

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
GEORGE BROT AND BETA BUSINESS PRODUCTS, INC.,	:
	:
Petitioner,	:
	:
To Review Under Section 101 of the Labor Law: An	:
Order to Comply with Article 6 of the Labor Law, and	:
an Order Under Article 19 of the Labor Law, both	:
dated May 6, 2011,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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DOCKET NO. PR 11-150

RESOLUTION OF DECISION

APPEARANCES

George Brot, petitioner *pro se* and for Beta Business Products, Inc.

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

WITNESSES

George Brot, for petitioners.

Jeremy Kuttruff, Senior Labor Standards Investigator, for respondent.

WHEREAS:

On May 19, 2011, petitioners George Brot and Beta Business Products, Inc. (Petitioners) filed a petition 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 two Orders that the Commissioner of Labor (Commissioner or Respondent) issued on May 6, 2011. The first Order is an Order to Comply with Article 6 of the Labor Law (Wage Order), which finds that petitioner failed to pay wages to claimant Chris Kinsley in the amount of \$416.66, interest at the rate of 16% calculated to the date of the order in the amount of \$116.16, and a civil penalty in the amount of \$416.00 (100%) for a total amount due of \$949.48.

The second Order is an Order under Article 19 of the Labor Law (Penalty Order), for petitioner's failure to keep and/or furnish payroll records for each employee for the period August 3 through August 7, 2009 and demands payment of \$500.00 for such violation.

The petition challenges the Wage Order as unreasonable or invalid on the grounds that claimant was paid \$328.60 on August 30, 2009 for the period August 3 through August 6, and did not work on August 7, 2009, which is the date the employee quit. The petition also alleges that petitioner never received prior correspondence or notices in this case and was not given an opportunity to dispute the claim prior to the issuance of the Orders. The petition also challenges the interest and penalties assessed.

Upon notice to the parties, a hearing was held on June 7, 2013, in Hicksville, New York, before Jean Grumet, Esq., Member of the Board and the designated hearing officer in this matter. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, make statements relevant to the issues, and make closing arguments.

SUMMARY OF EVIDENCE

Testimony of Petitioner George Brot

Brot was the owner and president of Beta Business Products, Inc., a supplier and distributor of computers, copying machines and supplies. The business closed in late March or early April 2010. Claimant was a salesman selling copy machines and supplies. Claimant's pay rate was \$833.33 twice a month for an eight hour/five day Monday through Friday work week, and he was paid twice a month on the 15th and on the 30th or 31st. During the week of August 3, 2009, claimant worked from Monday to Thursday. On Friday, August 7, 2009, claimant called the office stating that he quit. Brot believes that claimant "probably left a message with the receptionist or the comptroller...He didn't call me directly." Claimant's pay check was held back until the following payroll period due to a company policy of "waiting a payroll period to determine whether anything was missing or returned." On August 31, a check in the amount of \$328.00 was issued to claimant on the petitioners' Citibank payroll account for the amount of time he worked "which was around four days, maybe. Maybe slightly less."

Petitioner did not keep written attendance records, but the receptionist and comptroller kept track of when employees came in and left the office. Employees were required to call in twice a day. Claimant worked in the office half of the time, and was visiting potential customers selling copy machines and supplies the other half of his time. Petitioners' comptroller, Ann Outar maintained a handwritten payroll register and called the twice monthly payroll into Paychex, the petitioners' payroll service. The August 31, 2009 Paychex payroll journal indicates that Paychex calculated legally required deductions and prepared a check from petitioners' payroll checking account payable to the claimant in the amount of \$302.17. Neither the payroll register nor the Paychex payroll journal included the daily or weekly hours worked. While Brot retained the payroll records after the business closed, he did not keep copies of cancelled checks for more than six months after the business closed. Brot did not have copies of bank statements, nor did he request a copy of the bank statement from Citibank. According to Brot, paychecks were either given to employees in person, or mailed either by Paychex or by petitioners.

