STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: PIA L. LIEB (T/A PIA L. LIEB DMD PC), 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 December 6, 2011, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 12-042 RESOLUTION OF DECISION

APPEARANCES

Pia L. Lieb, petitioner *pro se*.

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

WITNESSES

Pia L. Lieb, for petitioner.

Danielle Guidice, claimant; Jeremy Kuttruff, Senior Labor Standards Investigator, for respondent.

WHEREAS:

On February 6, 2012, petitioner Pia L. Lieb filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued by the Commissioner of Labor (Commissioner) on December 6, 2011.

The first order (wage order) requires compliance with Article 6 and demands payment of $2,447.68 in wages due and owing employee Danielle Giudice for the period February 1, 2010 through August 10, 2010, together with interest at the rate of 16% to the date of the order in the amount of $647.80, liquidated damages in the amount of $611.92, and a civil penalty in the amount of $2,447.68. The total amount due is $6,155.08.

The second order (penalty order) requires compliance with Article 19 and demands payment of a civil penalty of $500 for failure to keep and/or furnish true and accurate payroll records for the period February 1, 2010 through August 10, 2010.

The petition argues that petitioner paid the claimant for all hours worked and made deductions from claimants' pay for loans, an advance, and the cost of a locksmith to change the locks to her office after claimant did not return the keys when she resigned.

The Commissioner filed an answer with the Board stating that claimant filed a claim with the Department of Labor (DOL) alleging that petitioner did not pay her for wages earned during the period February 1, 2010 to August 10, 2010. Petitioner failed to provide payroll records required by law and the Commissioner found that petitioner failed to meet her burden to prove that claimant was paid the wages claimed. The Commissioner determined that petitioner's deductions from claimant's wages for loans, a salary advance, and the cost of a locksmith were impermissible under Labor Law § 193.

Upon notice to the parties, a hearing was held with the Board on June 4, 2013, in New York, New York, before Board member and designated hearing officer J. Christopher Meagher, Esq. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

SUMMARY OF EVIDENCE

Wage Order

Petitioner is a dentist and is the sole practitioner in a dental office that she operates in New York City. Claimant was a dental assistant in petitioner's office and worked various hours at $27 an hour.

Claimant filed a claim against petitioner with DOL on September 8, 2010 for $1,298.97 in unpaid wages for 48.11 hours of work performed during a two week period ending February 14, 2010. She also claimed $611.68 in wages for work performed during the pay period ending August 16, 2010, which was the amount deducted by petitioner from claimant's pay to cover the costs of a locksmith. Her total claim for the two pay periods was $1,910.65.

During the DOL investigation, the claim was incorrectly increased to include deductions petitioner had made from claimant's wages for loans and advances. However, since claimant did not object to these deductions or make them part of her claim, at hearing the Commissioner moved to modify the wage order back to the original claimed wages of $1,910.65.

Petitioner testified that she required claimant to report her work hours on "Practice Works", a computer software program that claimant was to log in and out on each workday. The Practice Works time records showed an entry for claimant of 50 minutes on February 17, 2010 from 5:07 PM to 5:57 PM and not again until March 3, 2010. However, petitioner issued claimant her first paycheck on March 5, 2010 for 45.5 hours during the two week pay period ending on February 28, 2010 (February 14 - February 28). Practice Works showed the entry on February 17th was the only recorded work time during that pay period.

Claimant testified that she started her employment with petitioner on February 1, 2010 and worked the hours stated in her claim from February 1 to 14, 2010. She relied on petitioner to keep track of her hours when she first started because Practice Works was not fully operational for "several weeks". She did not recall the circumstances of how the entry was made on February 17th, or who made it, but stated that it was "at least" three weeks

before the program was up and running and she could regularly clock in and out every day. Petitioner did not pay her right away and after a few weeks claimant raised the issue with her. Petitioner told her that her first two week's wages would be withheld and when she left employment she would be paid the wages. However, when claimant left her employment petitioner failed to pay her the wages owed.

Penalty Order

On October 7, 2010, Supervising Labor Standards Investigator Philip Pisani issued petitioner a collection letter advising her of the details of the claim and that if she disagreed with the claim she should provide a statement of her reasons and include any payroll records to substantiate her position. On July 5, 2011, Senior Labor Standards Investigator Lori Roberts forwarded a letter to petitioner stating that Labor Law § 661 requires employers to keep records of hours worked and wages paid and to resolve the claim petitioner should submit documentary evidence that all wages were paid to the claimant.

Investigator Kuttruff testified that DOL found that petitioner violated Labor Law § 661 for failure to keep and/or produce accurate payroll records because it received no payroll records from her prior to the Order to Comply.

Petitioner testified in rebuttal that on November 23, 2010 she sent certain payroll and work hour documentation to DOL. These records included claimant's work hours and copies of wage statements from petitioner's payroll company. Petitioner attached these records to her petition.

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]). It also provides that a Commissioner's order shall be presumed "valid" (*Id.* § 103 [1]).

Pursuant to Rule 65.30 of the Board's Rules, "The 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 act and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR § 65.39).

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 relevant 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) wage rate;
(4) the number of hours worked daily and weekly . . . ;
(5) the amount of gross wages;
(6) deductions from gross wages;
(7) allowances, if any claimed as part of the minimum wage;
(8) allowances, if any, claimed as part of the minimum wage . . ."

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"(d) Employers, including those who maintain their records containing the information required by this section at a place outside of New York State, shall make such records or sworn certified copies thereof available upon request of the commissioner at the place of employment."

