STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: WENDY BARRETT FLEMING AND THE VILLAGE SCANDAL PRODUCTIONS LLC, 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 June 28, 2010, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 10-281 RESOLUTION OF DECISION

APPEARANCES

Hyman Silverglad, Esq., for petitioners.

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

WITNESSES

Maria Hidalgo and Labor Standards Investigator Guillermo Avalos.

WHEREAS:

The petition filed with the Industrial Board of Appeals (Board) in this matter seeks review of two orders issued by respondent Commissioner of Labor (Commissioner) against petitioners Wendy Barrett Fleming and The Village Scandal Productions LLC on June 28, 2010.

Upon notice to the parties, a hearing was held on April 25, 2013, 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 that petitioners pay the Commissioner wages owed claimant employee Maria Hidalgo in the amount of $1,868.00, together with interest continuing thereon at the rate of 16% to the date of the order in the amount of $150.67, and a civil penalty of $1,868.00. The total amount due is $3,886.67.

The second order (penalty order) directs petitioners to pay a civil penalty of $500.00 for failure to keep and/or furnish true and accurate payroll records regarding claimant Hidalgo's employment for the period December 7, 2009 through December 27, 2009.

A petition was filed with the Board on August 30, 2010, disputing the wage claim and making allegations of misconduct against the claimant. The respondent's answer to the petition dated October 21, 2010, was received by the Board on October 26, 2010. By notice to the parties dated November 14, 2012, a Pre-Hearing Teleconference was scheduled for November 19, 2012, and a Hearing for January 23, 2013.

Petitioner Wendy Barrett Fleming (Fleming) failed to call into the pre-hearing conference call and the Board was unable to reach her at the telephone number listed in the petition. By letter dated November 20, 2012, the Hearing Officer advised the parties of the petitioner's failure to participate in the pre-hearing conference. Petitioner was directed to contact the Board's secretary to reschedule the conference and that failure to do so would result in waiver of petitioners' opportunity to participate in a pre-hearing conference where "procedures for the Hearing may be discussed, documents exchanged, issues resolved, and the parties may open communication concerning any possible settlement."

Attorney Hyman Silverglad entered his Notice of Appearance on behalf of the petitioners on January 17, 2013, and requested that the hearing scheduled for January 23, 2013, be adjourned until a later date. By letter dated January 23, 2013, the Hearing Officer confirmed agreements reached during a telephone conference between counsel for the parties on January 18, 2013. Petitioners' request to reschedule the hearing was granted and the hearing was rescheduled for April 25, 2013. A new Pre-Hearing Conference was scheduled for March 14, 2013. At the March 14th conference, the petitioners were granted permission to file an amended petition stating "additional grounds why the wages to be paid under the order are not owed." A case management conference was scheduled for April 15, 2013, to provide an opportunity for the parties to report on efforts to settle the case and any other pre-hearing matters.

An amended petition was filed by the attorney for the petitioners on April 17, 2013, asserting that the orders should be reversed because: (1) claimant Hidalgo was paid "all of and more than she is requesting in her claim for unpaid wages as delineated in her complaint;" and (2) "[s]he is not entitled to any portion of her claim as she has received and/or taken emoluments and received income in excess of her claims in satisfaction of her alleged wage claim."

On April 24, 2013, the Board received a faxed letter from petitioners' counsel, requesting an adjournment of the hearing scheduled for April 25, 2013, because his client was ill and would be unable to attend the hearing. By letter dated April 24, 2013, the Hearing Officer advised the parties that the hearing would proceed as scheduled. He noted that the hearing had been previously adjourned at petitioner's request to April 25th, and marked final against petitioner.

Pursuant to Board Rule 65.23, a hearing will not be cancelled absent extraordinary circumstances. In this instance, the petitioner's request was not accompanied by a letter from a physician verifying the medical reasons for the adjournment and/or that petitioner would be available to attend a rescheduled hearing within a reasonable period of time. The petitioner had been advised since January, 2013 that no further adjournments would be granted.

Petitioner Fleming failed to attend the hearing. The Board finds that petitioner failed to meet her burden of proof that the orders were invalid or unreasonable, and for the reasons set forth below, affirms the wage order directing petitioners to pay wages and interest to the claimant in their entirety. We affirm the civil penalties in the wage and penalty orders as reasonable and valid in all respects.

SUMMARY OF EVIDENCE

Petitioner Wendy Barrett Fleming (Fleming) operated The Village Scandal, a clothing store that made and sold custom made hats and accessories in Greenwich Village, New York for over 15 years. According to petitioner, the boutique was the "#1 hat and accessory [store] in NYC, voted by The Village Voice, Manhattan Magizine (sic), and acclaimed in The NY Times." The petition asserted that each employee was a professional stylist and that employees worked alone, except for petitioner who was "in and out of the business and managing the entire business." During the claim period covered by the wage order, petitioner was ill, did not reside in New York City, and left the management and day to day operation of the business with the claimant Maria Hidalgo.

Hidalgo's Claim

Claimant Maria Hidalgo (Hidalgo) testified that she filed a claim with DOL against petitioners for unpaid wages on January 7, 2010 stating that she worked six days during the week ending December 13, 2009 (50 hours) at the rate of $15.00 per hour; five days during the week ending December 20, 2009 (36 hours) at the rate of $15.00 per hour; four days during the week ending December 27, 2009 (34 hours) at the rate of $17.00 per hour; and was owed $1,868.00 in unpaid wages for the period of the claim. Claimant stated that the information listed in the claim form was true and accurate.

