

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :
 :
MOHAMMAD MANSOOR MIRZA A/K/A :
MOHAMMED M. MIRZA AND 99 CENT MINI :
DEPOT INC., :
 :
Petitioners, : DOCKET NO. PR 15-031
 :
To Review Under Section 101 of the Labor Law: : RESOLUTION OF DECISION
An Order to Comply with Article 19 and an Order :
Under Articles 5 and 19 of the Labor Law, both dated :
January 23, 2015, :
 :
- against - :
 :
THE COMMISSIONER OF LABOR, :
 :
Respondent. :
 :
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APPEARANCES

Arthur Morrison, for petitioners.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor (Fredy Kaplan of counsel), for respondent.

WITNESSES

Adnan Iqbal and Labor Standards Investigator Guillermo Avalos, for petitioners.

WHEREAS:

On February 2, 2015, petitioners Mohammad Mansoor Mirza A/K/A Mohammed M. Mirza and 99 Cent Mini Depot Inc. filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued by respondent Commissioner of Labor (Commissioner or DOL) on January 23, 2015. Respondent filed an answer to the petition on March 12, 2015.

Upon notice to the parties, a hearing was held on August 25, 2015 in New York, New York before Wendell P. Russell, Jr., then counsel to the Board and designated hearing officer in this proceeding. The parties were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues. At the conclusion of petitioners' direct case, respondent moved to dismiss the petition for review on

grounds that petitioners failed to establish a prima facie case or otherwise meet their burden of proof that the minimum wage and penalty orders are invalid or unreasonable.

The order to comply with Article 19 of the Labor Law (minimum wage order) directs payment of minimum wages due and owing to claimant Edgar Flores in the amount of \$66,185.88 for the period from May 6, 2007 through April 17, 2010, interest continuing thereon at the rate of 16% calculated to the date of the order in the amount of \$50,540.63, 25% liquidated damages in the amount of \$16,546.47, and a 200% civil penalty in the amount of \$132,371.76. The total amount due is \$265,644.74.

The order under Articles 5 and 19 of the Labor Law (penalty order) assesses a civil penalty for each of the following counts: (1) \$1,000.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and / or furnish true and accurate payroll records for each employee from on or about May 6, 2007 through April 17, 2010; (2) \$1,000.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.7 by failing to provide each employee a complete wage statement with every payment of wages from on or about May 6, 2007 through April 17, 2010; and (3) \$1,000.00 for violating Labor Law § 162 by failing to provide employees a thirty minute meal period from on or about July 18, 2007 through April 17, 2010. The total amount due is \$3,000.00.

The petition alleges the orders are unreasonable because petitioners never employed Flores. As discussed below, we grant respondent's motion and dismiss the petition in its entirety for petitioners' failure to make a prima facie case upon which we can find the orders unreasonable or invalid.

SUMMARY OF EVIDENCE

Testimony of Adnan Iqbal

Adnan Iqbal testified that in 2009, Mohammad Mansoor Mirza was his "boss" at the 99 Cent Mini Depot located on 183rd Street in Bronx, New York. Mirza owned the store and Iqbal managed it. In 2009, Iqbal worked four-to-five days weekly, during which time he saw Mirza in the store "every day." During the time Iqbal worked for Mirza, Mirza "had" three other stores that he visited daily, none of which, according to Iqbal, were located at 2493 7th Avenue.

Testimony of Labor Standards Investigator Guillermo Avalos

Labor Standards Investigator Guillermo Avalos testified that on May 7, 2013, he made an initial visit to 99 Cent Mini Depot located at 2493 7th Avenue, New York, New York. During the visit, Avalos spoke with Mohd Ashraful, who identified himself as the store manager and informed Avalos that 99 Cent Mini Depot was opened in 2006 and Mirza was the owner and responsible for the day-to-day operation of the store. Avalos did not seek clarification from Ashraful about whether Mirza had owned and operated the store since 2006. Avalos testified that Mirza never raised as an issue his ownership of the store during the claim period. Avalos interviewed one employee during his visit who had only worked at 99 Cent Mini Depot for one week when investigator Avalos interviewed him. There was only one other employee in the store at the time, a cashier, who declined to speak with Avalos.

