

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 AFTABUDEEN AHMAD EDUN (T/A EDUN :
 VARIETY STORE), :
 :
 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 :
 September 30, 2009, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 09-304

RESOLUTION OF DECISION

APPEARANCES

Ruiz Law Group, P.C. (Francis Ruiz of counsel), for petitioner.
 Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Aftabudeen Edun, Bibi Edun, Kalid Mohamed, Ramanth Parchun, Ahbindyl Singh, and Fazal Mohamed for petitioners.
 Wei Sha, Senior Labor Standards Investigator, for respondent.

WHEREAS:

The Petition in this matter was filed with the Industrial Board of Appeals (Board) on October 29, 2009, and amended on November 1, 2010. The Amended Petition seeks review of two Orders issued by the Commissioner of Labor (Commissioner) against Petitioner Aftabudeen Ahmad Edun (T/A Edun Variety Store) (Petitioner or A. Edun) on September 30, 2009. Upon notice to the parties, a hearing was held on April 12, 2011 in New York, New York before J. Christopher Meagher, Member of the Board and the Board's designated

Hearing Officer in this proceeding. 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) directs Petitioner to pay to the Commissioner back wages, including overtime wages, owed to employee Omran K. Khan (Claimant) in the total amount of \$10,947.25, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of \$3,507.92, and a civil penalty of \$10,947.25, for a total amount due of \$25,402.42.

The second Order (Penalty Order) directs Petitioner to pay a civil penalty of \$500.00 (Count 1) for failure to keep and/or furnish true and accurate payroll records for its employees, and \$500.00 (Count 2) for failure to issue wage statements to its employees, for a total amount due of \$1,000.00.

The Amended Petition asserts that the Wage Order and Penalty Order should be reversed because the Claimant was never employed by Petitioner during the period covered by the Orders.

The matter before the Board involves whether, in the absence of payroll records establishing the identity of persons employed by Petitioner during the period covered by the Orders, and the hours and wages paid those employees, Petitioners' proof at hearing was sufficient to overcome the presumption favoring the Commissioner's calculation of wages pursuant to Labor Law § 196-a and the principles of *Anderson v Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

For the following reasons, we find Petitioner's proof sufficient to meet his burden to establish that Claimant was not employed. Since the Claimant did not testify at hearing to rebut such proof, we revoke the Wage Order. Likewise, the Penalty Order for failure to maintain records and issue wage statements is revoked given the fact that there was no finding of any employment.

SUMMARY OF EVIDENCE

Petitioner is the owner and operator of a variety store on Liberty Avenue in Queens, New York that serves as a base for customers to order products from the "Avon" catalogue. The store also sells perfumes. Avon products and perfumes are shipped to the store and the customer pays for them when they are picked up. However, inventory is accumulated when products are ordered and the customer fails to pick up the merchandise. During flea market season, Petitioner sells excess inventory at a booth at the Aqueduct Raceway Flea Market. Petitioner also sublets part of his store to another merchant and has a small storage site where he stores personal belongings and excess Avon products.

DOL's Investigation

Senior Labor Standards Investigator (SLSI) Wei Sha (Sha) testified concerning the investigation by the Department of Labor (DOL) that resulted in the Orders under review.

The investigative file reveals that on October 17, 2007, Claimant filed a Minimum Wage and Overtime Complaint against Petitioner with DOL stating that he was employed by Petitioner as a "handyman" for the period April 29, 2007 to September 30, 2007 and left his employment because he was discharged. Claimant stated that he worked seven days per week from 6:00 AM to 7:00 PM, with no meal period, and was paid \$350 per week in cash, with no wage statements.

On January 28, 2008, Labor Standards Investigator (LSI) Emily Nieves (Nieves) made a site visit to the premises, spoke with Petitioner's wife Bibi Edun (B. Edun), and issued a notice of revisit requesting that payroll records be produced on February 13, 2008. The notice demanded that Petitioner produce records of the hours worked and wages paid to Petitioner's employees from January 1, 2006 to December 31, 2007, including days and hours worked, hourly rate, time cards, time sheets and schedules, and wage statements issued to Petitioner's employees. In response to the demand, Petitioner informed Nieves that he operated the store with the help of his wife and son, did not know the identity of the Claimant, and did not maintain payroll records because he had no employees. In a final report summarizing the investigation, Nieves stated that Claimant informed DOL he worked for Petitioner at the Liberty Avenue store, the flea market, the storage site, and Petitioner's home. Additionally, Claimant submitted written statements from two persons identifying themselves as customers of Petitioner and stating that Claimant worked at the store and flea market.

