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 In the Matter of the Petition of: :
 :
 VIOLETTA GLADYSHEV AND EDOUARD :
 GLADYSHEV (T/A V & V BULK CARRIERS, :
 INC.), :
 :
 Petitioners, :
 :
 To Review Under Section 101 of the Labor Law: :
 An Order to Comply With Article 6 of the Labor :
 Law dated December 4, 2009, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 09-389

RESOLUTION OF DECISION

APPEARANCES

Edouard Gladyshev, Petitioner pro se, and for Violetta Gladyshev.

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

WITNESSES

Edouard Gladyshev, for Petitioners.

Gerard Capdevielle, Senior Labor Standards Investigator, for the Respondent.

WHEREAS:

On December 31, 2009, Petitioners filed separate petitions 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 an Order to Comply that the Commissioner of Labor (Commissioner or Respondent) issued on December 4, 2009. The Order is an Order to Comply with Article 6 of the Labor Law (Wage Order), which finds that Petitioners failed to pay wages to Robert R. Furman (Claimant) and demands payment of \$690.00 in wages due and owing, interest at the rate of 16% calculated to the date of the order in the amount of \$186.62 and a civil penalty in the amount of \$690.00 for a total amount of \$1,566.62.

The petitions assert that the Order is invalid or unreasonable because Claimant was an independent contractor; that V & V Bulk Carriers Inc. (V & V) was Claimant's employer; and, that Claimant never provided the services upon which the Wage Order is

based. At hearing, Petitioner also asserted that Violetta Gladyshev was not Claimant's employer as she had no involvement in V & V's operations.

The Commissioner's Answer alleges that Petitioners were Claimant's employer; that Petitioners were the corporate officers of V & V.; and that Claimant performed the services upon which the Wage Order was based.

Upon notice to the parties, the Board held a hearing in New York, New York on November 9, 2011, before Anne P Stevason, Esq., Board Chairperson and the designated hearing officer in this matter. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments.

SUMMARY OF THE EVIDENCE

Claimant drove a refuse truck for V & V, a company owned by Petitioners. He used Petitioners' truck to pick up garbage at the American Recycling Management transfer station in Queens, New York and transported it to a landfill in Seneca Falls, New York, a trip that took about 5 ½ hours each way. He loaded up the truck at night, drove throughout the night, and returned the next morning. He was paid \$230 per trip. On April 11, 2008, Claimant submitted a Claim for Unpaid Wages to the New York State Department of Labor (DOL) for three trips he alleged he completed during the period March 14, 2008 through March 28, 2008.

According to Edouard Gladyshev, Claimant's wages were paid upon receipt of transfer slips from both the Queens transfer station and the Seneca Falls landfill. These slips showed the tonnage, or the weight of the load that was picked up for transfer, the time of pickup, and the tonnage received at the landfill. They also showed the date (s) and time of pickup and transfer.

Mr. Gladyshev explained that in order to be paid, Claimant had to provide transfer slips from the transfer station and the landfill. These slips were normally left at the scales at the transfer station where Mr. Gladyshev would pick them up. He issued a check dated March 20, 2008 to Claimant for two trips allegedly made during the claim period in the amount of \$460 based on Claimant's verbal assurance that he had made the trips, but he stopped payment on the checks when the slips were not at the scales. Petitioner did not pay wages for the third alleged trip because he did not authorize or receive any slips for it. Mr. Gladyshev also testified that Petitioners also issued a personal check dated August 11, 2008 to Claimant in the amount of \$690, which bounced for insufficient funds. He stated that the \$690 check was issued upon advice of his attorney as a means to possibly resolve the claim and to avoid expensive legal fees.

In evidence, as Respondent's exhibits, are transfer slips provided by Claimant to DOL for March 12 and March 13, 2008. According to Mr. Gladyshev, the March 12th slip shows a pickup of 47.42 tons between 11:54 P.M. and 1:00 A.M. at American Recycling Management, and the March 13th slip shows a drop off of 32.24 tons at the Seneca Falls landfill between 2:11 P.M. and 3:06 P.M. Because the tonnage is different, and because the drop off times do not match the time it would take to travel from the transfer station to the landfill, Petitioner believed that these slips do not represent the same trip. Also in evidence is a transfer slip from March 21, 2009, which shows that

30.75 tons were dropped off at the Seneca Falls landfill. The fourth transfer slip is unreadable.

The March 12th slip for 47.42 tons lists under "Account Information:" "Denise Enterprises, Inc." Mr. Gladyshev explained that this reference shows that a load was picked up for this company, but he also explained that he never had a relationship with them. He suspected that Claimant was using Petitioners' trucks and working for other companies as he was supposed to do five loads a week but was only doing two. Mr. Gladyshev also testified that he was normally paid for transfers from the "transfer facility," but he was not paid for the transfers at issue here.

The Commissioner contends that Mr. Gladyshev stopped payment on the \$690 check because he believed that Claimant improperly took Petitioners' truck to a repair shop that Mr. Gladyshev did not authorize, and that Claimant did not return the truck to Petitioners. According to the Commissioner, this constituted an illegal wage deduction under Labor Law § 193.

Senior Labor Investigator Steven Konsistorum was responsible for DOL's investigation of the Claimant's wage claim. However, Konsistorum was retired at the time of the hearing and did not testify. Senior Labor Investigator Gerard Capdevielle testified that he reviewed the DOL file and he identified the documents contained therein, including a May 8, 2008 letter from Mr. Gladyshev to DOL in which he disputed the claim because Claimant "neither returned the company's truck, nor presented the paperwork for his last load"

Mr. Gladyshev testified that when he and Violetta Gladyshev started V & V it was opened as a corporation in both their names, but that she had nothing to do with the company; that he ran the company; and, that her name was on the corporate instruments only because she filed them.