While Avalos was in the store in May 2013, Ashraful connected Avalos to Mirza by telephone, who identified himself as the owner of the store. While on the telephone, Mirza stated that he was the employer, but Avalos did not specifically ask whether Mirza was the employer for the duration of the claim period. Avalos made a second, scheduled visit to the store to conduct a payroll records inspection for the period between 2007 and 2010. Petitioners provided no records with respect to any employees and the manager again connected Avalos with Mirza by telephone. On the call, Mirza stated that he had forwarded the notice of revisit to his accountant. Avalos then spoke with Syid Wajid, Mirza's accountant, who explained that he did not keep records of daily or weekly hours worked or wages paid to employees.

Avalos testified that he determined Mirza to be Flores' employer based on Flores' claim form, which states "Mansoor, proprietor" where the form calls for the name and address of the person responsible for the business. The April 14, 2010 claim form states that the period of the claim was from September 15, 2005 to "present" and that the business address is 2493 7th Avenue, New York, NY 10030.

SCOPE OF REVIEW AND BURDEN OF PROOF

An aggrieved party may petition the Board to review the validity and reasonableness of an order issued by the Commissioner (Labor Law § 101 [1]). A petition must state in what respects the orders on review are claimed to be invalid or unreasonable and any objections not raised in the petition shall be deemed waived (*id.* § 101 [2]). The Labor Law provides that an order of the Commissioner is presumed valid (*id.* § 103 [1]). The hearing before the Board is original in nature (Board Rules of Procedure and Practice [Board Rules] 66.1 [c]; 12 NYCRR 66.1 [c]). The party alleging error bears the burden of proving every allegation in a proceeding (State Administrative Procedure Act § 306 [1]; 12 NYCRR 65.30; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]). A petitioner must prove that the challenged order is invalid or unreasonable by a preponderance of evidence (Labor Law § 101 [1]; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 11, 2011]). Should the Board find the order or any part thereof invalid or unreasonable, the Board must revoke, amend, or modify the order (*id.* § 101 [3]).

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). Petitioners failed to meet their burden to establish that the minimum wage and penalty orders are invalid or unreasonable. We, therefore, grant the Commissioner's motion to dismiss the petition for petitioners' failure to make a prima facie case.

The Minimum Wage Order

Petitioners' only evidence at hearing was the testimony of two witnesses. At the conclusion of petitioners' case, respondent moved to dismiss the petition on grounds that petitioners failed to establish a prima facie case or otherwise meet their burden of proof that the minimum wage and penalty orders are invalid or unreasonable. A motion to dismiss made at the close of a petitioner's case "succeeds or fails on the evidence presented by that party" (*Benson v Cuevas*, 288 AD2d 542, 543 [2001]); *Matter of Metz*, Docket No. PR 09-390 at 5 [May 30, 2012]). The Board must consider

only evidence petitioners offered before respondent moved the Board to dismiss the petition (*see Benson*, 288 AD2d at 543).

The minimum wage order finds that petitioners violated Article 19 of the Labor Law by failing to pay claimant the statutory minimum wage for work performed between May 6, 2007 through April 17, 2010 (*see* Labor Law § 651 [1]; 12 NYCRR 142-2.1). At issue is whether petitioners employed claimant during the claim period making them liable for wages due and owing to claimant. With certain exceptions not relevant here, Article 19 of the Labor Law defines “employee” as “any individual employed or permitted to work in any occupation” (Labor Law § 651 [5]). Labor Law § 2 (7) defines “employed” to mean “permitted or suffered to work.”

Petitioners contend that Mirza did not own or operate 99 Cent Mini Depot during the claim period. To support their contention, petitioners offered the testimony of Iqbal, who managed a store located on 183rd Street in Bronx, New York, in 2009. Iqbal testified that Mirza was his “boss” at the Bronx location and that Iqbal saw Mirza daily at that location. Iqbal further testified that during 2009, petitioner Mirza “had” three other stores none of which were located at 2493 7th Avenue. Iqbal’s employment at a store owned by Mirza during one year, is not dispositive of petitioners employing claimant at another location and during a time unknown to Iqbal. Iqbal did not testify about claimant Flores and petitioners presented no evidence that Iqbal had relevant knowledge that would be probative of claimant’s employment with petitioners.

