

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :
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 :
TRACY KRAWITT AND SPACEY TRACY’S, INC. :
(T/A SPACEY TRACY’S PICKLES), :
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Petitioners, : DOCKET NO. PR 14-216
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To Review Under Section 101 of the Labor Law: : RESOLUTION OF DECISION
Two Orders to Comply with Article 6 of the Labor :
Law, and An Order Under Article 19 of the Labor :
Law, all dated August 29, 2014, :
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- against - :
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THE COMMISSIONER OF LABOR, :
 :
 :
Respondent. :
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APPEARANCES

Tracy Krawitt, petitioner pro se, and for Spacey Tracy’s, Inc.

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

WITNESSES

Tracy Krawitt and Patricia DiPerri for petitioners.

Bernadette Curtis, Robert Hutton and Labor Standards Investigator Lori Roberts for respondent.

WHEREAS:

On September 18, 2014, petitioners filed with the Industrial Board of Appeals a petition for review of three orders issued against them by respondent, Commissioner of Labor, on August 29, 2014. Petitioners amended their petition on December 15, 2014, and respondent filed her answer on February 12, 2015. Upon notice to the parties, a hearing was held in Albany, New York, on April 24, 2015, before Wendell P. Russell, Jr., then counsel to the Board and the designated Hearing Officer in the 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 to comply with Article 6 (wage order) directs payment of wages in the amount of \$502.00 due and owing to the claimant, Bernadette Curtis, from August 21, 2013 to September 29, 2013, \$73.50 in interest at 16% calculated to the date of the order, \$125.50 in liquidated damages, and \$251.00 in civil penalties, for a total due of \$952.00.

The second order to comply with Article 6 (supplemental wage order) directs payment of \$30.00 in supplemental wages to Curtis for gas expenses from August 21, 2013 to September 29, 2013, \$4.00 in interest at 16% calculated to the date of the order, \$7.50 in liquidated damages, and \$15.00 in civil penalties, for a total due of \$56.50.

The order under Article 19 (penalty order) directs that petitioners pay a civil penalty of \$250.00 for failure to keep and/or furnish true and accurate payroll records for each employee for the period of August 21, 2013 through September 29, 2013, in violation of Labor Law § 661 and 12 NYCRR 142-2.6.

The petition asserts that petitioners paid claimant all wages owed and petitioners do not owe claimant wages or supplemental wages. For the following reasons, we find petitioners did not meet their burden of proof and respondent's findings are reasonable. We affirm the three orders.

SUMMARY OF EVIDENCE

Petitioners' Evidence

Testimony of Petitioner Tracy Krawitt

Tracy Krawitt testified that she is the owner of Spacey Tracy's Pickles, Inc. and that Bernadette Curtis was an employee who worked for her and her company at several New York area fairs in the summer of 2013, including the Dutchess County Fair and the Columbia County Fair. Krawitt testified that she provided claimant with housing and transportation for seven weeks, as she allowed claimant to live in her home, and often drove her to and from the worksites since claimant did not own a car.

Krawitt never paid for her employees' gas because she believed travel to and from work sites is not considered work. She did not maintain records during the claim period, but knew that claimant worked a total of 104 hours because she contemporaneously wrote down the hours worked on a dry-erase board she kept at home.

Krawitt paid her employees in cash at the end of each engagement, so if a fair was a day long, she would pay her employees at the end of the day, but if a fair was, as is the case here, about a week long, her employees would be paid at the end of the week. Krawitt testified that she paid claimant on August 25th (Sunday) for the week's work at the Dutchess County Fair, and again on September 2nd (Monday) for the week's work at the Columbia County Fair. Krawitt paid her employees out of a moneybag that was filled with the day's earnings during the fairs. Claimant's compensation for the Dutchess County Fair reflected approximately 40 hours of work, while the Columbia County Fair compensation reflected about 60 hours of work. Claimant worked both fairs with another employee, Patricia DiPerri, who saw claimant being paid.

Krawitt ultimately fired claimant because claimant was accepting disability benefits that limited the number of hours she could work per week, and the hours already worked for petitioners exceeded said limitation.

Krawitt contacted the Department of Labor (DOL) in Poughkeepsie during claimant's employment, regularly reporting the hours worked by her employees to Jodi Lynn Buka, whom Krawitt described as a "department head." Krawitt told Buka that she thought she was "going to have problems with" the claimant. Buka advised Krawitt to keep payroll records. Accordingly, Krawitt used a ledger to track information, such as the hours worked by her workers and when they were paid. The entries of hours worked were not signed by employees and Krawitt testified that she continued to rely on her dry-erase board as a form of record keeping because she found that to be easier. Krawitt testified she lost the ledger during a move, but not before having provided Buka with copies. Krawitt indicated that, two months before this hearing, Buka's office shredded all of the documents related to "this case" as they assumed that "this matter" had concluded.

