R. Cassidy, 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 submit post-hearing briefs.

M. Sherpa, P. Sherpa, and P. Rai's claimed unpaid wages for pay periods ending December 6, and 13, 2008. In addition, M. Sherpa claimed unpaid wages for period August 3 to August 8, 2008; P. Sherpa claimed unpaid wages for the pay periods ending July 29 and August 8, 2008; and P. Rai claimed unpaid wages for the pay period ending July 29, 2008. S. Brown claimed unpaid wages for pay periods ending June 21, and 28, 2008.

Petitioners concede that they owe M. Sherpa, P. Sherpa, and P. Rai for the December 6 and 13, 2008 pay periods, and S. Brown for the June 21, 2008 pay period, but challenge claimants' wage claims for all other periods. Petitioners also challenge the civil penalties on the grounds that checks, though never cashed, were sent to claimants for the uncontested claim periods.

Petitioners challenge the Order related to C. Peifer asserting that they paid him for the period December 28 to December 31, 2008, but did not pay his claim for January 3, 2009, because after January 1, 2009, Star Shiva, a company who leased Petitioners' facilities, was his employer.

Petitioners challenge the Order related to K. Patterson on the grounds that he was paid in full. K. Patterson claimed wages for the period December 7, 2007 to January 20, 2008, and for the pay periods ending June 7 and June 21, 2008.

Petitioners challenge the Penalty Order, claiming that adequate payroll records were kept and were submitted during the investigation and at hearing. Petitioners also argue that records not available at GRJH's work sites were available at their out-of-state headquarters, and were too voluminous to be carried or sent to the New York work sites.

The Commissioner's answer denies the petition's material allegations and asserts that the calculation of wages, interest and penalties in the Orders in all respects is valid and reasonable. The Commissioner asserts that Petitioners did not produce evidence supporting their claim that checks for owed wages were sent to M. Sherpa, P. Sherpa, P. Rai or S. Brown; that Petitioners did not pay C. Peifer for the claim period December 28-31, 2008, and that Petitioners failed to show they were not his employer on January 3, 2009. The Commissioner also asserts that Petitioners did not keep or produce accurate records of the daily and hourly work hours of its employees.

SUMMARY OF EVIDENCE

Testimony of Lauren Simons

GRJH is a convenience and petroleum business, headquartered in Sharon, Connecticut, which during the claim period operated stores at exits 8, 9 and 11 on the

New York State Adirondack Northway (I-87). Lauren L. Simons ran the Sharon office, and a manager and/or an assistant manager was employed at each I-87 location.

L. Simons described GRJH's procedure for recording employee work hours. Store managers filled out weekly work schedules for each employee, which included each employee's daily shift hours. Employees verified that they worked the hours shown on the schedules by writing in the number of hours they worked in their assigned shift beneath, or next to, the scheduled shift hours. If an employee didn't record his hours, managers would fill them in for the employee. The work schedules included all employees working at a particular GRJH work site and each pay roll period was for one week. L. Simons had no direct knowledge of how the claimants' hours were recorded, and her understanding of how hours were recorded was based on running GRJH stores from 2000 to 2005.

L. Simons maintained that store managers faxed the work schedules and hours that employees worked to the Sharon office. GRJH called the hours into ADP, a payroll company. ADP issued GRJH's quarterly reports, processed its checks, and sent a "journal," or register, to GRJH which showed employee hours, gross earnings, deductions, check numbers and net pay. ADP sent payroll checks to GRJH in Connecticut where they were forwarded to individual stores. According to L. Simons, checks were mailed to employees' last known home address if they no longer worked for GRJH.

L. Simons testified that M. Sherpa, P. Sherpa, and P. Rai quit on the same day, without notice, and did not provide a forwarding address, and that checks were sent to the claimants to an address where they no longer resided. L. Simons' testimony that claimants were sent checks was based upon ADP payroll registers and bank statements. For M. Sherpa, L. Simons relied upon ADP registers and paychecks for pay periods ending August 16, 23, and, 30, and November 29 and December 6, 2008. No work schedules or payroll records were produced for M. Sherpa's wage claim for the pay periods ending August 8 or December 13, 2008.