Petitioners also offered during their direct case the testimony of investigator Avalos. Investigator Avalos testified that while the claim form states that Mirza was the “proprietor” of the business located at 2493 7th Avenue at the time of the April 2010 claim, Avalos did not know of or seek during his investigation documentary evidence from Mirza that establishes he owned and operated a business at the address in question for the duration of the claim period. Petitioners argue that, absent such evidence, respondent’s investigation of the claim was deficient and therefore the Commissioner’s orders are unreasonable.

Investigator Avalos testified that he determined Mirza was an employer based on Flores’ claim form which states that Mirza was the “proprietor” where the claim form asked for the name of the person responsible for the business at issue. Investigator Avalos further testified that, during his May 7, 2013 visit to 99 Cent Mini Depot, Ashraful informed investigator Avalos that the business opened in 2006 and Mirza was the owner and responsible for its day-to-day operations. Avalos twice spoke with Mirza by telephone, and Mirza never put at issue his ownership or management of the store during the claim period even when Avalos sought from him employment records relating specifically to that time period. Petitioners presented no evidence sufficient to contradict or rebut Avalos’ determination that petitioners employed Flores. On the record petitioners presented during their direct case, we find petitioners failed to establish a prima facie case. Because petitioners did not challenge in their direct case the wages, interest, liquidated damages, and civil penalties respondent determined are due to claimant, we need not address them. We grant respondent’s motion to dismiss the petition with respect to the minimum wage order.

Penalty Order

The penalty order finds that petitioners violated Articles 5 and 19 of the Labor Law by failing to keep and / or furnish true and accurate payroll records for each employee (Article 19); by failing to provide each employee a complete wage statement with every payment of wages

(Article 19); and by failing to provide employees a thirty-minute meal period (Article 5). All three counts are with respect to the period from May 6, 2007 through April 17, 2010.

Article 19 of the Labor Law requires employers to maintain accurate payroll records that include, among other details, their employees' daily and weekly hours worked, wage rate, gross and net wages paid, and any allowances claimed as part of the minimum wage (Labor Law § 661; 12 NYCRR 142-2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment and maintain them for no less than six years (Labor Law § 661; 12 NYCRR 142-2.6). Article 19 further requires employers provide all employees with a complete wage statement with every payment of wages (12 NYCRR 142-2.7).

Petitioners presented no evidence challenging the penalties under Article 19. To the contrary, petitioners offered the testimony of investigator Avalos which supports respondent's determination to assess civil penalties. During investigator Avalos' second scheduled visit to the store to conduct a payroll records inspection relevant to the claim period, petitioners provided no records with respect to any employees. When investigator Avalos spoke to petitioners' accountant, the accountant explained that he did not keep records of daily or weekly hours worked or wages paid to employees. Petitioners failed to rebut investigator Avalos' credible testimony regarding petitioners' failure to maintain employment records required by the Labor Law.

Article 5 requires employers to provide covered employees at least one thirty-minute break from work for a meal (Labor Law § 162 [2]). Petitioners offered no evidence to challenge the penalty under Article 5.

We find that petitioners failed to establish a prima facie case or otherwise meet their burden of proof that the penalty order is invalid or unreasonable. We grant respondent's motion to dismiss the petition for review with respect to the penalty order.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

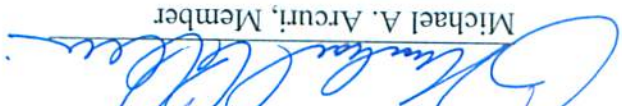
1. The minimum wage order is affirmed; and
2. The penalty order is affirmed; and
3. The petition for review is denied.



 Vilda Vera Mayuga, Chairperson




 J. Christopher Meagher, Member



 Michael A. Arcuri, Member

Absent

 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
 January 25, 2017.