Testimony of Patricia DiPerri

DiPerri testified that she worked for petitioners for about eight years. She was not present when Krawitt hired claimant, but testified that claimant was hired to work at the fairs.

DiPerri testified that workers were always paid on the last day of a multi-day fair. On the last day of both fairs, DiPerri first testified that she put money earned that day in the bag, and took out her pay before giving the bag to Krawitt. She later testified that she gave the bag directly to Krawitt for payment distribution to all workers, including herself. DiPerri also testified that on the last day of the Dutchess County Fair, DiPerri collected the money from the booth where the jars were sold and brought it to coworker Jessica Kelly. Kelly then brought the banker's bag to Krawitt, who used the cash to pay the workers. DiPerri further testified that although she never actually saw written records, Krawitt kept track of her workers' hours.

DiPerri does not know how much claimant was compensated, but saw her being paid on the last day of the Dutchess County Fair. Krawitt left the fairgrounds with Kelly after paying DiPerri and claimant. On the Sunday of the Columbia County Fair, DiPerri recalls that she brought Kelly the banker's bag along with a piece of paper listing the number of jars sold and the amount of money that was in the bag. Kelly then brought the banker's bag to Krawitt, who used the cash to pay DiPerri, Kelly, and claimant. DiPerri often left the fair immediately after being paid, leaving the last day's clean-up and pack-up to Krawitt and her other workers.

Respondent's Evidence

Testimony of Claimant Bernadette Curtis

Curtis testified that Krawitt hired her to work at the Dutchess County Fair, Columbia County Fair, the Garlic Festival, Little Italy Festival and a series of weekend farmer's markets in 2013. Claimant had never worked for Krawitt prior to the Dutchess County Fair in 2013, and did not live with Krawitt at any point during the claim period.

Claimant testified that she worked alone at her booth throughout the Dutchess County Fair, while DiPerri's nephew worked the concession stand. Krawitt paid claimant daily for the previous day's work. As such, Krawitt paid her on Wednesday for Tuesday's work, on Thursday for Wednesday's work, and on Friday for Thursday's work. Krawitt did not pay her for hours worked on the last days of the fair.

Claimant never saw DiPerri during the Dutchess County Fair, adding that the only workers were DiPerri's nephew and herself. Claimant recalled that Kelly was occasionally there helping DiPerri's nephew at the concession stand, but Kelly never handled the money.

Claimant testified that she did not work with or see DiPerri during the Columbia County Fair and that Krawitt was only present on the last day of the Columbia County Fair. Since Krawitt was not present during the week, claimant did not receive a wage payment the same way she did at the Dutchess County Fair where Krawitt compensated her daily for the previous day's work. On the last day of the fair, Labor Day 2013, Krawitt showed up with Kelly and told claimant that she could leave as Kelly was going to take over working at the concession stand for the rest of the day. When claimant asked Krawitt for compensation for hours worked on the last couple of days at the Dutchess County Fair, in addition to the week worked at the Columbia County Fair, Krawitt told her that she did not have any money but that she may be able to pay her the following day.

On September 3, 2013, the day after the Columbia County Fair ended, claimant worked a couple of hours for Krawitt as the two drove to the fairgrounds to pick up petitioners' supply-trailer and concession stand. Claimant again asked for her compensation, but Krawitt said that she did not know when she would be able to pay her. Krawitt suggested claimant work at some of her upcoming weekend farmer's markets as she may have some money afterward.

After the Columbia County Fair, claimant worked a number of days or weekend-long farmer's markets for petitioners, and received payment for that work, but not for the balance of the days worked at the Dutchess County Fair nor the entirety of the Columbia County Fair.

Claimant testified that she never lived in Krawitt's home, and would only visit to cook and assemble the jars of pickles. Claimant added that while her disability status caps her yearly gross earnings, she did not reach that threshold while working for petitioners as petitioners' fairs and farmer's markets were her only employment in 2013. She further clarified that she is not restricted in the weekly amount of hours that she may work.

Claimant used her disability card to pay for \$30.00 worth of gas pumped into Krawitt's truck. While she did not remember the exact date, claimant recalled that prior to the Columbia County Fair, Krawitt asked her to pay for gas while the two were out shopping for supplies. Informing claimant that she was low on cash, Krawitt assured claimant that she would reimburse her.

In or around October 2013, the two ceased communications and claimant filed a claim for unpaid wages with respondent.

Testimony of Robert Hutton

Having met the claimant while the two volunteered for a local church pantry, Hutton testified that claimant lived in Kingston, New York during her employment with petitioners as he drove her home on many occasions during the claim period. Hutton testified that he did not know whether he ever took claimant to Krawitt's home.

