STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ROSARIO A. CORNEJO (T/A ROSARIO CLEANING), Petitioner, 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, each issued February 10, 2011. - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 11-042 RESOLUTION OF DECISION

APPEARANCES

Rosario A. Cornejo, petitioner *pro se.*

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

WITNESSES

Rosario A. Cornejo, Senor Labor Standards Investigator Jeremy Kuttruff.

WHEREAS:

On February 18, 2011, Petitioner Rosario A. Cornejo (Petitioner) filed a petition with the Industrial Board of Appeals (Board) to review an order to comply with Article 6 and an order to comply under Article 19 of the Labor Law that the Commissioner of Labor (Commissioner or DOL) issued against her on February 10, 2011. The first order under Article 6 (wage order) directs payment of $507.50 in wages due and owing to Maria Urrutia Bermudez (Claimant) together with interest at 16% per annum calculated to the date of the order at $135.00, and a civil penalty in the amount of $507.50, for a total amount due of $1,150.04. The second order under Article 19 (penalty order) directs payment of $500.00 in civil penalties for failing to keep and/or furnish true and accurate payroll records.

The petition alleged that the Petitioner had no recollection of Maria Urrutia, but did "remember a woman by the name of Isabel" with whom she had "a minor issue... that was resolved with no problem because it was nothing serious." Petitioner stated that she usually worked alone, employing temporary help during holidays "or when I had problems with my knee." Petitioner stated that she owed no money to the Claimant, and that Claimant "a poor lady with no papers" was taking advantage of her. On March 9, 2011, the Petitioner filed an Amended Petition denying that any monies were owed, and stating that she did not know the person who filed the claim and "can not correctly defend myself if I do not know who I am defending myself against or what the situation is." Respondent filed an answer on April 21, 2011.

Upon notice to the parties, a hearing was held on April 24, 2013 in Hicksville, New York before Jean Grumet, 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

The Claim

Claimant's sworn claim identifies her as "Maria Isabel Urrutia Bermudez," and states that she worked for Petitioner as a house cleaner at different houses in New York City from February 10 to June 13, 2009 at a rate of $400.00 per week. The claim avers that Claimant was not paid for 60 hours that she worked during the week ending June 13, 2009, and that when Claimant demanded her pay that day, Petitioner told Claimant that "she was going to pay me if she felt like it" and threatened to call the police "because I don't have any papers."

Testimony of Petitioner Rosario A. Cornejo

Petitioner testified that she began her house cleaning business in 2003 or 2004, mainly cleaned houses by herself, and hired people to help her only three or four times. Once she was helped by a friend, and another time, by someone from church. "They saw that I was in a bad physical state, and it was probably a day or three days for some hours, and I paid them on an hourly basis."

Petitioner testified that after initially being confused because she did not recognize the name of the Claimant, she realized that she met her in 2009, at church and also at a deli where Claimant worked. When Claimant learned that Petitioner cleaned houses and saw her limping, she asked if Petitioner needed help, asked for her phone number, and called Petitioner twice. Claimant worked for Petitioner twice, and both times worked for three hours and was paid $10.00 per hour. Claimant called a third time inquiring about work and Petitioner told her that she was having a knee operation and would "need her services for a little more time" and asked her to provide documentation: "I needed, however, to have all her documents in place in order to include her in my income tax. And, of course, protecting the houses... and their belongings."

Because "[m]y knee was feeling very badly," Petitioner also asked Claimant to "please help me that morning," even when Claimant said she had been called to work at the deli, and

Claimant agreed to do so instead of going to the deli to work. However, Petitioner testified that when Claimant showed her documents, Petitioner rejected them as "false documents with the name of Isabel Dominguez," the two quarreled, and Claimant "was so bothered that she vomited in my car." According to Petitioner, this happened "at [Claimant's] doorstep" at an address different from the one listed by the Claimant in her claim. Petitioner testified that about two days later, Claimant called to demand payment "because she had not gone to the deli to work so that she could go with me. She had left her house and lost her day.... Otherwise, she would sue me. I thought the fact that she had not really worked, I didn't have to pay her. She had not worked for me at all."