Petitioners did not receive notice of the claim when it was filed in 2009. There are several companies with names starting with the letter "B" in the same building and "we did have a lot of mail that didn't come to us because there were some other companies in the building or they delivered it to the wrong party or floor. The post office personnel was not consistent." Brot first learned of the claim in May 2011, when the Orders were sent to his home address. The DOL's contact log, which Brot entered into the record, demonstrates that

letters mailed by DOL to petitioners at their New York City business address and at another address in Syosset, New York were returned to the DOL by the Post Office as undeliverable. The DOL issued the Orders on May 6, 2011 and served them by mail at Brot's home address.

Testimony of Senior Labor Standards Investigator Jeremy Kuttruff

SLSI Jeremy Kuttruff testified concerning the contents of the DOL investigative file in this case. Kuttruff had no knowledge of the case other than what was in the file. The investigative file contained a September 3, 2009 letter from DOL to Beta Business Products notifying it that a claim had been filed. The investigative file also included two copies of a January 10, 2011 letter to petitioners addressed to petitioners' business address and to another business address in Syosset, New York, both of which were returned by the Post Office as undeliverable. The DOL obtained Brot's home address, and the Orders were issued on May 6 and mailed there.

The payroll register and Paychex payroll journal provided by petitioners at the hearing were missing the daily and weekly hours worked by claimant as well as his rate of pay. While the Paychex payroll journal shows that a check was indeed prepared for claimant by Paychex, there was no evidence that the check was received and cashed by the claimant, and the evidence was insufficient to dispute the claim.

Kuttruff testified that the 100 percent penalty in the wage order was imposed, according to an Order to Comply coversheet in the DOL's file, due to petitioners' lack of cooperation in the investigation. The \$500.00 penalty order was recommended because of the petitioners' failure to furnish or maintain payroll records.

GOVERNING LAW

Standard of Review and Burden of Proof

In general, when a petition is filed, the Board reviews whether the Commissioner's order is valid and reasonable. The petition must state "in what respects [the order on review] is claimed to be invalid or unreasonable" (Labor Law § 101[2]). 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).

Pursuant to the Board Rules of Procedure and Practice (Rules) 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 petitioners to prove by a preponderance of the evidence that the orders are not valid or reasonable (see also State Administrative Procedures Act § 306; *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

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 (NYCRR 65.39). For the reasons stated below, we find that the petitioners failed to meet their burden of proving that claimant worked four days during the relevant period and was paid all wages due and owing.

The Wage Order - The Petitioners' have failed to Maintain Required Records

An Employer's Obligation to Maintain Records

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, in pertinent part:

- “(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) the wage rate;
 - (4) the number of hours worked daily and weekly;
 - (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;
 - (9) net wages paid; and
 - (10) student classification.
- “...
“(d) Employers...shall make such records...available upon request of the commissioner at the place of employment.”

Therefore, it is an employer's responsibility to keep accurate records of the hours worked by its employees and the amount of wages paid, and to provide its employees with a wage statement every time the employee is paid. This required recordkeeping provides proof to the employer, the employee, and the Commissioner that the employee has been properly paid.

Where an employee files a complaint for unpaid wages with DOL and the employer has failed to keep adequate records, the employer bears the burden of proving that the employee was paid. Labor Law § 196-a provides, in relevant part:

“Failure of an employer to keep adequate records, in addition to exposing such employer to penalties . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements.”

In the absence of adequate payroll records, the Commissioner may issue an order to comply based solely on employee complaints. 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 solely on employee claims. In the case of *Angello v. National Finance Corp.*, (1 AD3d 850, 768 NYS2d 66 [3d Dept. 2003]), the Commissioner issued an order to an employer to pay wages to a number of employees. The order was based on the employees' sworn claims filed with the Department of Labor. The employer had failed to keep required employment records. The employer filed a petition with the Board claiming that the claims and therefore, the order, were overstated. In its decision on the petition, the Board reduced some of the claims. The court, on appeal, held

that the Board erred in reducing the wages since the employer failed to submit proof contradicting the claims. Given the burden of proof in Labor Law § 196-a and the burden of proof which falls on the petitioner in a Board proceeding, 12 NYCRR 65.30, “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” (*Id.* at 854).

Petitioners’ payroll records provided at the hearing were inadequate because they did not contain the daily and weekly hours of work or the rate of pay as required by New York law.