Petitioner did not submit payroll records during the course of the investigation and DOL determined that Petitioner failed to establish that the Claimant was not employed. Wage calculations were therefore based solely on the written claim filed by the Claimant. A computer audit performed by Nieves of the wages and hours listed in the claim found Claimant was owed \$10,947.25 for the period April 29, 2007 to September 30, 2007. By letter dated March 4, 2008, Nieves issued Petitioner a notice recapitulating the claim and informing him that DOL had computed a total underpayment of \$10,947.25. The notice enclosed a "Notice of Labor Law Violation" for failure to timely pay wages and a "Recapitulation Sheet" listing the period of underpayment and amount of wages due. The notice also advised that failure to remit payment could entail assessment of interest and penalties and that Petitioner could request a District meeting where he could be heard concerning the Commissioner's findings. On June 12, 2008, Petitioner and his attorney appeared at a District meeting, denied that Claimant had been employed, and reiterated that Petitioner did not maintain employment records because he had no employees. Petitioner also submitted tax returns for 2007 for himself and his wife.

On June 1, 2009, Nieves issued Petitioner a "Notice of Labor Law Violation" citing Petitioner for failure to keep/furnish payroll records required by Labor Law § 661 and issue wage statements required by 12 NYCRR Part 142-2.7.

On September 30, 2009, the Commissioner issued the Orders under review. In support of the 100% civil penalty assessed in the Wage Order, SLSI Sha testified that LSI Nieves completed an investigative report titled "Background Information – Imposition of Civil Penalty" that provides information relating to the size of Petitioner's firm, their good faith, gravity of the violation, and records provided or not provided. DOL did not submit

testimony or documentary evidence explaining the civil penalties assessed in the Penalty Order.

Petitioner's Evidence

Petitioner, his wife, and four additional witnesses testified in support of Petitioner's contention that Claimant was never employed.

Petitioner testified that from April, 2007 to September, 2007 he operated the Liberty Avenue store with the help of his wife and son and the flea market booth by himself. The store was open weekdays from 10:00 AM to 7:00 PM, Saturday 9:30 AM to 7:30 PM, and Sunday 11:00 AM to 7:00 PM depending on business volume. The booth was open Saturday, Sunday, and Tuesday from 8:00 AM to 5:00 PM. Petitioner testified that he did not employ the Claimant at the store, the booth, the storage site, or his home during the period of the claim or at any time. Petitioner explained that he and his wife cleaned the store and managed the inventory themselves and their son helped out with these tasks two to three times a week. If Petitioner's wife needed to step away from the store when he was at the booth, she would close the store or ask the subtenant to watch the inventory. Likewise, Petitioner would ask a neighboring merchant at the flea market to watch the booth if he needed to leave for any reason. Petitioner testified that he did not know the identity of the Claimant until the District meeting at DOL where the Claimant appeared. Petitioner recognized him as a person from the neighborhood who used to come into the store to buy perfume and once asked Petitioner for work and to extend him credit. Petitioner said he declined and asked the Claimant to leave the store.

B. Edun corroborated her husband's testimony concerning the operation of the store and booth and denying that Claimant was ever employed. B. Edun added that the store operates out of two storefronts on Liberty Avenue -- a main site and a smaller storefront located four doors down the street that Petitioner shares with a subtenant. When Petitioner is at the booth on weekends, their son sometimes watches the smaller store while B. Edun manages the main one. She closes the smaller store on Tuesdays because there is nobody to watch it.

Four additional witnesses testified that they are neighboring merchants or customers of Petitioner's and regularly observed the operation of his business from April, 2007 to September, 2007. Kalid Mohamed (K. Mohamed) operates a furniture store two doors from that of Petitioner on Liberty Avenue; Ramanth Panchon (R. Panchon) operates a nearby booth at the flea market; Ahbindyl Singh (A. Singh) is a regular customer of Petitioner's at the store and flea market; and Fazal Mohamed (F. Mohamed) operates a jewelry store alongside Petitioner's business in the smaller storefront. The witnesses testified that the only persons they saw working at the store or flea market booth during that period of time were Petitioner, his wife, or occasionally their son(s). They did not see the Claimant or any other employees at either site.

