

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

-----X	
In the Matter of the Petition of:	:
	:
ANDREW ANDRUSZKO AND PETER KAY	:
AUTO SALES, INC.,	:
	:
Petitioners,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 6 and an Order	:
under Article 19 of the Labor Law, both dated April	:
13, 2010	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
-----X	

DOCKET NO. PR 10-189

RESOLUTION OF DECISION

APPEARANCES

Andrew Andruszko, petitioner *pro se* and for petitioner Peter Kay Auto Sales, Inc.

Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Jeffrey G. Shapiro of counsel) for respondent.

WITNESSES

Andrew Andruszko, for the petitioner.

Mark Mekus, claimant; Mary Coleman, Supervising Labor Standards Investigator; for the respondent.

WHEREAS:

The petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on June 15, 2010, seeking review of two Orders to Comply issued on April 13, 2010. The Order to Comply with Article 6 (wage order), was issued for failure to pay wages and commissions due and owing to claimant Mark Mekus, a former employee, in the amount of \$3,380.80, with interest at the statutory rate of 16% in the amount of \$1,966.61, and a civil penalty in the amount of \$3,380.80, for a total amount on this Order of \$8,728.21. The Order under Article 19 (penalty order) imposes a \$500.00 civil penalty against Petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6, for failing to keep and/or furnish true and accurate

payroll records for each employee from on or about June 1, 2009 through August 26, 2009.

The Respondent filed an answer on September 15, 2010. Upon notice to the parties, a hearing was held on January 16, 2013, in Buffalo, New York, before LaMarr J. Jackson, 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 file post-hearing briefs.

SUMMARY OF EVIDENCE

Petitioner's Testimony

The Petitioners in this case are Andrew Andruszko (Andruszko) and Peter Kay Auto Sales, Inc. (PK Auto), a used car dealership with a location in Hamburg, New York. According to the New York Secretary of State's Division of Corporations, Andruszko is listed as the Chief Executive Officer of PK Auto with a principal executive office in Alden, New York.

Andruszko disputed the claim for sales commissions filed against his company by the Claimant Mark Mekus (Mekus). The petition challenged both the formula for calculating commissions and the commission amounts claimed by Mekus. Salespersons were paid both a salary and a regular draw against their potential earned sales commissions. When questioned about how commissions were calculated Andruszko testified:

“...if they were ahead of their draws, checks were issued the following month, roughly the middle of the month. They submitted their sheets on or about the first week of the following month. If the month closed on the 30th, for example, it was their responsibility, which he did fill out sheets and turn them in, within the following week or two. And then we paid out the commissions. If they were behind on their draws, though, we just continued to roll them. If they didn't meet their draw, we just continued to pay on their draws every week, and eventually you hope it all washes out and they come out ahead (Transcript pp. 56-57).”

To illustrate how commissions were calculated, Andruszko gave an example from Petitioner's Exhibit 1 of a selling price of a car at \$7,700, with a base or “rock” price of \$7,200. The salesperson would receive \$100.00 for the commission if they sold it at \$7,200 and 33% of the amount over the rock price. If financing or a warranty was also part of the deal things would become “a little more complicated” because there would be separate commission calculations for those items. When asked if any of these terms of employment, including methods of calculation for commissions, were reduced to writing, signed by both the employer and the commission salesperson as required under Labor Law Section 191 (1) (c), the Petitioner responded that he did not have such a document.

To support his position, Andruszko introduced into evidence Peter Kay Sales Sheets for June, July and August 2009 (Petitioner's Exhibits 1-3) and eight vehicle cash purchase agreements (Petitioner's Exhibits 5, 6, 7, 8, 9, 10, 11 and 13) and testified that those records were under his exclusive control at all times. The sales sheets were supposed to be forms used to

document the vehicle sales and the commissions due for such sales. There was conflicting testimony, however, about who wrote which parts of these documents. While Mekus wrote most of the information on the sales sheets for June and July 2009, Andruszko stated that he filled in the commission credit amounts on the forms or adjusted numbers changing full commission credit for example, to one-half of the earned commission in several instances. Andruszko also testified that he completed the sales sheet for August 2009. Petitioner presented only eight sales contracts while the Claimant filed commission/wage claims for the sales of fifteen vehicles. Andruszko did not provide any explanation for his failure to provide the vehicle cash purchase agreements for the seven other vehicles.

Petitioner also testified that he did receive demand letters from the Department of Labor dated November 12, 2009 and February 4, 2010.