L. Simons' testimony that checks were forwarded to P. Sherpa was based on ADP registers and paychecks for pay periods ending August 8, 23, 30, November 29, and December 6, 2008. No work schedules or payroll records were produced for P. Sherpa's wage claim for the pay periods ending July 29 or December 13, 2008.

L. Simons' testimony that checks were forwarded to P. Rai was based on ADP registers and paychecks for pay periods ending, August 9, 16, 23, 30, November 29, and December 6, 2008. No work schedules or payroll records were produced for his wage claim for the pay periods ending July 29 or December 13, 2008.

L. Simons testified that S. Brown was a salaried manager at the exit 11 store, and was sent a check for her weekly salary for the pay period ending June 21, 2008. No schedules or payroll records were produced for S. Brown's wage claim for the pay period ending June 28, 2008.

L. Simons wrote a September 2008 memorandum regarding S. Brown to the Department of Labor (DOL). The memorandum stated that her employment ended on June 21, 2008; that a final check was issued to her on June 27, 2008; and, that "[a]ll wages earned by Ms. Brown have been paid." On December 2, 2008, L. Simons sent

another memorandum to the DOL (Philip Pisani) in which she stated that Brown had been paid in full.

C. Peifer worked at the GRJH's exit 8 store and was paid by GRJH for the week ending January 10, 2009, which L. Simons said was paid in error. She avered that GRJH leased its exit 8 store to Star Shiva under an agreement dated January 1, 2009. That agreement stated "It is agreed further that all personnel are employees of the CONTRACTOR [Star Shiva] and are not employees of the COMPANY [GRJH]. It is further agreed that the CONTRACTOR has the sole responsibility for all wages, employee insurance, employee taxes, FICA and employee benefits." The lease agreement was for five years beginning on January 1, 2009.¹

L. Simons explained that Star Shiva was responsible for paying some GRJH employees who they had retained to train Star Shiva employees to take over the stores, and that "[o]nce that was deciphered who was owed the wages and who was responsible for paying the employees, that (Peifer's) check was issued." A work schedule for G.R.J.H.'s exit 8 store shows that C. Peifer worked seven hours on December 28, 29, 30, 31, 2008 and January 3, 2009, for a total of 35 hours.

L. Simons testified that K. Patterson worked at GRJH's exit 8, 9 and 11 stores and that he was paid for in full for all hours worked. She relied on an ADP payroll register and GRJH work schedule for the pay period ending June 7, 2008, which indicated K. Patterson completed 8 hours of work.

L. Simons stated that "employees' folders, the records, sign in and sign out sheets" were made available to senior labor standards investigator Elizabeth Ares at the exit 11 store, and agreed that payroll records located in Connecticut were not provided at any New York work sites. L. Simons contended that she was unwilling to bring or mail the payroll records that Ares requested to New York because they were too voluminous.

Testimony of Christopher Peifer

C. Peifer testified that GRJH was his employer during the period of December 28, 2008 to January 3, 2009; that he talked to Alicia and James Metz about not being paid for that period; that James Metz hired him; and, that, he understood that James Metz and Alicia Metz were in charge of GRJH. C. Peifer added that on December 31st or January 1st, James Metz asked him to stay for the remainder of his shift to show Star Shiva how to clean a fryer, and that Metz told him that that GRJH would pay him and that "after that week Star Shiva would take over."