Testimony of Lori Roberts, Senior Labor Standards Investigator

Roberts testified that respondent received Curtis' claim forms and sent petitioners two collection letters dated November 7, 2013, and February 21, 2014. She added that Krawitt responded by letter dated February 27, 2014, mentioning "Jody Burka" of the Poughkeepsie DOL office, but that Roberts did not contact Burka because it was petitioners' responsibility to provide payroll records, rather than a name or phone number of someone who may or may not have them. Petitioners never mentioned a log that tracked hours worked by employees, and Roberts heard of such log for the first time during Krawitt's testimony at hearing.

Roberts testified that she never received payroll records from petitioners, and concluded that a civil penalty of 50% of wages, or \$250.00, was appropriate based on the size of the company, and the fact that petitioners did not have prior labor law violations on file.

ANALYSIS

The Board makes the following findings of fact and conclusions of law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

Burden of Proof

Petitioners' burden of proof in this matter is to establish, by a preponderance of the evidence, that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30 ["The burden of proof of every allegation in a proceeding shall be upon the person asserting it"]; see also *Matter of Ram Hotels, Inc.*, PR 08-078, at 24 [2011]). For the reasons stated below, we find petitioners did not meet their burden.

Petitioners Failed to Maintain Required Records

Articles 6 and 19 of the Labor Law require employers to maintain payroll records, for at least six years, that show, among other things, the wage rate of each employee, number of hours they worked daily and weekly, including the time of arrival and departure of each employee working a spread of hours exceeding ten, the amount of gross wages, and the net wages paid (Labor Law §§ 195 [4] and 661, 12 NYCRR 142-2.6 [a]). Articles 6 and 19 further require employers to provide employees a statement with each payment of wages showing the hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages (Labor Law §§ 195 [3] and 661, 12 NYCRR 142-2.7). Payroll records must be produced to the DOL for inspection when requested (Labor Law §§ 660, 661). The record indicates that petitioners never produced any payroll records to respondent during its

investigation. Instead, petitioners sent the DOL a letter identifying an alleged DOL employee in Poughkeepsie, a county in which the investigation did not originate, and indicated that said DOL employee had copies of petitioners' payroll records. This is not enough to satisfy petitioners' burden. The alleged DOL employee did not testify and Krawitt did not seek to compel her appearance at hearing. Krawitt herself testified that she did not keep records for the entire claim period and only relied on a dry-erase board in her home where she tracked employees' work hours. Petitioners did not submit any evidence of compliance with the record keeping requirements of the Labor Law. Therefore, we find petitioners failed to maintain required payroll records as required by Articles 6 and 19 of the Labor Law.

The Unpaid and Supplemental Wages Order are Affirmed

Claimant filed a claim for unpaid wages on October 15, 2013, alleging petitioners did not pay her any wages for work performed between August 21, 2013 and September 29, 2013. Claimant also filed a claim for \$30.00 she paid for gas during the claim period and in relation to her work for petitioners. Having received no payroll records, respondent issued the unpaid and supplemental wages orders finding petitioners failed to pay earned wages and supplemental wages to Curtis for the time period from August 21, 2013 to September 29, 2013, in the amount of \$502.00 and \$30.00, respectively.

Article 6 of the Labor Law requires that an employer pay wages to its employees (Labor Law § 191). Labor Law § 190 (1) defines "wages" as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." Article 6 also requires employers to reimburse employees for expenses (Labor Law § 198-c). In the absence of accurate records required by the Labor Law, an employer bears the burden of proving that the disputed wages were paid (Labor Law § 196-a). Where the employer has failed to keep such records, the Commissioner may draw reasonable inferences and calculate unpaid wages based on the "best available evidence" drawn from employee statements or other evidence, even though the results may be approximate (*Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 820-21 [3d Dept 1989]; *Ramirez v Commissioner of Labor*, 110 AD3d 901 [2d Dept 2013]).

In a proceeding challenging such determination, the employer must come forward with evidence of the "precise" amount of work performed or with evidence to negate the reasonableness of the inferences to be drawn from the employee's evidence (*Anderson v Mt. Clemens Pottery*, 328 US 680, 687-88 [1949]; *Mid-Hudson Pam Corp.*, 156 AD2d at 821). Given the interrelatedness of wages and hours, the same burden shifting applies to wages and requires the employer to prove the "precise wages" paid for that work or to negate the inferences drawn from the employee's credible evidence (*Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 332 [SDNY 2005]; *Matter of Kong Ming Lee*, PR 10-293 at 16 [April 20, 2014]).

Having failed to produce legally sufficient payroll records as required by Labor Law § 195 (4), DOL's calculation of wages must be credited unless petitioners meet their burden to negate the reasonableness of the Commissioner's inferences drawn from claimant's evidence. In this case, petitioners did not meet their burden.