Claimant's Testimony

Claimant Mark Mekus (Mekus) testified he was employed by PK Auto from October 2007 until August 2009, at the Hamburg, New York used auto lot. His job was to sell cars and assist customers with financing. His gross weekly pay was \$400.00; \$200.00 of which was salary and \$200.00 was a draw against earned commissions. He testified that his commission for each vehicle that he sold was based upon a "rock" selling price which was the lowest or "rock bottom" price that the vehicle was to be sold, and for which he would be paid \$150.00. If the vehicle was sold for more than the "rock" price, he would earn 33% of the amount earned over the rock price. In an example Mekus gave, if the car's rock was \$10,000 and it sells for \$12,000, the salesman would get as a commission \$150.00 and 33% of the \$2,000 (the amount over the rock price). Mekus stated that the rock rate or the lowest commission for the sale of a vehicle of \$150.00, was discussed when he was hired and there was no written contract or company policy document that set forth the details of commission calculations. Mekus testified that many of the sales contracts introduced by Andruszko contained information written by other persons that he was not familiar with and he could not testify about that information.

Mekus left his employment at PK Auto at the end of August 2009. On October 11, 2009, he filed a detailed eight page claim for unpaid wages with the Department of Labor (DOL) stating he had not been paid commissions by the Petitioners in the amount of \$3,180.80 for fifteen motor vehicles that he had sold from June 1, 2009 through August 26, 2009. The claim also included unpaid vacation pay of \$200.00, making the total claim amount of \$3380.80. The claim form stated that he had made "numerous requests" for his wages to Andy Andruszko and had been given "numerous excuses" for the failure to give him his money. Mekus testified that salespersons were not allowed to take sales documents home so his claim form and his testimony was based upon his memory of what the sales records and amounts were on each sale.

"I did the math and came up with a dollar amount of five thousand, five hundred and eighty dollars and eighty cents, which was my commission earned during the time frame of 6/1/2009 and 8/25/2009. During that time frame I received twelve paychecks, which would have totaled a total draw of two thousand, four hundred dollars. I deducted that amount from the total commission earned, minus the total draw taken, which gave me a number of three thousand, one hundred eighty dollars and eighty cents (Transcript pages 92-93)."

Supervising Labor Standards Investigator's Testimony

Supervising Labor Standards Investigator Mary Coleman testified that the Claimant filed a claim for unpaid wages against Peter Kay Auto Sales, Inc. on October 11, 2009. Coleman identified Respondent's Exhibit B, the letter to PK Auto of November 12, 2009, providing notice of Mark Mekus' claim and stating that if the claim was correct to remit the money within ten days subject to any legal deductions or if the claim was disputed to submit a full statement giving reasons why the claim was disputed and including "any payroll record, policy, contract, etc. to substantiate your position." Coleman further testified that a letter was sent to Andrew Andruszko on February 4, 2010 (Respondent's Exhibit C), notifying him of the claim and stating that to resolve the claim he needed to send \$3,380.80 to the Commissioner of Labor within ten days or the case would be referred to an Order to Comply. Coleman testified that there was no response to the letter, so an Order to Comply was issued. None of the correspondence was returned to the Commissioner of Labor. In addition, Coleman testified that she recommended a 100% civil penalty for this matter because the employer "hadn't responded or furnished any response to the claim." Finally, Coleman testified that she recommended a \$500.00 penalty for failure to furnish requested payroll records because the Petitioner failed to furnish requested payroll records as required by the Labor Law.

STANDARD OF REVIEW AND BURDEN OF PROOF

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 [1]). Pursuant to the Board's Rules of Procedure and Practice 65.30 [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 Petitioner to prove that the Order under review is not valid or reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board having given due consideration to the pleadings, hearing testimony, arguments, and documentary evidence, makes the following findings of fact and law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39). We affirm the wage order and find that the Commissioner's determination that petitioners failed to pay Claimant wages and commissions he had earned is valid and reasonable. We also affirm the penalty order and find that the Petitioners did not maintain and provide required records.

An Employer's Obligation to Maintain Records and DOL's Calculation of Wages in the Absence of Adequate Employer Records

The law requires employers to maintain payroll records that include, among other things, its employees' daily and weekly hours worked, wage rate, and gross and net wages paid. (Labor Law §§ 195 and 661, and 12 NYCRR 142-2.6.) Employers are required to keep such records open to inspection by the Commissioner or a designated representative.

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; *Angello v National Finance Corp.*, 1AD3d 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."

Commissions due to Claimant

Claimant was "paid on commission basis and a commission is considered a wage under section 190 (1) of the Labor Law" (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 617-18 [2008]). Regarding the employer's obligation to pay commission wages, specifically, Labor Law § 191-c (1) provides, in pertinent part:

"When a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after they become due in the case of earned commissions not due when the contract is terminated."

Commissions are "wages" for the purposes of the Labor Law. Section 190(1) provides:

" 'Wages' means the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis. The term 'wages' also included benefits or wage supplements as defined in section one hundred ninety-eight-c of this article, except for the purposes of sections one hundred ninety-one and one hundred ninety-two of this article."