Testimony of Elizabeth Ares

Investigator Elizabeth Ares was assigned to visit GRJH's facilities to determine whether GRJH was in compliance with the Labor Law and whether wages were due to various claimants. On April 27, 2009, she met with store manager, John Dejnocka, at the exit 11 store after appearing at the exit 8 store, where she found that store being operated by Star Shiva, and not by GRJH. She issued a Notice of Revisit to Dejnocka stating that she would revisit the facility on May 6, 2009, and she requested the

¹ The term of lease agreement provision includes a footnote stating "It is understood between the parties that transfer of (sic) possession may occur on or before 12pm on January 3, 2009."

employee names, addresses, social security numbers, hire and termination dates, time cards or time sheets, records of wages paid, job titles and bank statements showing paychecks cashed.

E. Ares revisited the exit 11 store on May 6th, but the records that she requested on April 27th were not provided. L. Simons told her that they were available in GRJH's Connecticut office. Ares testified that she told L. Simons that the Labor Law required the records to be available at the workplace, and that they needed to be brought there. E. Ares also testified that because Star Shiva was operating the exit 8 store, she was willing to obtain the records at the exit 11 location at a time convenient to Petitioners.

On June 11, 2009, E. Ares mailed L. Simons a revisit notice for June 24, 2009. In the notice, Ares requested payroll records from June 1, 2003 to June 30 2009. The Notice also requested evidence that GRJH's facilities were not operated by GRJH during the claim periods. Ares revisited the exit 11 store on June 24th and again no payroll records were provided. E. Ares then issued a Notice of Labor Law Violation by personal service to Dejnocka and by mail to L. Simons. Included in the Notice was a recapitulation sheet listing claimants, their addresses, wages due, and claim periods.

E. Ares explained that a payroll register, such as relied upon by L. Simons as proof that checks were mailed to claimants, was not proof of payment of wages:

"A payroll register indicates to us that a paycheck was generated. It does not show us whether the check was issued to the worker, whether the worker actually cashed the check as opposed to the worker never got the check or that the worker got the check, but it bounced or couldn't be cashed for some reason. It's a mid-step. It's not the final – it's not the confirmation that the wages were received by the worker."

E. Ares also testified that at no time during the investigation did Petitioners claim that they attempted to pay claimants, but that they had moved without leaving a forwarding address.

E. Ares explained that she recommended a civil penalty of 100% because Petitioners twice failed to provide payroll records or any other information that she requested and that the penalty was not higher because although Petitioners had four prior cases of employees not being paid wages due, Petitioners ultimately paid the employees. She also explained that the penalty for a first time violation of the failure to provide records was between zero and \$1,000.

GOVERNING LAW

A. 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]). It also provides that an order of the Commissioner shall be presumed "valid" (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state “in what respects [the order on review] is claimed to be invalid or unreasonable” (Labor Law § 101[2]). It is a petitioner’s burden at hearing to prove the allegations that are the basis for the claim that the orders under review is invalid or unreasonable (Board’s Rule of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 [“The burden of proof of every allegation in a proceeding shall be upon the person asserting it”]; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]).

It is therefore Petitioners’ burden to prove by a preponderance of the evidence the allegations in the petition that the wages, interest and penalty were improperly assessed.

B. Recordkeeping Requirements

Labor Law § 661, as supplemented by 12 NYCRR § 142-2.6 (a), requires:

“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) wage rate;
- (4) number of hours worked daily and weekly, including the time of arrival and departure of each employee working a split shift or spread of hours exceeding 10; . . .
- (6) the amount of gross wages;
- (7) deductions from gross wages
- (8) net wages paid “

Additionally, pursuant to 12 NYCRR §142-2.6 (d), “[e]mployers, including those who maintain their records containing the information required by this section at a place outside New York State, shall make such records or sworn certified copies thereof available upon request of the commissioner at the place of employment.” Labor Law § 661 further requires “[e]very employer {to} . . . keep such records open to inspection by the commissioner or his duly authorized representative at any reasonable time.”