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 [C]ommissioner 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 order under review is invalid or unreasonable (Board’s Rules 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 AD 3d 850, 854 [3d Dept 2003]).

It is therefore Petitioners’ burden to prove the allegations in the Petition by a preponderance of evidence.

B. Recordkeeping Requirements

Article 19 of the Labor Law, known as the “Minimum Wage Act,” defines “[e]mployee,” with certain exceptions not relevant to this appeal, as including “any individual employed or permitted to work in any occupation (Labor Law § 651 [5]).” Labor Law § 661 requires employers to maintain payroll records for employees covered by the Act and to make such records available to the Commissioner:

“Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time. . .”

The Commissioner’s regulations implementing Article 19 provide at 12 NYCRR § 142-2.6:

- “(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) wage rate;
 - (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
 - (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.”

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 complaints. Where employee complaints 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 provides that employers who keep inadequate records "shall bear the burden of proving that the complaining employee was paid wages, benefits, and wage supplements" (*See, Angello v Natl. Fin. 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 [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 calculations 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 as contemplated by the Fair Labor Standards Act."

Citing to *Anderson v Mt. Clemens*, the Appellate Division in *Mid-Hudson Pam Corp. v Hartnett*, *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."

FINDINGS

Petitioner Met His Burden To Establish That Claimant Was Not Employed

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 (*Matter of Mid-Hudson Pam Corp. v Hartnett*, *supra* 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

negative the reasonableness of the inference to be drawn from the employee’s evidence” (*Anderson v Mt. Clemens Pottery, supra* at 688; *Matter of Mid-Hudson Pam Corp. v Hartnett, supra* at 821 [employer burden to negate reasonableness of Commissioner’s determination]). The same burden shifting applies to establishing who was an “employee” as it does in establishing the hours and wages paid those persons (*Matter of Omar Thabet, PR 08-083* at p. 15 [October 9, 2011]).

It was therefore Petitioner’s burden to come forward with sufficient evidence to “negative the reasonableness of the inference” drawn by the Commissioner that Claimant was employed as a handyman for the period April 29, 2007 to September 30, 2007. In the circumstances of this case, we find Petitioner’s proof at hearing sufficient to meet his burden. Petitioner testified that he did not employ the Claimant during this time frame at the store, the flea market booth, the storage site, or his home, and that he operated his business with the help of his wife and son. Petitioner’s testimony was corroborated by his wife and four witnesses who were neighboring merchants or customers during the period of the claim. The latter witnesses testified that they regularly observed Petitioner’s operations and did not see any persons working there other than Petitioner or his family members. The testimony of Petitioner and his witnesses was consistent and credible and sufficient to negate the inference drawn from Claimant’s statements that he was employed. In the absence of testimony from the Claimant rebutting such evidence, the Commissioner’s Wage Order is therefore revoked as invalid and unreasonable.

We also revoke the Penalty Order assessing Petitioner civil penalties for failure to keep and/or furnish true and accurate payroll records and issue wage statements. Since Petitioner met his burden to establish that the Claimant was not employed, any penalties for failure to comply with recordkeeping requirements regarding his employment are necessarily invalid. While the Penalty Order cited Petitioner for failing to maintain records and furnish wage statements to his “employees”, DOL failed to submit testimony or documentary evidence explaining whether the Order covered individuals the Commissioner deemed employees other than the Claimant. Absent such explanation, the Commissioner’s determination assessing penalties is arbitrary for failure to adequately explain the basis of her administrative determination.

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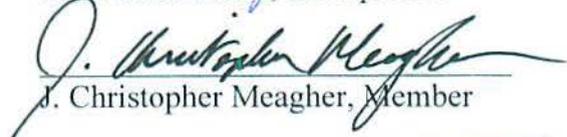
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NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

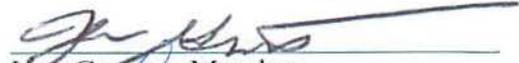
1. The Wage Order and Penalty Order issued Petitioner on September 30, 2009 are revoked; and
2. The Petition for review be and the same hereby is, granted.



Anne P. Stevason, Chairperson



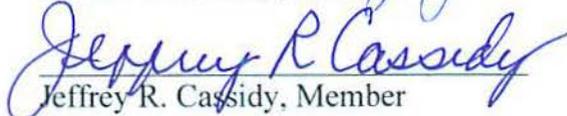
J. Christopher Meagher, Member



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.