Petitioner discontinued her housekeeping business at the end of July 2009, as confirmed by a Certificate of Discontinuance of Business she filed with Suffolk County. She also introduced medical records of an MRI on her knee in September 2009, and testified that she "had a long process of problems with my knee. It didn't happen from one day to the other.... In July I stopped working." Petitioner testified that her ligaments had torn "[a]bout a year before" the MRI," and "I could not have been working with her for 60 hours as she states, because I was very ill at the time."

On cross-examination, Petitioner stated that in 2009, she was cleaning houses and three offices, and "had two daily clients" plus others who wanted service biweekly, once a month, or occasionally. She did not have a consistent schedule, nor could she count on clients not to cancel. Three or four people helped her when her leg was injured, including two members of her church, Petitioner's son's girlfriend, who worked for a period of three weeks, and Petitioner's sister-in-law, who occasionally worked for Petitioner after her knee injury.

Testimony of Senior Labor Standards Investigator, Jeremy Kuttruff

Kuttruff, a DOL investigator for eleven years, conducted the investigation, and at hearing, authenticated the DOL's investigative file in this matter. Kuttruff wrote $507.50 as the claim amount, "cross[ing] out $400, written by the Claimant, in order to compute for overtime wages that would also have been owed" based on the information Claimant had recorded.

Kuttruff spoke to the Petitioner and sent her a November 1, 2010 letter confirming the telephone conversation and notifying her of a claim filed by "Maria Urrutia Bermudez." Petitioner responded with a November 4, 2010 letter stating that she did not know who the Claimant was and requesting Claimant's photograph, address or phone number "so I can know who this person is that is trying to defame me." Petitioner's November 4, 2010 letter went on to state that because of her leg injury, "I eventually contracted with three or four people to help me part time, but that name is not in my book where I jot everything down." Petitioner denied that she ever stopped paying anyone who worked for her temporarily, and:

> "I only remember that on that date I had a problem with a lady named Isabel Dominguez who worked about ten days or less, I don't remember exactly since this happened a year and a half ago, and if it is regarding the same person I have witnesses and an explanation. It surprises me that such a person who changes her names uses the system of the United States of America to make easy money and besmirch the honesty of someone like me...."

After receiving the Petitioner's November 4, 2010 letter, Kuttruff had a phone conversation with the Claimant on January 4, 2011, during which Claimant stated that she performed the work described in the claim, and that Petitioner hired her, directed her activities, and failed to pay her for her work. After speaking to the Claimant, Kuttruff called the Petitioner and asked her if she had records of hours worked and wages paid to her employees. Petitioner told him that she did not have any records because the employees were only hired as temporary help. On January 12, 2011, Kuttruff sent a final collection letter reiterating that Petitioner told him that she did not maintain payroll records and checks to corroborate that employees were paid. Kuttruff then referred the case for an Order to Comply.

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]). The petitioner has the burden at the hearing of proving that the Commissioner's order under review is invalid or unreasonable (Board Rules of Procedure and Practice (Board Rule) § 65.30 at 12 NYCRR § 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"); State Administrative Procedure Act § 306; *Angello 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 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 Penalty Order is Affirmed

An employer's obligation to keep adequate employment records is found in Labor Law § 195 as well as in the New York Code of Rules and Regulations (NYCRR). Specifically, Title 12 of the NYCRR, § 142-2.6 provides that an employer must maintain and preserve for a period of six years, weekly payroll records showing, *inter alia*, the employee's social security number, wage rate, daily and weekly hours worked, gross wages, deductions, any allowances claimed as part of the minimum wage, and net wages. Upon request of the Commissioner, the employer is required to make the records available at the place of employment. Section 142-2.7 further provides that an employer shall furnish each employee with a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the

minimum wage, deductions and net wages. This required recordkeeping provides proof to the employer, the employee and the Commissioner that the employee has been properly paid.