C. DOL’s Calculation of Wages in the Absence of Adequate Employer Records.

An employer’s failure to keep adequate records does not bar employees from filing wage claims. Where employee claims demonstrate a violation of the Labor Law, DOL must 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 Natl. Fin. Corp.*, 1 AD3d 850). As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d 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 calculation to the employer.”

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 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 by the Fair Labor Standards Act.”

Citing to *Anderson*, the Appellate Division in *Mid-Hudson Pam Corp.*, 156 AD2d at 821, 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.”

FINDINGS

Petitioners Failed to Meet Their Burden to Establish that the Wage Orders are Invalid or Unreasonable.

M. Sherpa, P. Sherpa, P. Rai, and S. Brown

Petitioners concede that M. Sherpa, P. Sherpa, and P. Rai are owed pay for the pay periods ending on December 6, and December 13, 2008, and that S. Brown is due and owing pay for the pay period ending June 21, 2008. However, they challenge M. Sherpa’s claim for a period predating August 9, 2008, P. Sherpa’s claim for the pay periods ending July 29 and August 8, 2008, P. Rai’s claim for the period July 29 to August 2, 2008, and S. Brown’s claim for the pay period ending June 28, 2008.

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 (*Mid-Hudson Pam Corp.*, 156 AD2d at 821). 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 inference to be drawn from the employee’s evidence” (*Anderson*, at 688; *Mid-Hudson Pam Corp.*, 156 AD2d at 821 [employer burden to negate the reasonableness of commissioner’s determination]). We find that Petitioners’ records were either inaccurate or insufficient and we rely upon, with one exception discussed below, claimants’ wage statements.

L. Simons testified that GRJH's method of recording employee work hours was to produce weekly work schedules and have each employee verify the completion of those hours by writing the daily number of hours worked on the schedule. According to L. Simons, if an employee forgot to write in the completed hours, the manager would fill in the numbers. However, L. Simons had no personal knowledge of how time sheets were recorded at GRJH's facilities, as she relied exclusively on her experience running GRJH stores from 2000 to 2005.

We find that Petitioners have met their burden to show that the Wage Order for M. Sherpa, other than for the pay periods ending on December 6 and 13, 2008, is invalid or unreasonable. Claimant was hired on August 3, 2008, and does not challenge wages earned in the pay period August 3 to August 9, 2008, on her DOL wage claim. On the front page of her claim form she listed her claim period as November 23 to December 13 2008. However, on the second page of the claim form, in addition to claiming wages for the pay periods ending December 5 and 13, 2008, she claimed wages for a period that is not clearly identified, but that predates the payroll period August 3 to August 9, 2008. Also, DOL's Recapitulation Sheet listed claimant's claim period as "08/03/2008 to 12/13/2008."

The Wage Order for M. Sherpa for a period predating the August 9, 2008 pay period is unreasonable and invalid as August 9th pay period covers the period back to her hiring date of August 3, 2008, and is a period she does not challenge. Moreover, if her claim can be read to challenge a period prior to August 3, 2009, any order for this period is unreasonable or invalid as the period predates her hiring date.

We modify the Wage Order to delete the wages owed M. Sherpa in the amount of \$450.00 for the claim period predating the payroll period ending August 9, 2008, and direct the Commissioner to amend the wages interest, and civil penalties in the Order accordingly.

We find that Petitioners have not met their burden to show that the Wage Order for P. Sherpa is invalid or unreasonable. P. Sherpa was hired on July 29, 2008 and claimed wages for 5 days from that date to August 3, 2008, and wages for the pay periods ending August 9, December 6 and 13, 2008. Petitioners submitted a time sheet and a payroll register for the exit 9 store for the pay period ending August 9 which shows earnings for 40 hours work. Petitioners also submitted a time sheet and payroll record for this pay period for an unidentified store that does not include P. Sherpa.