GOVERNING LAW

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 a Commissioner's order 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 the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board 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"]; *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]). It is therefore Petitioners' burden to prove, by a preponderance of the evidence, that Claimant's wages and miscellaneous expenses are not due and owing. It is also Petitioners' burden to prove, by a preponderance of evidence that the Civil Penalty is invalid or unreasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR § 65.39).

The Wage Order is Revoked.

The only witnesses at hearing were Mr. Gladyshev and Senior Labor Standards Investigator Gerard Capdevielle, who did not investigate Claimant's claim, and whose testimony was limited to identifying documents contained in the DOL file.¹ We rely upon Mr. Gladyshev's testimony, unless it is not credible, or is contradicted by a plain reading of documents contained in the DOL file.

Mr. Gladyshev testified that payment for Claimant's work was predicated upon proof of picking up refuse from a transfer station and delivering it to a landfill approximately 5 ½ hours away. Upon picking up the refuse, a slip was issued indicating the date, time, amount, and location of the pickup, and upon delivery a similar slip was issued by the receiving landfill. Petitioner credibly testified that he issued a \$460 check for two trips that Claimant alleged that he made on March 12-13, 2008, because Claimant phoned him and told him that he made the trips, but stopped payment when Claimant did not provide the requisite slips. He also credibly testified that he initially did not issue a check for a third trip because he believed the trip was not made, and because he did not receive the slips for that trip.

In evidence are slips from the transfer station and the landfill for the claim period which are attached to a fax from the Claimant to Konsistorum, indicating "as per your request." These slips would have probative value if they accurately represented that Claimant picked up and delivered refuse for Petitioners on three trips during the claim period. However, the slips do not clearly show that Claimant made the trips claimed.

One of the slips is unreadable. Another shows the pickup of refuse on March 12, 2008, but identifies the account as Denise Enterprises, Inc., which Mr. Gladyshev testified was not a company that he did business with. A third slip shows delivery of 32.24 tons of refuse on March 13, 2008 to the landfill, but is unaccompanied by a matching pickup slip. The last slip shows a delivery of 30.7560 tons of refuse on March 21, 2008, to the landfill, but also is not accompanied by a pickup slip.

Further, there is no evidence before us demonstrating that these slips, regardless of how flawed and unreliable, were given to Petitioners upon completion of the alleged trips. That Claimant provided the slips upon request to the DOL does not establish that he ever gave them to Petitioners. Without supporting testimony, or some other sustainable evidence that the slips accurately reflect the trips that form the basis of the claim, and that they were provided to Petitioners, we cannot rely upon them and therefore we credit Mr. Gladyshev's testimony.

We also find the fact that Petitioners stopped payment of \$460 to claimant, and the subsequent bounced payment of \$690, do not demonstrate admission of owing Claimant wages. Mr. Gladyshev credibly explained that the first check was issued in

¹ Claimant died prior to the hearing.

reliance on Claimant's assertion that two trips were made, and that the second check was provided merely in the hopes of avoiding the cost of litigation.

Similarly, we also find that Mr. Gladyshev's admission, as contained in a May 8, 2008 letter to DOL, that Petitioners disputed the claim because Claimant had not returned the company's truck, not dispositive of the issue before us. Mr. Gladyshev stated in that memo that "[Claimant] . . . has neither returned the company's truck, nor presented the paperwork for his last load" However, the petitions are clear that the failure to return property was not a reason why Petitioners believed that the Orders were unreasonable or invalid. The petitions claim that Claimant was an independent contractor (a claim not asserted at the hearing) and that Claimant "failed to submit required paperwork (delivery slips, bills of lading and invoices) as proof of contracted delivery in order to get paid." They do not claim that the Order is unreasonable or invalid because of the failure to return property.

In light of the clarity of the petitions, we do not rely upon Mr. Gladyshev's statement in the May 8th letter as proof that Petitioners denied payment because of their belief that Claimant did not return company property. This is supported by Mr. Gladyshev's testimony that the only reason that payment was denied was because Claimant had not provided the requisite slips showing the trips were made. It is also supported by Konsistorum's memo of February 1, 2010 to DOL Senior Attorney Benjamin Garry, which states "While the employer did not elaborate on why he cancelled the check to the claimant, we can assume (based on his 5/8/08) response to us, that it was to punish the claimant for taking the company's truck to an unauthorized repair shop" (emphasis added). Konsistorum's memo also states "Although this claim was not docketed as such, if true, would be a violation of Sec. 193.1," (emphasis added). These statements indicate that Mr. Gladyshev's May 8th memo did not definitively assert that Claimant was not paid as punishment for the failure to return company property.

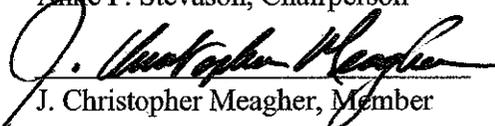
NOW THEREFORE IT IS HERBY RESOLVED THAT

1. The Wage Order is revoked.
2. The petition is granted.

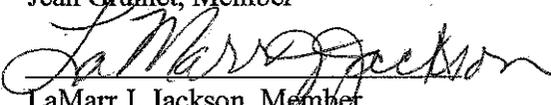
Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
December 14, 2012.

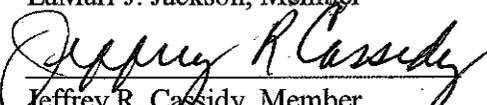
Absent

Anne P. Stevason, Chairperson


J. Christopher Meagher, Member


Jean Grunet, Member


LaMarr J. Jackson, Member


Jeffrey R. Cassidy, Member