Labor Law § 191 (1)(c) provides in relevant part:

"...The agreed terms of employment shall be reduced to writing, signed by both the employer and the commission salesperson, kept on file by the employer for a period of not less than three years and made available to the commissioner upon request. Such writing shall include a description of how wages, salary, drawing account, commissions and all other monies earned and payable shall be calculated...The failure of an employer to produce such written terms of employment, upon request of the commissioner, shall give rise to a presumption that the terms of employment that the commissioned salesperson has presented are the agreed terms of employment."

Section 191 (3) further provides:

“If employment is terminated, the employer shall pay the wages not later than the regular pay day for the pay period during which the termination occurred, as established in accordance with the provision of this section. If requested by the employee, such wages shall be paid by mail.”

Petitioner testified that there was no written commission agreement and failed to meet his burden of proof to establish the terms of the commission arrangement. In contrast, the Claimant provided very credible testimony about the commission arrangement and was able to produce detailed notes on the sales transactions and the commissions due in his claim form. The Petitioner failed to produce sales and commission records when requested prior to the issuance of the Order to Comply and the records produced at the hearing were incomplete, ambiguous and did not comply with the law’s requirements. It is especially telling that Petitioner only presented sales contracts for eight of the fifteen vehicles that were listed in the claim. The failure to provide any evidence on those sales strongly undercut the Petitioner’s credibility and provides evidence of the failure to meet the burden of proof for challenging the claimed commissions.

We also do not find credible Petitioner’s Exhibit 14 which purports to be an “advanced pay report” dated “as of December 14, 2009.” This document is supposed to show that the Claimant owed the Petitioner money when he left his employment. The Petitioner did no more at the hearing than introduce this document into evidence with no foundation and provided no other evidence to support this self-serving position.

The Petitioner failed to meet his burden of proof on the amount owed to the Claimant for commissions despite having control over all the sales records and he did not address at all the claim for vacation pay. The Third Department held in *Angello v National Finance Corp.*, 1 AD3d at 854, that if the employer does not provide the records required under the Labor Law, “regardless of the reason therefore”, the presumption favoring the Commissioner’s determination based on the employees’ complaints applies (*Id.* At 854). Since there was no written commission agreement between Petitioner and Claimant, and failing to meet the burden to prove that the Claimant was either not entitled to the commissions or that the wages due calculation was in error, we affirm the Commissioner’s determination of the wage claim in the amount of \$3,380.80 for vacation pay and for commissions on orders that were earned on sales prior to August 25, 2009; the last day the Claimant worked.

Imposition of Civil Penalty

The Order assesses civil penalties in the amount of 100% of the wages to be paid. Labor Law § 218 (2007) provides, in relevant part:

“In addition to directing payments of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total

wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty. Where violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars...In assessing the amount of the penalty the commission shall give due consideration the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations ad, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

The Board finds that the assessment of a civil penalty of 100% is reasonable in this case. The statute provides for a 200% penalty where the employer has a previous violation or has acted in a willful or egregious manner. DOL based its penalty on the fact that Petitioner failed to respond to requests for payroll records that are required to be kept under law and provided to the Commissioner of Labor upon request. We find that a civil penalty in the amount of 100% of the unpaid wages is reasonable in this instance and we affirm it.

Interest

Labor Law §219(1) (1987) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest 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 imposes a \$500.00 civil penalty against the Petitioners for violating Labor Law §661 and 12 NYCRR 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee. It is undisputed that the Petitioners were requested to provide the DOL payroll records for the period on or about June 1, 2009 through August 26, 2009, and failed to produce such records. Accordingly, the penalty order is affirmed.

//////////

//////////

//////////

//////////

//////

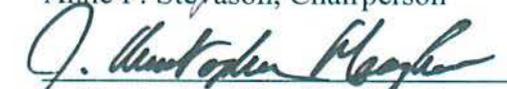
//

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 6 (wages) is affirmed; and
2. The Order under Article 19 (penalty order) is affirmed; and
3. The Petition for review be, and the same hereby is, denied.



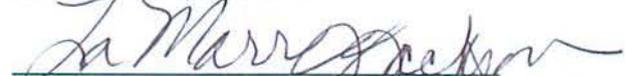
Anne P. Stevason, Chairperson



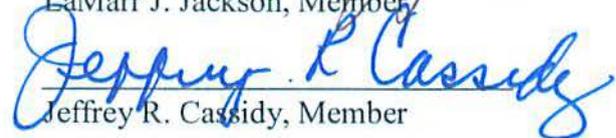
J. Christopher Meagher, Member



Jean Gramet, Member



LaMarr J. Jackson, Member



Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
October 2, 2013.