Petitioner's proffered payroll records are insufficient to establish that the Wage Order for P. Sherpa is invalid or unreasonable. The records for the pay period ending August 9th are insufficient as Petitioners only produced records for two work sites, one of which is unidentified. As there were three possible work sites, it is possible that P. Sherpa's wage claim was for work at a site for which no records were produced. Petitioners have also failed to show that the Wage Order for the period July 28 to August 3, 2008, is invalid or unreasonable as they did not submit any payroll records for this claim period.

P. Rai claimed wages for the period July 29 to August 3, 2008, and for the pay periods ending December 6 and 13, 2008. Petitioners submitted a work schedule and payroll register for the pay period August 3 to August 9, 2008, but did not produce any work schedule or payroll register for the period July 29 to August 3, 2008. We find that

Petitioners have not met their burden to show that the Wage Order for P. Rai is invalid and unreasonable, as they have not shown that claimant did not work the hours claimed.

S. Brown claimed wages for the payroll periods ending June 21 and June 28, 2008. Petitioners challenge the Wage Order for the pay period ending June 28, 2008. Petitioners did not produce any evidence, other than a memo from L. Simons to the DOL on September 15, 2008, stating that Brown's last day of employment was June 21, 2008. That memo reflects L. Simons' position that Brown did not work past June 21st, but does not prove that her employment terminated on that date. In the absence of any evidence that Brown did not work past June 21st, or did not work the hours claimed, we find that Petitioners did not prove that the Wage Order regarding S. Brown was unreasonable or invalid.

Christopher Peifer

Petitioners assert that C. Peifer was not a GRJH employee after January 1, 2009, because as of this date it leased out its I-87 stores to Star Shiva. Petitioners also maintain that C. Peifer was paid by GRJH for December 28 to 31, 2008. C. Peifer's claim period included December 28, 29, 30, 31, 2008 and January 3, 2009

The record evidence does not support Petitioners' claim that it paid C. Peifer for December 28 to December 31, 2008. Even if we were to accept the ADP earnings statements as evidence of receipt of wages, Petitioners did not submit such records for the pay period ending January 3, 2009, which is the pay period covering the December 28, 2008 to January 3, 2009 claim period.

We also find that Petitioners have not shown that it was not C. Peifer's employer on January 3, 2009. Petitioners argue that its lease agreement with Star Shiva establishes that it became C. Peifer's employer as of January 1, 2009, because the agreement began on that date, and because it states that "all personnel are employees of [Star Shiva]" However, the lease agreement does not establish when Star Shiva became C. Peifer's employer. Petitioners did not show that Star Shiva hired, supervised, or scheduled C. Peifer's work on January 3rd, nor did it show that GRJH's wage payment for the pay period ending January 10 was made to him in error.

L. Simons' explained that GRJH paid C. Peifer for the January 10 pay period because Star Shiva retained some GRJH employees to train its employees and "[o]nce that was deciphered who was owed the wages and who was responsible for paying the employees, . . . [Peifer's] check was issued." L. Simons' testimony does not substantiate Petitioners' claim that Star Shiva was C. Peifer's employer after January 1, 2009. L. Simons' explanation indicates the opposite – that GRJH paid C. Peifer after January 1, 2009, because it "deciphered" that GRJH owed him wages.

K. Patterson

We find that Petitioners have failed to show that the Wage Order for K. Patterson is unreasonable or invalid. L. Simons testified that K. Patterson worked at different stores, "primarily exit 11 and 9," but also exit 8. Petitioners produced a schedule for the week ending June 7, 2008, for a store which L. Simons identified as the exit 11 store. The schedule includes a notation for "Kevin" for a work shift of "11p-7a" for June 4, 2008. No other work schedule for any of Petitioners' other stores was produced for this pay period. Petitioners have not shown that K. Patterson did not work his claimed hours

for the pay period ending June 7, 2008, as he may have worked his claimed hours at Petitioners' other stores.