Petitioners' evidence consisted of Krawitt's and DiPerri's testimony. While DiPerri testified to seeing Krawitt pay claimant on the Sunday of each of the fairs, Krawitt testified she

paid employees on the last day of each fair, which the record reflects was not always a Sunday. DiPerri also provided inconsistent testimony as to who handled the money at the fairs when petitioners' paid their employees. DiPerri first testified that she collected the money and paid herself before handing over the balance to Krawitt; then she testified that she gave all money collected to Krawitt who paid employees including DiPerri; and yet one other time DiPerri testified that she gave the money to Kelly who gave it to Krawitt who then paid employees. In contrast, claimant Curtis provided specific and detailed testimony of her work performed at each fair and daily routines reflective of petitioners' payment practices.

Petitioners' evidence is limited to general assertions that Krawitt paid all employees for all hours worked. Inasmuch as petitioners failed to maintain and produce payroll records, and have not presented sufficient evidence at hearing demonstrating that claimant was paid the amounts claimed during the claim period, we find respondent correctly relied on claimant's statements as the best available evidence. We affirm respondent's determination of unpaid wages.

As to supplemental wages, Krawitt testified to not paying claimant for gas expenses because claimant did not have a vehicle to which she could pump gas, and even if she did, that such expense was personal and not her responsibility as an employer. However, while claimant admitted to not owning a vehicle when she worked for petitioners, she testified to paying for gas pumped into *petitioners'* vehicle. Claimant testified credibly as to method of payment, location of the gas station and circumstances that resulted in her paying for petitioners' gas. We find respondent's determination that claimant was not reimbursed for the gas expense reasonable and valid.

Interest

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the orders directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services 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 (1) sets the "maximum rate of interest" at "sixteen per centum per annum." Petitioners failed to submit evidence at hearing challenging the interest assessed in the orders, and the issue is waived pursuant to Labor Law § 101 (2). Respondent's determination of interest due did not exceed the statutory limit, was required by statute, and as such, was not unreasonable or invalid.

Liquidated Damages

The unpaid and supplemental wages orders include liquidated damages in the amount of 25% of the wages and supplemental wages owed. Labor Law § 218 (1) requires respondent to include liquidated damages of 100 % of the wages found due with the order. An employer must pay liquidated damages unless the employer "proves a good faith basis to believe that its underpayment was in compliance with the law."¹ Petitioners failed to present any evidence to

¹ While Labor Law § 218 requires the Commissioner to include 100 % liquidated damages in her orders to comply, Labor Law § 198 provides that liquidated damages shall be calculated by the Commissioner as "no more than" 100 % of the underpayments found due.

prove a good faith basis to believe that the underpayment was in compliance with the law. We affirm respondent's imposition of 25% liquidated damages in the orders.

Civil Penalties

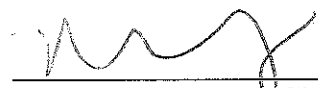
The unpaid and supplemental wages orders each includes a 50% civil penalty pursuant to Labor Law § 218 in the amount of \$251.00 and \$15.00, respectively. Petitioners did not present any evidence to challenge respondent's determination, which Roberts testified was based on the statutory factors. We affirm respondent's determination of civil penalties in each of the orders.

The penalty order is affirmed

The penalty order assesses a \$250.00 civil penalty against petitioners for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period from on or about August 21, 2013 through September 29, 2013. As we have already found above, petitioners did not maintain any payroll records as required by Article 19 of the Labor Law. The penalty order, therefore, is affirmed.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

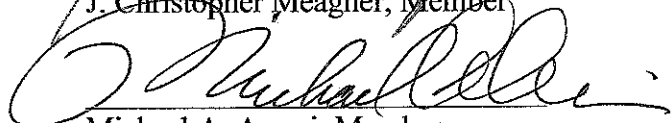
- 1. The unpaid wages order is affirmed; and
- 2. The supplemental wage order is affirmed; and
- 3. The penalty order is affirmed; and
- 4. The petition for review be, and the same hereby is, denied.



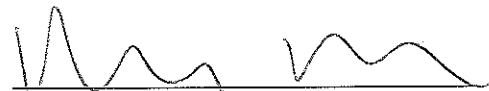
 Vilda Vera Mayuga, Chairperson



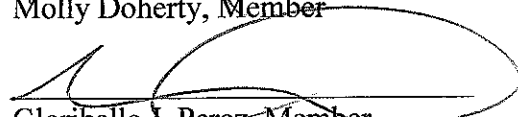
 J. Christopher Meagher, Member



 Michael A. Arcuri, Member



 Molly Doherty, Member



 Gloribelle J. Perez, Member

Dated and signed by the Members of the Industrial Board of Appeals in New York, New York, on December 14, 2016.