Petitioners Failed to Meet Their Burden of Proof that the Wage Order
Was Invalid or Unreasonable

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.

We find that the petitioners failed to meet their burden of proving that claimant worked four days during the relevant period and was paid all wages due and owing for the period of August 3-7, 2009. The petitioner testified that no attendance records were maintained; the handwritten payroll register and Paychex payroll journal did not show the daily and weekly hours worked by the claimant; and Brot testified that claimant “didn’t call me directly” but speculated he “probably left a message with the receptionist or the controller” on August 7, 2009 when he allegedly quit. The record indicates that the claimant worked outside the office as a salesman, but neither the receptionist nor the comptroller, who kept track of the claimant’s whereabouts but kept no written attendance records, were called as corroborating witnesses to testify that claimant did not work that day. Although it appears that Paychex prepared a check in the amount of \$328.00 payable to the claimant for what Brot described as “around four days, maybe. Maybe slightly less,” there is no evidence in the record that the paycheck was given to the claimant or that he cashed it. Brot did not provide a copy of the cancelled check or the bank statement and he testified that he never tried to contact Citibank to obtain a copy of the bank statement.

Because petitioners provided no evidence of legally required records of the daily and weekly hours worked or wages paid to the claimant as well as cancelled checks or bank statements showing the claimant had been paid, and did not provide corroborating testimony that the claimant did not work on August 7, 2009, the Commissioner was entitled to use the best available evidence, which in this case, was the claim form as a basis for his calculation of underpayment (Labor Law § 196-a; *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989]), and we affirm the Order.

Civil Penalties

The wage order assesses a 100% civil penalty. Petitioners allege that this civil penalty should be overturned because he did not receive notice of the claim until the order issued in May 2011, more than a year after the petitioners’ business had closed, making it impossible for him to cooperate with the investigation. We agree. While the DOL investigative file contains a September 3, 2009 letter to petitioners notifying them of the claim, there was no testimony that the letter was, in fact, sent to the petitioners. Kuttruff,

who was not the investigator in this matter, had no knowledge of the case other than what was contained in the investigative file, and was not involved in the recommendation to impose the 100% civil penalty. Additionally, the record shows that other than a phone call made to the claimant on August 28, 2009, there was no further investigation of this matter. Under these circumstances we credit Brot's testimony that he received no notice of the investigation, and we find the 100% civil penalty unreasonable.

Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then 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 section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

Penalty Order

The penalty order assesses a \$500.00 civil penalty against the petitioners for failing to keep and/or furnish true and accurate payroll records for each employee. The penalty order further states that the petitioners were "duly requested to provide payroll records for the period from on or about August 3, 2009 through August 7, 2009. While we note that there is no evidence in the record that the respondent "duly requested" the petitioners to produce payroll records, the petitioners bore the burden of proving that they did not violate Labor Law § 661 and 12 NYCRR 142-2.6. The petitioners did not produce evidence at the hearing to demonstrate that they kept records of daily and weekly hours worked or employees' wage rates, and in fact, admitted that they did not. As discussed above, the payroll register and Paychex payroll journal produced by the petitioners at the hearing were insufficient to prove that claimant did not work on August 7, 2009, or that the petitioners had paid the claimant for the pay periods in question. No cancelled checks or bank statements were provided to substantiate the allegation the claimant was paid for the week of August 3-7, 2009. Accordingly, the penalty order is affirmed.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The wage order is modified to revoke the 100% civil penalty imposed against Petitioners, and otherwise affirmed.
2. The penalty order is affirmed.
3. The petition be, and the same hereby, is denied.

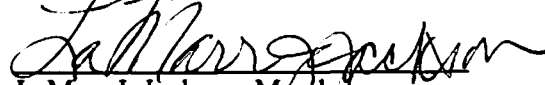


Anne P. Stevason, Chairperson

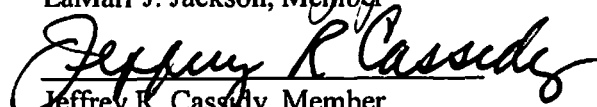
J. Christopher Meagher, Member



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
November 20, 2013.