

The order to comply with Article 19 (minimum wage order) directs compliance with Article 19 and payment to the Commissioner for minimum wages due and owing to the claimant in the amount of \$8,768.83 for the time period from January 14, 2007 through April 7, 2008, with interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$4,756.79, assesses a 100% civil penalty in the amount of \$8,768.83 and assesses liquidated damages at a rate of 25% in the amount of \$2,192.21, for a total amount due and owing of \$24,486.66.

The Commissioner also issued an order under Article 19-A (penalty order) assessing a \$1,000.00 civil penalty against the petitioner for violating Labor Law § 679 and 12 NYCRR § 190-8.2, by failing to keep and/or furnish true and accurate payroll records for each employee, including daily and weekly hours for piece rate employees for the period of February 1, 2007 through April 7, 2008.

SUMMARY OF EVIDENCE

Petitioner Edward Lillie testified that he is the owner of a dairy farm located in Gowanda, New York that consists of 170 acres of which 41.5 are farmed. In January 2007, he hired Douglas Hawkins and had an oral agreement to pay him \$1,725.00 per month in two installments of \$862.50. The payments were made by check. A five room house with two bedrooms was provided to Mr. Hawkins for his family rent free but petitioner deducted monthly utility costs from claimant's wages. Petitioner further testified that Mr. Hawkins worked for different periods of time Monday through Sunday, milking the cows, and a small amount of hours doing other farm chores.

Petitioner admitted that he did not keep daily time records of the hours worked by the claimant during his employment. Entered into evidence as Petitioner's Exhibit 1 was an "estimate" of the hours worked by the claimant in 2007 and 2008. The petitioner testified that he created Petitioner's Exhibit 1 in 2010, which was more than two years after the claimant worked for the petitioner and only for purposes of this proceeding.

Claimant testified that he worked on petitioner's farm from 2007 to 2008, including milking cows, fixing farm equipment and driving a truck and trailer to auctions. He confirmed petitioner's testimony that his pay was \$1,725.00 per month receiving two equal installments biweekly. Claimant's testimony about his work schedule was almost identical to petitioner's testimony totaling 73 hours per week versus the 70 claimed by petitioner.

Claimant testified that petitioner provided him with housing during his employment for which claimant was to pay the cost of utilities. Petitioner deducted those amounts from the claimant's wages. The utility bills were not in the claimant's name and the claimant never saw any of those bills. Claimant stopped working for petitioner on April 7, 2008, but remained in the house provided by petitioner until the end of April 2008.

Finally, claimant testified that he was not paid for the time he did not work due to a back injury, but he received pay for hours he did not work to take his wife to medical appointments. There was no time clock for Mr. Hawkins to clock in and out and petitioner did not require him to keep a log of hours worked.

Senior Labor Standards Investigator James Donohue testified that he conducted a field visit at petitioner's farm and spoke to petitioner at that time. Petitioner told Donohue that he did not keep time records of the hours worked by claimant, but informed Donohue that claimant worked around 10-12 hours per day six days a week. Donohue computed an underpayment based upon the information provided by the claimant regarding the number of hours he worked. Petitioner was initially afforded a lodging credit of \$8.00 per day when Donohue computed the underpayment due to the claimant and gave petitioner credit for a one week pay during which claimant had not worked. However, the lodging credit was subsequently removed from the computations due to petitioner deducting the cost of the utilities for the house from the claimant's wages. Respondent also determined that petitioner had to reimburse the amounts deducted from the claimant's wages for the utilities because the deduction was unlawful.

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 commissioner under the provisions of this chapter" (Labor Law § 101 [1]). 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 filed with the Board challenging the validity or reasonableness of an order issued by the Commissioner shall state "in what respects [the order] is claimed to be invalid or unreasonable" (Labor Law § 101 [2]). The Board's Rules provide that "[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]).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Petitioner and Claimant are Covered by Article 19-A and Not by Article 19

Labor Law § 671 [1] includes dairy farms in its definitions as an industry covered by Article 19-A of the Labor Law (*see also* 12 NYCRR § 190-1.3 [f]). Similarly, "employee" is defined as "any individual employed or permitted to work by an employer on a farm" (*id.* § 671 [2]; *see also* 12 NYCRR § 190-1.3 [b] and [g]) subject to several exceptions not applicable here (*id.* § 671 [2] [a] to [e]; *see also* 12 NYCRR § 190-1.3 [1] to [4]), and "employer" includes "any individual . . . acting as an employer of an individual employed or permitted to work on a farm" (*id.* § 671 [3]; *see also* 12 NYCRR § 190-1.3 [a]).

By contrast, Article 19 explicitly excludes individuals employed or permitted to work "in labor on a farm" (*see* Labor Law § 651 [5] [b]; *see also* 12 NYCRR § 142-2.14 [a] [3]), therefore the work in question is not covered by Article 19 (*cf.* Labor Law § 651 [2] [e]).

There is no dispute that petitioner is a dairy farmer who employed claimant to perform labor in the farm. Thus, neither is covered by Article 19 but by Article 19-A of the Labor Law, under the facts of this case. The wage order was incorrectly issued by respondent to comply with Article 19.

Therefore, the wage order is revoked in its entirety as invalid.

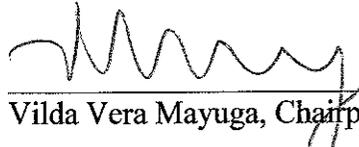
Penalty Order

The penalty order assesses civil penalties against petitioners of \$1,000.00 for violation of Labor Law § 679 of Article 19-A and 12 NYCRR § 190-8.2 by failing to keep and/or furnish true and accurate payroll records for each employee, including daily and weekly hours.

Petitioner conceded that he did not maintain contemporaneous records of the claimant and it was not until respondent approached him that petitioner created records to estimate the number of hours worked by claimant. Accordingly, we affirm the penalty order as valid and reasonable.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The minimum wage order is revoked in its entirety as invalid;
2. The penalty order is affirmed;
3. The petition for review be, and the same hereby is, granted in part and denied in part.



 Vilda Vera Mayuga, Chairperson

Absent

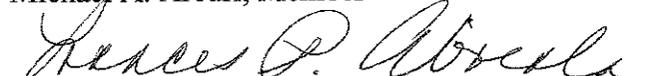
 J. Christopher Meagher, Member



 La Marr J. Jackson, Member



 Michael A. Arcuri, Member



 Frances P. Abriola, Member

Dated and signed in the Office
 of the Industrial Board of Appeals
 at New York, New York, on
 December 17, 2014.