Claimant testified that she was employed by petitioner for about three years from September, 2007 until she was fired on December 28, 2009. She first met Fleming as a customer in her shop and later began to work for her. Hidalgo wrote down her daily hours of work and the sales made in the shop each day in a "sales book" that was kept in the store. Fleming was absent from the business during much of the time that claimant worked at the boutique: "When I first started working for Wendy, she was there for maybe six months and she was - then she went away for the weekend, but in fact went away for six months. Then she came back for about six months, and then she said she was going away for the weekend, and was gone for about I believe a year and a half..." Petitioner paid claimant by check and authorized her to use a debit card for Fleming's bank accounts to make deposits, transfers, and handle other banking matters for Fleming's business.

Claimant testified that the cooperative relationship with petitioner changed near the end of Hidalgo's employment. Fleming refused to pay claimant the wages listed in the claim and terminated her employment at the end of December, 2009. Petitioner had an attorney present during the actual firing that took place in a local restaurant.

Claimant testified that Fleming had never disputed her hours in the past and the first time this occurred was at the time of her termination: "...during the time of me working for her she never questioned the amount of hours I worked for her. Not until after I was no longer working for her and she didn't want to pay me what she owed me, that was the first time that she disputed the amount of hours that I was in the store...The first time she told me that she wasn't going to pay me was when she met me at Mingala, and she told me she didn't want me to work for her any longer and I said that's fine, but you need to pay me what you owe me and she said I will not pay you what I owe you, and then she said, oh, you didn't work all the hours you said you worked. That was the first time that she said that I wasn't working hours that I did work."

Petitioner's Evidence

Petitioner did not appear at the hearing. Petitioner's counsel attempted to introduce into evidence certain emails and other documents prepared by or on behalf of the petitioner but those documents were rejected upon objection by respondent because they were not business records but rather documents prepared for litigation containing conclusory statements; not evidence made during the time period of the wage claim; and not payroll or business records that require a foundation from a witness prior to introduction. Certain of the documents contained irrelevant and inflammatory material. The only exhibit accepted was a portion of the sales book prepared by the claimant. Claimant identified those portions she wrote and testified they were an accurate statement of her hours worked.

DOL Labor Standards Investigator Guillermo Avalos

Labor Standards Investigator Guillermo Avalos testified concerning DOL's investigation that resulted in the orders under review.

In support of the civil penalties assessed in the orders, Avalos testified that Labor Standards Investigator Steven Konsistorum prepared an "Issuance of Order to Comply Cover Sheet" and "Labor Law Articles 6, 19 and 19-A Violation Recap" that recommended a 100% civil penalty be assessed in the wage order and a $500 penalty assessed for failure to maintain/furnish records.

GOVERNING LAW

A. Standard of Review and Burden of Proof

When a petition is filed, the Board reviews whether an order issued by the Commissioner of Labor is "valid and reasonable" (Labor Law § 101[1]). Any objections not raised in the petition shall be deemed waived (*Id.* § 101[2]). The Labor Law provides that an order of the Commissioner shall be presumed "valid" (*Id.* §103 [1]). If the Board finds that the order, or any

part thereof, is invalid or unreasonable it shall revoke, amend, or modify the same (*Id.* § 101[3]).

A petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (*Id.* § 101[2]). Pursuant to Rule 65.30 of the Board's Rules, "[t]he burden of proof of every allegation in a proceeding shall be upon the person asserting it" (12 NYCRR § 65.30). The burden is by a preponderance of evidence (State Administrative Procedure Act § 306[1]).

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. Civil Penalties

Labor Law § 218 provides that once the Commissioner determines that an employer has violated Article 6 or 19 of the Labor Law, he shall issue to the employer an order directing

compliance therewith, which shall describe with particularity the nature of the violation. The statute also provides:

> "In addition to directing payment 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 [of the Labor Law], 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 the 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 for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation. In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

FINDINGS

Petitioners Failed to Meet Their Burden to Prove That Claimant Was Not Owed Wages

The petitioners failed to meet their burden of showing by a preponderance of the evidence that claimant was not owed wages for the period of the claim. Petitioner failed to attend the hearing despite notice that it would be her only opportunity to contest the claim and failed to present any payroll records or other affirmative evidence establishing that she had paid the wages owed for the period of the claim. The sales log records introduced by petitioner supported the claimant's claim for the days and time worked on her claim form submitted to DOL.

Petitioner Fleming left her business to be managed and operated by the claimant for over a year and a half while she was absent from New York City. Fleming relied on the claimant's integrity and business management until shortly before she terminated the claimant at the end of December, 2009. We find that claimant was a credible witness who testified consistently as to her hours and wages, as documented in the sales log and set forth in her claim form. Petitioner failed to submit any credible evidence to rebut claimant's testimony. 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,* 156 AD2d 818, 821 [3rd Dept 1989]). We find

petitioners failed to meet their burden to establish that claimant was fully paid for the work performed during the period of the claim and affirm the wage order in its entirety.

Civil Penalties

Petitioners did not submit evidence challenging the penalties assessed in the wage or penalty orders. The Board finds that the considerations and computations required to be made in connection with the imposition of civil penalties in both orders are valid and reasonable in all respects.

Interest

Labor Law § 219(1) provides that when the Commissioner issues a compliance order finding wages are due, 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 § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." Petitioners did not challenge the assessment of interest in the wage order. The Board finds that the considerations and computations required to be made in connection with the interest set forth in the order was valid and reasonable in all respects.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Order to Comply with Article 6 of the Labor Law and the Order under Article 19, both dated June 28, 2010, 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 New York, New York, on
October 2, 2013.