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). In a proceeding challenging such determination, the employer must then "come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence" (*Anderson v Mt. Clemens Pottery,* 328 U.S. 680, 688; *Matter of Mid-Hudson Pam Corp. v Hartnett, supra* at 821 [employer burden to negate reasonableness of Commissioner's determination]).

Petitioner Violated Article 6 of the Labor Law by Failing to Pay Claimant Wages Due

We find that Petitioner failed to meet her burden of proof to establish by credible evidence that claimant was not entitled to wages for the period of her claim.

Claimant credibly testified that she was hired and started working for petitioner on February 1, 2010, worked 48.11 hours during the payroll period from February 1 to February 14, 2010 at the rate of $27.00 an hour, and that her total wages due and owing were $1,298.97. When first employed she relied on petitioner to keep track of her hours because the Practice Works program was not fully operational for several weeks. After not being paid, she questioned petitioner about the issue and was told that it was petitioner's practice to withhold the first two weeks pay for all her employees. Petitioner assured claimant that the wages would be paid when she left petitioner's employ.

Petitioner did not specifically rebut claimant's testimony but instead claimed that had claimant worked the first two weeks she would have recorded her hours on the log in program. However, petitioner paid claimant on March 5, 2010 for 45.50 hours of work for the last two weeks of the month, where the only computer-recorded work time during that pay period was on February 17th in the amount of 50 minutes. Petitioner did not explain why claimant was paid during the second pay period if the program was fully operational during the entire time and was the only method she utilized to determine the hours worked. The fact that petitioner paid claimant in full for a pay period where only 50 minutes was recorded on the program contradicts petitioner's argument that if there was work performed it would be

recorded on the system and buttresses claimant's testimony that it was not fully operational in February of 2010.

The Federal Fair Labor Standards Act and the Labor Law define "employ" to include "suffer or permit to work" (29 USC § 2[g]; Labor Law § 2[7]). If an employer has actual or constructive knowledge that an employee has performed work, the employee must be compensated for that work (*Matter of Givens,* PR 10-076 at p.7 [2013]). The Labor Law requires that employers maintain records of employees' daily and weekly work hours. While employers may utilize a system of employee self-reporting as a convenient method to record those hours, they may not use it to avoid responsibility to pay employees for work performed (*Goldberg v Cockrell,* 303 F2d 811, 812 n.1 [5th Cir. 1962] ["while there is nothing to prevent an employer from delegating to his employees the duty of keeping a record of their hours, the employer does so at his peril. He cannot escape the record keeping provisions of the Act by delegating that duty to his employees").

We find that petitioner knew or should have known that claimant worked the hours claimed during the period February 1 to 14, 2010. The failure of a log in system utilized by petitioner to reflect those hours does not relieve her of the obligation to pay claimant for work done on her behalf. As such, claimant was "suffered or permitted to work" and must be compensated.

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 [3d Dept. 1989]). Petitioner failed to submit credible proof at hearing to overcome the approximation of wages owed claimant drawn by the Commissioner from claimant's written claim. We affirm his determination that she was entitled to wages in the amount of $1,910.65 for the period of her claim.

We also find that Petitioner violated Labor Law § 193 when she deducted $611.68 from claimant's pay for the cost of a locksmith to change the locks on her office. Section 193 bars an employer from deducting monies from an employee's wages except as "are made in accordance with the provisions of any law" or as "are expressly authorized in writing by the employee and are for the benefit of the employee." The statute specifies the deductions that an employee may authorize and these do not include withholding wages for the cost of a locksmith, whether such costs were necessitated by claimant's actions or not. The regulations of the Commissioner also prohibit deductions for spoilage or breakage, cash shortages or losses, or fines or penalties for lateness, misconduct or quitting by an employee without notice (12 NYCRR § 142-2.10). Further, at hearing petitioner consented to return to claimant the amount of the deduction.

Interest

Labor Law § 219(1) provides that when the Commissioner determines that 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 payments." Banking Law § 14-A sets the "maximum rate of interest" at "sixteen percent per centum."

Petitioner did not challenge the assessment of interest made by the wage order. The Board finds that the Commissioner shall recalculate the interest on the wage order in the amount of $1,910.65 consistent with the amendment to the order made at hearing.

Liquated Damages

Labor Law § 663 (2) provides that the Commissioner may collect liquidated damages for violations of the Minimum Wage Act in an amount up to 100% of the unpaid wages, unless the employer proves a good faith basis to believe that her underpayment was in compliance with the law. Petitioner produced no evidence of a good faith belief that their wage and hour practices were in compliance with the law. We affirm the imposition of liquidated damages and direct the Commissioner to recalculate them consistent with the amended wage order as set forth above.

Civil Penalties

The wage order assesses a 100% civil penalty. The Board finds that the considerations the Commissioner is required to make in connection with the imposition of a 100% civil penalty were proper and reasonable in all respects. We direct the Commissioner to recalculate the penalty consistent with the amended wage order as set forth above.

Petitioner did not submit evidence at hearing challenging the penalty order beyond submitting records showing that claimant was paid starting with the two-week pay period ending on March 5, 2010. As no records were submitted showing that claimant was paid from February 1, 2010 through February 14, 2010, we affirm the Commissioner's determination that petitioner failed to keep and/or furnish true and accurate payroll records. The Board finds that the considerations and computations the Commissioner was required to make in connection with the imposition of the penalty order are valid and reasonable in all respects.

NOW, THEREFORE IT IS HERBY RESOLVED THAT:

1. The wage order is modified to reduce the amount of wages due and owing to $1,910.65 and the interest, liquated damages and civil penalty on such amount proportionally, and in all other respects 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
February 27, 2014.