Petitioners produced a work schedule for one store for the pay period ending June 21, 2008. This work schedule does not include K. Patterson's name and includes a notation made by L. Simons, "Kevin not on." Petitioners did not submit any work schedules from any of its other stores, which may have substantiated Petitioners' position that K. Patterson was not due wages for the pay period ending June 21, 2008.

K. Patterson also claimed wages for the period December 7, 2007 to January 20, 2008. Petitioner produced work schedules and payroll registers that included K. Patterson for the pay periods ending December 8 (exit 8 store), December 15 (one unidentified store), December 22 (exit 8), December 29 (exit 8 and 11) 2007, and January 5, 2008 (exits 8 and 11). Petitioners failed to submit work schedules for all of its locations during the period December 7 to January 5, and did not produce any work schedules for the period January 5 to January 20. Petitioners have failed to show that K. Patterson was paid all wages due and owing for this period as it failed to produce evidence that he did not work at any other work sites during the claim period.

Petitioners Failed to Show that the Penalty Order for the Failure to Keep and/or Furnish True and Accurate Payroll Records Is Invalid or Unreasonable.

Labor Law § 661, supplemented by 12 NYCRR §142-2.6 (d) requires employers, upon request by the Commissioner, to make available payroll records kept outside New York at New York work sites. On numerous occasions, Investigator Ares asked L. Simons to bring to New York various payroll records. L. Simons did not comply with the requests, and told E. Ares that she could review them in GRJH's office in Sharon, Connecticut. We find that Petitioners failed to show that the Penalty Order for the failure to keep and/or furnish true and accurate payroll records was invalid or unreasonable.

Imposition of Civil Penalties

If the Commissioner determines that an employer has violated Article 19 or Article 6 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing and a civil penalty based on the amount owing (Labor Law § 218 [1]). E. Ares testified that she recommended a 100% penalty because Petitioners failed to comply with her requests for payroll information, and that the penalty was not higher, because despite four prior violations, Petitioners ultimately paid wage claims

Petitioners argue that any penalties for the failure to pay M. Sherpa, P. Sherpa, P. Rai, or S. Brown should be dismissed because ADP sent paychecks to them at their last known address, but that the checks were not cashed. We find that Petitioners have not demonstrated that they sent paychecks to the claimants for either the wages contained in the orders, or for wages they do not challenge.

Petitioners rely on ADP payroll registers as proof that paychecks were sent to the claimants. As noted by E. Ares, payroll registers do not show proof of delivery of paychecks. L. Simons never established that the paychecks were sent to claimants, as she

failed to identify who sent the paychecks, when they were sent, nor what GRJH used for claimants' mailing addresses.

Subject to the modification above, we therefore affirm the civil penalties as valid and reasonable in all respects.

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." Banking Law § 14-a sets the "maximum rate of interest" at "sixteen percent per centum per annum from the date of the underpayment to the date of the payment. "

Petitioners challenged the assessment of interest based on the allegation that Petitioners made a good faith effort to forward checks to M. Sherpa, P. Sherpa, P. Rai, and S. Brown. For the reasons stated above, we do not find that Petitioners proved that they made such effort. Moreover, even if such effort was made, that effort only included the wage claims that Petitioners do not dispute. Subject to the modification above, the Board finds that the considerations required to be made by the Commissioner in connection with the interest set forth in the Orders are valid and reasonable in all respects.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

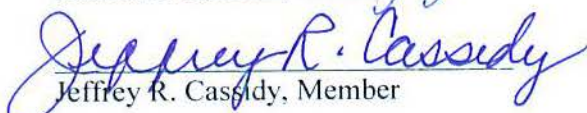
1. The Orders to Comply With Article 19 dated August 31, 2009, are modified to reduce \$450.00 from the wages due and owing to M Sherpa and to reduce the interest and civil penalties proportionately, and otherwise affirmed in their entirety; and
2. The Order to Comply Under Article 6 of the Labor Law dated August 31, 2009, is affirmed; and,
3. The Petition for review by, and the same hereby is, otherwise 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.