It is undisputed that Petitioner did not maintain required payroll records and did not provide required wage statements to Claimant and we affirm the Penalty Order.

The Wage Order is Affirmed

Pursuant to Labor Law § 196-a, where an employee files a complaint for unpaid wages with DOL and the employer has failed in its statutory obligation to keep records, the employer bears the burden of proving that the employee was properly paid. Where employee complaints demonstrate a violation of the Labor Law, DOL may credit the complainant'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 showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the claimants worked and that they were paid for these hours, or other evidence that shows the Commissioner's findings to be invalid or unreasonable (*see* Labor Law § 196-a; *Angello v. National Finance Corp.*, 1 AD3d 850 [3d Dept. 2003]). In *National Finance Corp.*, the Court stated that "the burden of disproving the amounts sought in the employee claims fell to [the employer], not the employees, and its failure in providing that information, regardless of the reason therefore, should not shift the burden to the employees" (*Angello*, 1 AD3d at 854).

We find that the Petitioner did not meet her burden of proving that Claimant did not work for 60 hours during the relevant period. Petitioner's insistence at hearing that Claimant only worked for her for two days – a total of six hours – is contradicted by her November 4, 2010 letter stating that Claimant worked for a period of ten days.[1] While the November 4, 2010 letter asserted that Claimant's name "is not in my book where I jot everything down," Petitioner did not furnish her book to the DOL during the investigation or enter it into evidence at the hearing. Petitioner called no witnesses to corroborate her testimony, although the November 4, 2010 letter stated that she had witnesses and an explanation regarding her "problem" with Claimant.

We do not credit Petitioner's testimony, which was internally inconsistent and inconsistent with her earlier statements. From Petitioner's own testimony, it is clear she suffered severe medical problems in 2009, which caused her to close her business just a few weeks after the period here at issue. Petitioner herself testified that she hired Claimant "because I had a very bad problem with my leg," that she wanted Claimant to bring documents because she needed steady work from her while Petitioner underwent a knee operation, and that when Claimant told her she could not work one day because she had been called to work at her other employer, the deli, Petitioner asked her to "please help me that morning" because her knee "was feeling very badly." Whatever Petitioner's practice may have been during earlier periods, we do not find it credible that in the spring of 2009 Petitioner was cleaning houses and three offices with only occasional help, as she claimed.

Nor do we find it credible that Petitioner was initially not certain who Claimant was. At the hearing Petitioner described a dramatic confrontation on the "doorstep" of Claimant's house,

[1] Claimant's sworn claim avers that she worked for Petitioner for a four month period from February 10-June 13, 2009, but was not paid for her last week of work.

whose address Petitioner knew, after Petitioner insisted that Isabel Dominguez was not actually

Claimant's name. Petitioner's November 4, 2010 letter to Kutruff, says nothing about this supposed confrontation, or the threat to sue to which Petitioner later testified. In her February 18, 2011 Petition, Petitioner stated she had no recollection of the Claimant but did "remember a woman by the name of Isabel" with whom she had "a minor issue... that was resolved with no problem because it was nothing serious."

Petitioner also argues that the Commissioner's determination is flawed because Claimant did not testify at hearing. However, we have held that, in the absence of adequate employment records for a petitioner's employees, and where Petitioner has failed to meet her burden of proof, the Commissioner's determination of wages owed based solely on employee statements may be deemed valid and reasonable (*Matter of Mohammed Aldeen et al,* PR 07-093 [2008] *aff'd sub nom. Matter of Aldeen v Industrial Appeals Board,* 82 AD3d 1220 [2d Dept 2011]).

CIVIL PENALTIES

The Order additionally assessed a 100% civil penalty in the amount of $507.50. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the imposition of the civil penalty amount set forth in the Order were followed and that the Order is valid and reasonable in all respects.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Wage Order is affirmed ; and

2. The Penalty Order is affirmed; and

3. The Petition for review be, 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 New York, New York, on
July 25, 2013.